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.

Banking Department

EMERGENCY RULE MAKING

Registration and Financial Responsibility Requirements for Mortgage Loan Servicers

I.D. No. BNK-28-09-00002-E
Filing No. 706
Filing Date: 2009-06-25
Effective Date: 2009-06-25

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

Action taken: Addition of Part 418 and Supervisory Procedures MB 109 and 110 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: Chapter 472 of the Laws of 2008, which requires mortgage loan servicers to be registered with the Superintendent, goes into effect on July 1, 2009. These regulations implement the registration requirement. It is therefore necessary that servicers be informed of the details of the registration process sufficiently far in advance to permit applications for registrations to be prepared, submitted and reviewed by the effective date.

Subject: Registration and financial responsibility requirements for mortgage loan servicers.

Purpose: To implement provisions of the Subprime Lending Reform Law (ch. 472, L. 2008).

Substance of emergency rule: NEW PART 418

Section 418.1 summarizes the scope and application of Part 418. It notes that Sections 418.2 to 418.11 implement the requirement in Article 12-D of the Banking Law that certain mortgage loan servicers (''servicers'') be registered with the Superintendent of Banks, while Sections 418.12 to 418.15 set forth financial responsibility requirements that are applicable to both registered and exempt servicers. [Section 418.16 sets forth the transitional rules.]

Section 418.2 implements the provisions in Section 590(2)(b-1) of the Banking Law requiring registration of servicers and exempting mortgage bankers, mortgage brokers, and most banking and insurance companies, as well as their employees. The Superintendent is authorized to approve other exemptions.

Section 418.3 contains a number of definitions of terms that are used in Part 418, including ''Mortgage loan'', ''Mortgage loan servicer'' and ''Exempted Person''.

Section 418.4 describes the requirements for applying for registration as a servicer.

Section 418.5 describes the requirements for a servicer applying to open a branch office.

Section 418.6 covers the fees for application for registration as a servicer, including processing fees for applications and fingerprint processing fees.

Section 418.7 sets forth the findings that the Superintendent must make to register a servicer and the procedures to be followed upon approval of an application for registration. It also sets forth the grounds upon which the Superintendent may refuse to register an applicant and the procedure for giving notice of a denial.

Section 418.8 defines what constitutes a ''change of control'' of a servicer, sets forth the requirements for prior approval of a change of control, the application procedure for such approval and the standards for approval. The section also requires servicers to notify the Superintendent of changes in their directors or executive officers.

Section 418.9 sets forth the grounds for revocation of a servicer registration and authorizes the Superintendent, for good cause or where there is substantial risk of public harm, to suspend a registration for 90 days without a hearing. The section also provides for termination of a servicer registration upon non-payment of the required assessment. The Superintendent can also suspend a registration when a servicer fails to file a required report, when its surety bond is cancelled, or when it is the subject of a bankruptcy filing. If the registrant does not cure the deficiencies in 90 days, its registration terminates. The section further provides that in all other cases, suspension or revocation of a registration requires notice and a hearing.

The section also covers the power of the Superintendent to extend a suspension and the right of a registrant to surrender its registration, as well as the effect of revocation, termination, suspension or surrender of a registration on the obligations of the registrant. It provides that registrations will remain in effect until surrendered, revoked, terminated or suspended.

Section 418.10 describes the power of the Superintendent to impose fines and penalties on registered servicers.

Section 418.11 sets forth the requirement that applicants demonstrate five years of servicing experience as well as suitable character and fitness.

Section 418.12 covers the financial responsibility and other requirements that apply to applicants for servicer registration and to registered servicers. The financial responsibility requirements include (1) a required net worth of at least 1% of total loans serviced, with a minimum of $250,000; (2) a ratio of net worth to total New York mortgage loans serviced of at least 5%; (3) a corporate surety bond of at least $250,000 and a Fidelity and E&O bond in an amount that is based on the volume of New York mortgage loans serviced, with a minimum of $300,000.

The Superintendent is empowered to waive, reduce or modify the financial responsibility requirements for certain servicers who service not more than 12 mortgage loans or an aggregate amount of loans not exceeding $5,000,000, whichever is less.

Section 418.13 applies similar financial responsibility requirements to ''Exempted Persons'' who are not subject to the requirement to register as servicers. Such persons include mortgage bankers, mortgage brokers and most banking institutions and insurance companies.

Section 418.14 exempts from the otherwise applicable net worth and Fidelity and E&O ond requirements entities subject to comparable requirements in connection with servicing mortgage loans for federal instrumentalities, and exempts from the otherwise applicable net worth requirement entities that are subject to the capital requirements applicable to insured depositary institutions and that are considered at least adequately capitalized.

Section 418.15 covers the utilization of the proceeds of a servicer's surety bond in the event of the surrender or termination of its registration.

Section 418.16 provides a transitional period for registration of mortgage loan servicers. A servicer doing business in this state on June 30, 2009 which files an application for MLS registration by July 31, 2009 will be deemed in compliance with the registration requirement until notified that its application has been denied.

NEW SUPERVISORY PROCEDURE MB 109

Section 109.1 defines a number of terms that are used in the Supervisory Procedure.

Section 109.2 contains a general description of the process for registering as a mortgage loan servicer (''servicer'') and contains information about where the necessary forms and instructions may be found.

Section 109.3 lists the documents to be included in an application for servicer registration, including the required fees. It also sets forth the execution and attestation requirements for applications. The section makes clear that the Superintendent can require additional information or an in person conference, and that the applicant can submit additional pertinent information.

Section 109.4 describes the information and documents required to be submitted as part of an application for registration as a servicer. This includes various items of information about the applicant and its regulatory history, if any, information demonstrating compliance with the applicable financial responsibility and experience requirements, information about the organizational structure of the applicant, and other documents, such as fingerprint cards and background reports.

NEW SUPERVISORY PROCEDURE MB 110

Section 110.1 defines a number of terms that are used in the Supervisory Procedure.

Section 110.2 contains a general description of the process for applying for approval of a change of control of a mortgage loan servicer (''servicer'') and contains information about where the necessary forms and instructions may be found.

Section 110.3 lists the documents to be included in an application for approval of a change of control of a servicer, including the required fees. It also sets forth the time within which the Superintendent must approve or disapprove an application. It also sets forth the execution and attestation requirements for applications. The section makes clear that the Superintendent can require additional information or an in person conference, and that the applicant can submit additional pertinent information. Last, the section lists the types of changes in a servicer's operations resulting from a change of control which should be notified to the Banking Department.

Section 110.4 describes the information and documents required to be submitted as part of an application for approval of a change of control of servicer. This includes various items of information about the applicant and its regulatory history, if any, information demonstrating continuing compliance with the applicable financial responsibility and experience requirements, information about the organizational structure of the applicant, a description of the acquisition and other documents regarding the applicant, such as fingerprint cards and background reports.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires September 22, 2009.

Text of rule and any required statements and analyses may be obtained from: Sam L. Abram, Secretary of the Banking Board, New York State Banking Department, One State Street, New York, NY 10004-1417, (212) 709-1658, email: sam.abram@banking.state.ny.us

Regulatory Impact Statement

1. Statutory authority.

Article 12-D of the Banking Law, as amended by the Legislature in the Subprime Lending Reform Law (Ch. 472, Laws of 2008, hereinafter, the ''Subprime Law''), creates a framework for the regulation of mortgage loan servicers. Mortgage loan servicers (MLS) 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 Subprime 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.

New Paragraph (d) was added to Subsection (5) of Section 590 by the Subprime 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 Subprime 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 Subprime 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 Subprime 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 Subprime 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 Subprime 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 Subprime 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 MLS registration applications and for MLS branch applications are established in accordance with Banking Law Section 18-a.

2. Legislative objectives.

The Subprime Bill is intended to address various problems related to residential mortgage loans in this State. The Subprime 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 has heretofore been no general regulation of servicers by the state or the Federal government.

The Subprime 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 Banking Board and the superintendent to promulgate appropriate rules and regulations for the regulation of servicers in this state.

The regulations implement the first component of the mortgage servicing statute - the registration of mortgage servicers. (See Sections 418.4 to 418.7.) In doing so, the rule utilizes the authority provided to the Superintendent to set standards for the registration of such entities. For example, the rule requires that a potential loan servicer would have to provide, under Sections 418.10 and 418.11 to 418.14 of the proposed regulations, evidence of their character and fitness to engage in the servicing business and demonstrate to the Superintendent their financial responsibility. The rule

also utilizes the authority provided by the Legislature to revoke, suspend or otherwise terminate a registration or to fine or penalize a registered mortgage loan servicer.

Consistent with this requirement, the rule authorizes the Superintendent to refuse to register an applicant if he/she shall find that the applicant lacks the requisite character and fitness, or any person who is a director, officer, partner, agent, employee, substantial stockholder of the applicant has been convicted of certain felonies. These are the same standards as are applicable to mortgage bankers and mortgage brokers in New York. (See Section 418.7.)

Further, in carrying out the Legislature's mandate to regulate the mortgage servicing business, Section 418.8 sets out certain application requirements for prior approval of a change in control of a registered mortgage loan servicer and notification requirements for changes in the entity's executive officers and directors. Collectively, these various provisions implement the intent of the Legislature to register and supervise mortgage loan servicers.

3. Needs and benefits.

Governor Paterson reported in early 2008 that there were more than 52,000 foreclosure actions filed in 2007, or approximately 1,000 per week. That number increased in 2008, averaging approximately 1,100 per week in the first quarter. This is a crisis and the problems that have affected so many have been found to affect not only the origination of residential mortgage loans, but also their servicing and foreclosure. The Subprime Law adopted a multifaceted approach to the problem. It affected 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.

Currently, the Department regulates 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 may act as agents for owners of mortgages in negotiations relating to modifications. 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; and erroneously force-placing insurance when borrowers already have insurance. While establishing minimum standards for the business conduct of servicers will be the subject of another regulation currently being developed by the Department, Section 418.2 makes it clear that persons exempted by from the registration requirement must notify the Department that they are servicing loans and must otherwise comply with the regulations.

As noted above, the proposed regulation relates to the first component of the mortgage servicing statute - the registration of mortgage loan servicers. It is 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.

Further, consumers in this state will also benefit under these proposed regulations because in the event there is an allegation that a mortgage servicer is involved in wrongdoing and the Superintendent finds that there is good cause, or that there is a substantial risk of public harm, he or she can suspend such mortgage servicer for 90 days without a hearing. And in other cases, he or she can suspend or revoke such mortgage servicer's registration after notice and a hearing. Also, the requirement that servicers meet minimum financial standards and have performance and other bonds will act to ensure that consumers are protected.

As noted above, the MLS regulations are being divided into two parts in order to facilitate meeting the statutory requirement that all MLSs be registered by July 1, 2009. The Department will separately propose regulations dealing with business conduct and consumer protection requirements for MLSs.

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 will be required to comply with the conduct of business and consumer protection rules applicable to MLSs.

4. Costs.

The mortgage business will experience some increased costs as a result of the fees associated with MLS registration. The amount of the application fee for MLS registration and for an MLS branch application is $3,000.

The amount of the fingerprint fee is set by the State Division of Criminal Justice Services and the processing fees of the National Mortgage Licensing System are set by that body. MLSs will also incur administrative costs associated with preparing applications for registration.

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, through the timely response to consumers' inquiries, should assist in decreasing the number of foreclosures in this state.

The regulations will not result in any fiscal implications to the State. The Banking 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.

An application process is being established for potential mortgage loan servicers to apply for registration electronically through the National Mortgage Licensing System and Registry (NMLSR) - a national system, which currently facilitates the application process for mortgage brokers, bankers and loan originators. Therefore, the application process would be virtually paperless; however, a limited number of documents, including fingerprints where necessary, would have to be submitted to the Department in paper form.

The specific procedures that are to be followed in order to apply for registration as a mortgage loan servicer are detailed in Supervisory Procedure MB 109.

7. Duplication.

The proposed regulation does not duplicate, overlap or conflict with any other regulations.

Currently, the mortgage servicing industry is required to meet specific financial net worth requirements and to maintain certain surety bonds in order to service mortgage loans for federal instrumentalities. Those requirements have been considered and in drafting these proposed regulations an exemption was created under Section 418.13, from the otherwise applicable net worth and Fidelity and E&O bond requirements, for entities subject to comparable requirements in connection with servicing mortgage loans for federal instrumentalities, and entities that are subject to the capital requirements applicable to insured depository institutions and are considered adequately capitalized.

8. Alternatives.

The purpose of the regulation is to carry out the statutory mandate to register mortgage loan servicers while at the same time avoiding overly complex and restrictive rules that would have imposed unnecessary burdens on the industry. The Department is not aware of any alternative that is available to the instant regulations. The Department also has been cognizant of the possible burdens of this regulation, and it has accordingly concluded that an exemption from the registration requirement for persons or entities that are involved in a de minimus amount of servicing would address the intent of the statute without imposing undue burdens those persons or entities.

The procedure for suspending servicers that violate certain financial responsibility or customer protection requirements, which provides a 90-day period for corrective action, during which there can be an investigation and hearing on the existence of other violations, provides flexibility to the process of enforcing compliance with the statutory requirements.

9. Federal standards.

Currently, mortgage loan servicers are not required to be registered by any federal agencies. However, although not a registration process, in order for any mortgage loan servicer to service loans on behalf of certain federal instrumentalities such servicers have to demonstrate that they have specific amounts of net worth and have in place Fidelity and E&O bonds.

These regulations exceed those minimum standards, in that, a mortgage loan servicer will now have to demonstrate character and general fitness in order to be registered as a mortgage loan servicer. In light of the important role of a servicer - collecting consumers' money and acting as agents for mortgagees in foreclosure transactions - the Department believes that it is imperative that servicers be required to meet this heightened standard.

10. Compliance schedule.

The regulations will become effective on July 1, 2009.

The Department expects to approve or deny applications within 90 days of the Department's receipt (through NMLSR) of a completed application.

A transitional period is provided for mortgage loan servicers which are doing business in this state on June 30, 2009 and which file an application for registration by July 31, 2009. Such servicers will be deemed in compliance with the registration requirement until notified by the Superintendent that their application has been denied.

Regulatory Flexibility Analysis

1. Effect of the Rule:

The emergency rule will not have any impact on local governments. It is estimated that there are approximately 120 mortgage loan servicers in the state which are not mortgage bankers, mortgage brokers or exempt organizations, and which are therefore required to register under the Subprime Lending Reform Law (Ch. 472, Laws of 2008) (the ''Subprime Law'') Of these, it is estimated that a very few of the remaining entities will be deemed to be small businesses.

2. Compliance Requirements:

The provisions of the Subprime Law relating to mortgage loan servicers has two main components: it requires the registration by the Banking Department of servicers who are not mortgage bankers, mortgage brokers or 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 Subprime Law relating to mortgage loan servicers (the ''MLS Business Conduct Regulations'').

The provisions of the Subprime Law requiring registration of mortgage loan servicers which are not mortgage bankers, mortgage brokers or exempt organizations become effective on July 1, 2009. The emergency MLS Registration Regulations here adopted implement that statutory requirement by providing a procedure whereby MLSs can apply to be registered and standards and procedures for the Department to approve or deny such applications. The emergency regulations also set forth financial responsibility standards applicable to applicants for MLS registration, registered MLSs and servicers which are exempted from the registration requirement.

Additionally, the regulations set forth standards and procedures for Department action on applications for approval of change of control of an MLS. Finally, the emergency regulations set forth standards and procedures for, suspension, revocation, expiration, termination and surrender of MLS registrations, as well as for the imposition of fines and penalties on MLSs.

3. Professional Services: None

4. Compliance Costs:

Applicants for mortgage loan servicer registration will incur administrative costs associated with preparing applications for registration. Applicants, registered MLSs and mortgage loan servicers exempted from the registration requirement may incur costs in complying with the financial responsibility regulations. Registration fees of $3000, plus fees for fingerprint processing and participation in the National Mortgage Licensing System and Registry (NMLS) will be required of non-exempt servicers.

5. Economic and Technological Feasibility:

The emergency rule-making should impose no adverse economic or technological burden on mortgage loan servicers who are small businesses. The NMLS is now available. This technology will benefit registrants by saving time and paperwork in submitting applications, and will assist the Department by enabling immediate tracking, monitoring and searching of registration information; thereby protecting consumers.

6. Minimizing Adverse Impact:

The regulations minimize the costs and burdens of the registration process by utilizing the internet-based NMLS, developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. This system uses an on-line application form for servicer registration. A common form will be accepted by New York and the other participating states.

As noted above, most servicers are not small businesses. Of the remaining servicers which are small businesses subject to the registration requirements of the regulation, a number are expected to be exempt from most of the financial responsibility requirements because they service mortgages for FNMA, GNMA, VA or other federal instrumentalities and comply with net worth and E&O bond requirements of those entities.

As regards servicers that are small businesses and not otherwise exempted, the regulations give the Superintendent the authority to reduce, waive or modify the financial responsibility requirements for entities that do a de minimis amount of servicing.

7. Small Business and Local Government Participation:

Industry representatives have participated in outreach programs during the month of April. The Department also maintains continuous contact with large segments of the servicing industry though its regulation of mortgage bankers and brokers. 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.

Rural Area Flexibility Analysis

Types and Estimated Numbers. The New York State Banking Department anticipates that approximately 120 mortgage loan servicers may apply to become registered in 2009. It is expected that a very few of these entities will be operating in rural areas of New York State and would be impacted by the emergency regulation.

Compliance Requirements. Mortgage loan servicers in rural areas which are not mortgage bankers, mortgage brokers or exempt organizations must be registered with the Superintendent to engage in the business of mortgage loan servicing. An application process will be established requiring a MLS to apply for registration electronically and to submit additional background information and fingerprints to the Mortgage Banking Division of the Banking Department.

MLSs are required to meet certain financial responsibility requirements based on their level of business. The regulations would authorize the Superintendent to reduce or waive the otherwise applicable financial responsibility requirements in the case of MLSs which 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 which those requirements might otherwise impose on entities operating in rural areas.

Costs. The mortgage business will experience some increased costs as a result of the fees associated with MLS registration. The application fee for MLS registration will be $3,000. The amount of the fingerprint fee is set by the State Division of Criminal Justice Services and the processing fees of the National Mortgage Licensing System and Registry (''NMLSR'') are set by that body. Applicants for mortgage loan servicer registration will also incur administrative costs associated with preparing applications for registration.

Applicants, registered MLSs and mortgage loan servicers exempted from the registration requirement may incur costs in complying with the financial responsibility regulations.

Minimizing Adverse Impact. The regulations minimize the costs and burdens of the registration process by utilizing the internet-based NMLSR, developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. This system uses an on-line application form for servicer registration. A common form will be accepted by New York and the other participating states.

Of the servicers which operate in rural areas, it is believed that most are mortgage bankers, mortgage brokers or exempt organizations. Of the remainder, a number are expected to be exempt from most of the financial responsibility requirements because they service mortgages for FNMA, GNMA, FHLMC, VA or other federal instrumentalities and comply with net worth and E&O bond requirements of those entities.

As regards servicers that operate in rural areas and are not otherwise exempted, the regulations give the Superintendent the authority to reduce, waive or modify the financial responsibility requirements for entities that do a de minimis amount of servicing.

Rural Area Participation. Industry representatives have participated in outreach programs during the month of April. The Department also maintains continuous contact with large segments of the servicing industry though its regulation of mortgage bankers and brokers. 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 Subprime 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. This emergency regulation sets forth the application, exemption and approval procedures for registration as a Mortgage Loan servicer (MLS), as well as financial responsibility requirements for applicants, registrants and exempted persons. The regulation also establishes requirements with respect to changes of officers, directors and/or control of MLSs and provisions with respect to suspension, revocation, termination, expiration and surrender of MLS registrations.

The requirement to comply with the emergency regulations is not expected to have a significant adverse effect on jobs or employment activities within the mortgage loan servicing industry. Many of the larger entities engaged in the mortgage loan servicing business are already subject to oversight by the Banking Department and exempt from the new registration requirement. Many of the remaining servicers, while subject to the registration requirement, already service mortgages for FNMA, GNMA or VA and are thus expected to be exempt from the financial responsibility requirements in the regulation. Additionally, the regulations give the Superintendent the authority to reduce, waive or modify the financial responsibility requirements for entities that do a de minimis amount of servicing.

The registration process itself should not have an adverse effect on

employment. The regulations require the use of the internet-based National Mortgage Licensing System and Registry, developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. This system uses a common on-line application for servicer registration in New York and other participating states. It is believed that any remaining adverse impact would be due primarily to the nature and purpose of the statutory registration requirement rather than the provisions of the emergency regulations.

Office of Children and Family Services

EMERGENCY RULE MAKING

Education Stability of Foster Children, Transition Planning and Relative Involvement in Foster Care Cases

I.D. No. CFS-28-09-00001-E
Filing No. 705
Filing Date: 2009-06-24
Effective Date: 2009-06-24

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

Action taken: Amendment of sections 421.24(c)(19), 428.3(b)(2)(iii) and (iv), 428.5(c)(6), (10)(viii), 430.11(c)(1) and (2) and 430.12(c); and addition of sections 428.3(b)(2)(v), 430.11(c)(4), 430.12(c)(4) and (j) to Title 18 NYCRR.

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

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

Specific reasons underlying the finding of necessity: The regulations must be filed on an emergency basis to prevent the loss of federal funding that supports the health, safety and welfare of the children in foster care, children receiving adoption assistance and families receiving child welfare services.

Subject: Education stability of foster children, transition planning and relative involvement in foster care cases.

Purpose: The regulations implement the federal Foster Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351).

Text of emergency rule: Paragraph (19) of subdivision (c) of section 421.24 is amended to read as follows:

(19) The social services official on *an annual* [a biennial] basis *in a written notification* must remind the adoptive parents of their obligation to support the adopted child and to notify the social services official if the adoptive parents are no longer providing any support or are no longer legally responsible for the support of the child. *Where the adopted child is school age under the laws of the state in which the child resides, such notification must include a requirement that the adoptive parents must certify that the adopted child is a full-time elementary or secondary student or has completed secondary education. For the purposes of this paragraph, an elementary or secondary school student means an adopted child who is: (i) enrolled, or in the process of enrolling, in a school which provides elementary or secondary education, in accordance with the laws where the school is located; (ii) instructed in elementary or secondary education at home, in accordance with the laws in which the adopted child's home is located; (iii) in an independent study elementary or secondary education program, in accordance with the laws in which the adopted child's education program is located, which is administered by the local school or school district; or (iv) incapable of attending school on a full-time basis due to the adopted child's medical condition, which incapacity is supported by annual information submitted by the adoptive parents as part of this certification.*

Subparagraphs (iii) and (iv) of paragraph (2) of subdivision (b) of section 428.3 are amended and a new subparagraph (v) is added to read as follows:

(iii) educational and/or vocational training reports or evaluations indicating the educational goals and needs of each foster child, including school reports and Committee on Special Education evaluations and/or recommendations; [and]

(iv) if the child has been placed in foster care outside of the state, a report prepared every six months by a caseworker employed by either the authorized agency with case management and/or case planning responsibility for the child, the state in which the placement home or facility is located, or a private agency under contract with either the authorized agency or other state, documenting the caseworker's visit(s) with the child at his or her placement home or facility within the six-month period*; and*

(v) the child's transition plan prepared in accordance with the standards set forth in section 430.12(j) of this Part.

Paragraph (6) of subdivision (c) of section 428.5 is amended to read as follow:

(6) description of contacts with educational/vocational personnel on behalf of the child*, including, but not limited to, contacts made with school personnel in accordance with sections 430.11(c)(1)(i) and 430.12(c)(4) of this Part;*

Subparagraph (viii) of paragraph (10) of subdivision (c) of section 428.5 is amended to read as follows:

(viii) any information acquired about an absent or non-respondent parent that is in addition to information recorded pursuant to section 428.4(c)(1) of this Part, [and] the results of an investigation into the location of any relatives, including grandparents of a child subject to article 10 of the Family Court Act or section 384-a of the Social Services Law, *and the efforts to identify and provide notification to grandparents and other adult relatives in accordance with the requirements of section 430.11(c)(4) of this Part*;

Subparagraph (i) of paragraph (1) of subdivision (c) of section 430.11 is amended to read as follows:

(1)(i) Standard. Whenever possible, a child shall be placed in a foster care setting which permits the child to retain contact with the persons, groups and institutions with which the child was involved while living with his *or her* parents, or to which the child will be discharged. It shall be deemed inappropriate to place a child in a setting which conforms with this standard only if the child's service needs can only be met in another available setting at the same or lesser level of care. *The placement of the child into foster care must take into account the appropriateness of the child's existing educational setting and the proximity of such setting to the child's placement location. When is it in the best interests of the foster child to continue to be enrolled in the same school in which the child was enrolled when placed into foster care, the agency with case management, case planning or casework responsibility for the foster child must coordinate with applicable local school authorities to ensure that the child remains in such school. When it is not in the best interests of the foster child to continue to be enrolled in the same school in which the child was enrolled when placed into foster care, the agency with case management, case planning or casework responsibility for the foster child must coordinate with applicable local school authorities where the foster child is placed in order that the foster child is provided with immediate and appropriate enrollment in a new school; and the agency with case management, case planning or casework responsibility for the foster child must coordinate with applicable local school authorities where the foster child previously attended in order that all of the applicable school records of the child are provided to the new school.*

Subparagraph (viii) of paragraph (2) of subdivision (c) of section 430.11 is amended, subparagraph (ix) is renumbered as subparagraph (x) and a new subparagraph (ix) is added to read as follows:

(viii) if the child has been placed in a foster care placement a substantial distance from the home of the parents of the child or in a state different from the state in which the parent's home is located, the uniform case record must contain documentation why such placement is in the best interests of the child; [and]

(ix) *show in the uniform case record that efforts were made to keep the child in his or her current school, or where distance was a factor or the educational setting was inappropriate, that efforts were made to seek immediate enrollment in a new school and to arrange for timely transfer of school records; and*

(x) if the child has been placed in foster care outside of the state in which the home of the parents of the child is located, the uniform case record must contain a report prepared every six months by a caseworker employed by the authorized agency with case management and/or case planning responsibility over the child, the state in which the home is or facility is located, or a private agency under contract with either the authorized agency or other state documenting the caseworker's visit to the child's placement within the six-month period.

Paragraph (4) of subdivision (c) of section 430.11 is added to read as follows:

(4) Within 30 days after the removal of a child from the custody of the child's parent or parents, or earlier where directed by the court, or as required by section 384-a of the Social Services Law, the social services district must exercise due diligence in identifying all of the child's grandparents and other adult relatives, including adult relatives suggested by the child's parent or parents and, with the exception of

grandparents and/or other identified relatives with a history of family or domestic violence. The social services district must provide the child's grandparents and other identified relatives with notification that the child has been or is being removed from the child's parents and which explains the options under which the grandparents or other relatives may provide care of the child, either through foster care or direct legal custody or guardianship, and any options that may be lost by the failure to respond to such notification in a timely manner. The identification and notification efforts made in accordance with the paragraph must be recorded in the child's uniform case record as required by section 428.5(c)(10)(viii) of this Part.

Paragraph (4) of subdivision (c) of section 430.12 is amended and renumbered paragraph (5) and a new paragraph (4) is added to read as follows:

(4) Education. (i) Standard. The social services district with care and custody or guardianship and custody of a foster child who has attained the minimum age for compulsory education under the Education Law is responsible for assuring that the foster child is a full-time elementary or secondary school student or has completed secondary education. For the purpose of this paragraph, an elementary or secondary school student means a child who is: (a) enrolled, or in the process of enrolling, in a school which provides elementary or secondary education, in accordance with the laws where the school is located; (b) instructed in elementary or secondary education at home, in accordance with the laws in which the foster child's home is located; (c) in an independent study elementary or secondary education program, in accordance with the laws in which the foster child's education program is located, which is administered by the local school or school district; or (d) incapable of attending school on a full-time basis due to the foster child's medical condition, which incapability is supported by regularly updated information in the child's uniform case record.

(ii) Documentation. The progress notes for each school age child in foster care must reflect either the education program in which the foster child is presently enrolled or is enrolling; or the date the foster child completed his or her compulsory education; or where the child is not capable of attending school on a full-time basis, what the medical condition is and why such condition prevents full-time attendance. The social services district must update the progress notes on an annual basis to reflect why such medical condition continues to prevent the foster child's full-time attendance in an education program. On an annual basis, by the first day of each October, the education module in CONNECTIONS must be updated with education information about each school age foster child in the form and manner as required by the Office.

(5) [(4] Discharge planning. (i) Standard. For any child *age* 18 or under who is discharged from foster care, the district [shall] *must* consider the need to provide preventive services to the child and his *or her* family subsequent to [his] *the child's* discharge.

(ii) Documentation. The uniform case record form to be completed upon discharge of the child [shall] *must* show either the recommended type of preventive services and the district's attempts to provide or arrange for these services, or the reasons why these services are deemed unnecessary.

Subdivision (j) of section 430.12 is added to read as follows:

(j) Transition plan Whenever a child will remain in foster care on or after the child's eighteenth birthday, the agency with case management, case planning or casework responsibility for the foster child must begin developing a transition plan with the child 180 days prior to the child's eighteenth birthday or 180 days prior to the child's scheduled discharge date where the child is consenting to remain in foster care after the child's eighteenth birthday. The transition plan must be completed 90 days prior to the scheduled discharge. Such plan must be personalized at the direction of the child. The transition plan must include specific options on housing, health insurance, education, local opportunities for mentors and continuing support services, and work force supports and employment services. The transition plan must be as detailed as the foster child may elect.

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 September 21, 2009.

Text of rule and any required statements and analyses may be obtained from: Public Information Office, NYS Office of Children and Family Services, 52 Washington Street, Rensselaer, New York 12144, (518) 473-7793

Regulatory Impact Statement

1. Statutory authority

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

Section 34(3)(f) of the SSL requires the Commissioner of OCFS to promulgate regulations for the administration of public assistance and care within the state.

2. Legislative objectives

The regulations implement standards required by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) that went into effect on October 7, 2008.

3. Needs and benefits

The regulations will reduce disruption experienced by a child when removed from he child's home and placed into foster care and will enhance continuity in the child's environment.

Regarding the relationship of the child with his or her relatives, the regulations require that within 30 days of the removal of a foster child from his or her home, the social services district must exercise due diligence in identifying and notifying relatives of the child, including all grandparents and other relatives identified by the child's parents, that the child was removed, the options available to relatives to become the child's foster parent or to otherwise care for the child and any options that may be lost by the failure of the relative to respond to such notification in a timely manner. The regulations take into consideration the safety of the child by excluding the need to notify any relative who has a history of family or domestic violence.

The regulations address the need to minimize disruption by requiring the social services district to assess the proximity of the foster care placement to the school the child attended before placement into foster care and the appropriateness of the child remaining in that school upon entry into foster care. Where it is not in the best interests of the child to attend such school, the regulations require the social services district to work with the appropriate local school officials to see that the child is immediately enrolled in a new school.

The regulations also support the preparation of the foster child to transition out of foster care. One of the fundamental needs of any child is his or her education. The regulations clarify that each foster child of school age must either be enrolled in an appropriate educational setting, unless the child is incapable of attending school, or has completed his or her secondary education. The regulations impose a similar requirement in regard to a child who is in receipt of an adoption subsidy and is of school age.

The regulations support the transition of older foster children out of foster care by requiring the authorized agency with case management responsibility to develop a transition plan for a foster child who is aging out of foster care. This plan must be developed to meet the needs of the particular foster child, with such child's input. Development of the transition plan must commence 180 days prior to the scheduled discharge date of the foster child, with the completion of the plan 90 days prior to the scheduled discharge. Such plan must address such basic post discharge issues as housing, health insurance, education, supports services and employment.

4. Costs

The regulatory amendments are required by the federal Fostering Connections to Success and Increasing Adoption Act of 2008. There is no fiscal impact associated with implementing the regulations because current OCFS regulations require social services districts to carry out similar functions as those prescribed in these regulations. With the exception of the regulatory amendment associated with the transition plan, the regulatory changes are federally mandated under Title IV-E of the Social Security Act. Currently, New York must demonstrate that it has implemented these requirements in order to have a compliant Title IV-E State Plan. This is a condition for continuing to receive federal funds for foster care, adoption assistance and the administration of these programs.

The regulatory change regarding the transition plan for children who are aging out of foster care is a federal mandate under Tile IV-B, Subpart 1 of the Social Security Act. In order to have a compliant Title IV-B State Plan and to continue to receive federal Child Welfare Services funding, New York State must demonstrate that it has implemented such standard.

There is no fiscal impact associated with the regulatory amendment to 18 NYCRR 421.19(c)(19). Currently, the New York City Administration for Children's Services notifies adoptive parents to verify that they are continuing to sup-port their adoptive children and continue to be legally responsible for the support of their adoptive children. Acceptable documentation includes proof of school attendance. Documentation provided by the adoptive parent can be maintained in the social services district in the adoption subsidy case file. The regulatory amendments do not require any modification to CONNECTIONS. The requirements associated with documenting information in the child's uniform case record progress notes can be supported by CONNECTIONS.

5. Local government mandates

The regulations require social services districts to carry out functions similar to those they already have been obligated by State statute and OCFS regulations to perform. Current OCFS regulation 18 NYCRR 430.11(c) requires the social services district placing a child into foster

care, whenever possible, to place the child in a foster care setting that permits the child to retain contact with the persons, groups and institutions with which the child was involved while living with his or her parents. OCFS regulation 18 NYCRR 430.10(b) currently requires the social services district that is contemplating the placement of a child into foster care to attempt, prior to placement, to locate adequate alternative living arrangements with a relative or family friend which would enable the child to avoid placement into foster care. Section 1017 of the Family Court Act and section 384-a of the SSL currently provide that when a child is to be removed from his or her home, the social services district must identify and discuss with such relative, including grandparents, available options to function as the child's foster parent or to assume direct legal custody of the child. The social services district must also notify the relative that the child may be adopted by foster parents if attempts at reunification with the birth parent are not required or are unsuccessful.

Social services districts are obligated pursuant to section 409-e of the SSL and OCFS regulations 18 NYCRR Part 428 and 430.12 to develop for each foster child a family assessment and service plan that addresses the needs of the child, including those related to education and the preparation of the child for discharge from foster care. These standards also presently require that foster children over the age of 10 be invited to participate in such planning.

6. Paperwork

The regulations require the recording of the actions taken by the social services district or voluntary authorized agency with case management responsibility in meeting the standards referenced above. Such documentation will be recorded in New York State's statewide automated child welfare information system, CONNECTIONS.

7. Duplication

The regulations do not duplicate other state or federal requirements. The regulations build on related existing requirements.

8. Alternatives

Given the mandates imposed by the federal Foster Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) and the adverse financial consequences for non- compliance, there is no viable alternative to implementing the regulations.

9. Federal standards

Each of the regulatory amendments reflects requirements imposed by the federal Foster Connections to Success and Increasing Adoptions Act of 2008. The regulatory changes relating to relatives and education are federally mandated under Title IV-E of the Social Security Act. New York State must demonstrate that it has implemented such standards in order to have a compliant Title IV-E State Plan which is a condition for New York to continue to receive federal funding for foster care and adoption assistance. The regulatory change relating to the transition plan for aging out foster children is federally mandated under Title IV-B, Subpart 1 of the Social Security Act. New York must demonstrate that is has implemented such standard in order to have a compliant Title IV-B State Plan which is a condition for New York to continue to receive federal child welfare services funding.

10. Compliance schedule

Compliance with the regulations would take effect upon adoption.

Regulatory Flexibility Analysis

1. Effect on Small Businesses and Local Governments

Social service districts, the St. Regis Mohawk Tribe and voluntary authorized agencies that have contracts with social service districts to provide foster care, will be affected by the regulations. There are 58 social service districts and approximately 160 voluntary authorized agencies.

2. Compliance Requirements

The regulations implement standards required by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L 110-351) that went into effect on October 7, 2008. Implementation of the regulations is necessary for the State of New York to maintain compliant Title IV-B and Title IV-E State Plans which are required for New York to continue to receive federal funding under Title IV-B and Title IV-E of the Social Security Act for foster care, adoption assistance, child welfare services and the administration of those programs.

The regulations require that within 30 days of the removal of a foster child from his or her home, the social services district must exercise due diligence in identifying and notifying relatives of the child, including all grandparents and other relatives identified by the child's parents, that the child was removed, the options available to the relatives to become the child's foster parent or to otherwise care for the child and any option that may be lost by the failure of the relatives to respond to such notification in a timely manner. Notification must be made earlier than 30 days of removal if directed by the court. Notification is not required in regard to relatives who have a history of family or domestic violence.

The regulations require the authorized agency with case management responsibility to develop a transition plan for a foster child who is aging out of foster care. Such plan must be personalized to the particular foster child and developed with the involvement of such child. Development of the transition plan must commence 180 days prior to the scheduled discharge date of the foster child, with the completion of the plan 90 days prior to the scheduled discharge. The transition plan must address housing, health insurance, education, local opportunities or mentors and continuing support services, and work force supports and employment services.

The regulations set forth standards social services districts must satisfy in relation to the educational stability of children when they are removed from their homes and placed into foster care. The regulations address the need to assess the proximity of foster care placements to the school the child attended at the time of removal and the appropriateness of the child remaining in that same school after entering foster care. Where the foster child can not remain in the same school, the agency with case management responsibility must coordinate with local school officials in order that the foster child will be provided with immediate and appropriate enrollment in a new school.

The regulations require that foster children of school age must either be enrolled in an appropriate educational setting, unless incapable of attending school or have completed secondary education. The regulations impose a similar requirement post discharge from foster care for a child who is school age and is in receipt of an adoption subsidy.

3. Professional Services

It is anticipated that the requirements imposed by the regulations will be implemented by existing case work staff.

4. Compliance Costs

The regulatory amendments are required by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. There is no fiscal impact associated with implementing the regulations because current OCFS regulations require social services districts to carry out similar functions as those prescribed in these regulations. With the exception of the regulatory amendment associated with the transition plan, the regulatory changes are federally mandated under Title IV-E of the Social Security Act. Currently, New York must demonstrate that it has implemented these requirements in order to have a compliant Title IV-E State Plan. This is a condition for continuing to receive federal funds for foster care, adoption assistance and the administration of these programs.

The regulatory change regarding the transition plan for children who are aging out of foster care is a federal mandate under Title IV-B, Subpart 1 of the Social Security Act. In order to have a compliant Title IV-B State Plan and to continue to receive federal Child Welfare Services funding, New York State must demonstrate that it has implemented such standard.

There is no fiscal impact with the regulatory amendment to 18 NYCRR 421.24(c)(19). Currently, the New York City Administration for Children's Services notifies adoptive parents to verify that they are continuing to support their adopted children and continue to be legally responsible for the support of their adoptive children. Acceptable documentation includes proof of school attendance. Documentation provided by the adoptive parent can be maintained by the social services district in the adoption subsidy case file. The regulatory amendments do not require any modification to CONNECTIONS. The requirements associated with documenting information in the child's uniform case record progress notes can be supported by CONNECTIONS.

5. Economic and Technological Feasibility

The regulations require the recording of the actions taken to comply with the regulatory standards noted above. Such information will be recorded in New York State's statewide automated child welfare information system, CONNECTIONS.

6. Minimizing Adverse Impact

The standards set forth in the regulations reflect mandates imposed on the states by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. Implementation is necessary for New York to continue to be eligible to receive federal funding for foster care, adoption assistance child welfare services and the administration thereof, as required by Title IV-B and title IV-E of the Social Security Act. The regulations do not go beyond the scope of the federal mandates.

7. Small Business and Local Government Participation

By letter dated, December 5, 2008, OCFS informed the commissioner of each of the local department of social services in the State of New York of the amendments to OCFS regulations that are necessitated by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. The letter included a brief summary of the new regulatory requirements. In addition, it informed local commissioners of the requirements enacted by the federal legislation that are already in effect in New York and that will not require any further regulatory amendments. OCFS advised the local commissioners that OCFS will provide any clarification received from the federal Department of Health and Human Services on these requirements. A copy of the OCFS regulations was provided along with a contact person if the local commissioners or their staff had any questions.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas

Social services districts, the St. Regis Mohawk Tribe and voluntary au-

thorized agencies that have contracts with social services districts to provide foster care will be affected by the regulations. There are 44 social services districts and the St. Regis Mohawk Tribe that are in rural areas. Currently, there are also approximately 100 voluntary authorized agencies in rural areas of New York State.

2. Reporting, recordkeeping and other compliance requirements; and professional services

The regulations implement standards required by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) that went into effect on October 7, 2008. Implementation of the regulations is necessary for the State of New York to maintain compliant Title IV-B and Title IV-E State Plans which are required for New York to continue to receive federal funding under Title IV-B and Title IV-E of the Social Security Act for foster care, adoption assistance, child welfare services and the administration of those programs.

The regulations require that within 30 days of the removal of a foster child from his or her home, the social services district must exercise due diligence in identifying and notifying relatives of the child, including all grandparents and other relatives identified by the child's parents, that the child was removed, the option available to the relative to become the child's foster parent or to otherwise care for the child and any options that may be lost by the failure of the relative to respond to such notification in a timely manner. Notification must be made earlier than 30 days of removal if directed by the court. Notification is not required in regard to relatives with a history of family or domestic violence.

The regulations require the authorized agency with case management responsibility to develop a transition plan for a foster child who is aging out of foster care. Such plan must be personalized to the particular foster child and developed with the involvement of such child. Development of the transition plan must commence 180 days prior to the scheduled discharge date of the foster child, with the completion of the plan 90 days prior to the scheduled discharge. The transition plan must address housing, health insurance, education, local opportunities for mentors and continuing support services and wok force supports and employment services.

The regulations set forth standards social services districts must satisfy in relation to the educational stability of children when they are removed from their homes and placed into foster care. The regulations address the need to assess the proximity of foster care placements to the school the child attended at the time of removal and the appropriateness of the child remaining in that school after entering foster care. Where the foster child can not remain in the same school, the agency with case management responsibility must coordinate with local school officials in order that the foster child be provided with immediate and appropriate enrollment in a new school.

The regulations require that foster children of school age must either be enrolled in an appropriate educational setting, unless incapable of attending school, or have completed secondary education. The proposed regulations would impose a similar requirement post discharge from foster care in regard to a school age child who is in receipt of an adoption subsidy.

3. Costs

Each of the regulatory amendments is required by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. There is no fiscal impact associated with implementing the regulations because current OCFS regulations require social services districts to carry out similar functions as those prescribed in these amendments. With the exception of the regulatory amendment associated with the transition plan, the regulatory changes are federally mandated under Title IV-E of the Social Security Act. Currently, New York must demonstrate that is has implemented these requirements in order to have a compliant Title IV-E State Plan. This is a condition for continuing to receive federal funds for foster care, adoption assistance and the administration of these programs.

The regulatory change regarding the transition plan for children who are aging out of foster care is a federal mandate under Title IV-B, Subpart 1 of the Social Security Act. In order to have a compliant Title IV-B State Plan, and to continue to receive federal Child Welfare Services funding, New York State must demonstrate that it has implemented such standard.

There is no fiscal impact associated with the regulatory amendment to 18 NYCRR 421.24(c)(19). Currently, the New York City Administration for Children's Services notifies adoptive parents to verify that they are continuing to support their adoptive children and continue to be legally responsible for the support of their adoptive children. Acceptable documentation includes proof of school attendance. Documentation provided by the adoptive parent can be maintained by the social services district in the adoption subsidy case file. The regulatory amendments do not require any modification to CONNECTIONS. The requirements associated with documenting information in the child's uniform case record progress notes can be supported in CONNECTIONS.

4. Minimizing adverse impact

The regulations require the recording of the actions taken to comply with the regulatory standards noted above. Such information will be recorded in New York State's statewide automated child welfare information system, CONNECTIONS.

5. Rural area participation

By letter dated, December 5, 2008, OCFS informed the commissioner of each local department of social services in the State of New York of the amendments to OCFS regulations necessitated by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. The letter included a brief summary of the new regulatory requirements. In addition, it informed local commissioners of the requirements enacted by the federal legislation that are already in effect in New York and that will not require any further regulatory amendments. OCFS advised the local commissioners that OCFS will provide any clarification received from the federal Department of Health and Human Services on these requirements. A copy of the regulations was provided along with a contact person if the local commissioners or their staff had any questions.

Job Impact Statement

A full job impact statement has not been prepared for the regulations. The amendments will not result in the loss or creation of any jobs.

Department of Correctional Services

NOTICE OF ADOPTION

Death Sentence

I.D. No. COR-13-09-00005-A
Filing No. 731
Filing Date: 2009-06-29
Effective Date: 2009-07-15

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

Action taken: Repeal of section 103.45 of Title 7 NYCRR.

Statutory authority: Correction Law, sections 70 and 652

Subject: Death Sentence.

Purpose: To repeal the section since it no longer applies to any person in accordance with New York State Court of Appeals ruling.

Text or summary was published in the April 1, 2009 issue of the Register, I.D. No. COR-13-09-00005-P.

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

Text of rule and any required statements and analyses may be obtained from: Maureen E. Boll, Deputy Commissioner and Counsel, New York State Department of Correctional Services, 1220 Washington Avenue - Building 2 - State Campus, Albany, NY 12226-2050, (518) 457-4951, email: Maureen.Boll@DOCS.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Department of Economic Development

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Minority and Women Business Enterprise Program

I.D. No. EDV-28-09-00013-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 140.1 and addition of sections 144.9 and 144.10 to Title 5 NYCRR.

Statutory authority: Executive Law, section 314(2-a)[c]

Subject: Minority and Women Business Enterprise Program.

Purpose: Create procedure to accept federal certification verification for MWBE applicants w/o requiring state certification process.

Text of proposed rule: PART 140 OF THE REGULATIONS OF THE COMMISSIONER OF THE DEPARTMENT OF ECONOMIC DEVELOPMENT ARE HEREBY AMENDED TO READ AS FOLLOWS:

PART 140

DEFINITIONS

140.1*(bb) Supplemental Application. The form that the DMWBD requires an applicant to submit for purposes of applying for minority-or women-owned business enterprise status in accordance with section 144.10 of this part.*

PART 144 OF THE REGULATIONS OF THE COMMISSIONER OF THE DEPARTMENT OF ECONOMIC DEVELOPMENT ARE HEREBY AMENDED TO READ AS FOLLOWS:

PART 144

STATEWIDE CERTIFICATION PROGRAM

144.9 Acceptance of federal certification pursuant to Executive Law section 314(2-a) Provided all the criteria set forth in section 144.10 below have been satisfied, the DMWBD shall accept, in lieu of requiring the applicant to complete and submit the New York State minority and women owned business enterprise certification application, a current federal certification issued to the minority and women business enterprise pursuant to Title 49 CFR Part 26 or Title 13 CFR Part 124.

144.10 Criteria for acceptance of federal certification in lieu of completing and submitting the New York State minority- and women-owned business enterprise certification application.

1. DMWBD shall approve an applicant as a certified business without requiring that applicant to complete the New York State minority and woman owned business enterprise certification application provided: (i) the applicant demonstrates that it holds a current federal certification pursuant to Title 49 CFR Part 26 or Title 13 CFR Part 124 by submitting a true copy of the certification to DMWBD; (ii) the applicant completes the Supplemental Application;—(iii) the applicant provides a signed authorization for the exchange of information between the DMWBD and the certifying entity for the purpose of determining the applicant's eligibility for certification; (iv) an owner, a partner or a principal officer that is authorized to act on behalf of the applicant signed and has notarized an attestation that the information submitted in connection with the federal certification is accurate to the best of that person's knowledge; and (v) the applicant provides proof satisfactory to the DMWBD that the applicant is owned, operated and controlled by women or minority group members. Documentation referenced in section 144.2(c)(1) of this Part may be required to substantiate the claim of membership in a minority group or gender.

2. Notwithstanding anything to the contrary in section 144.10 (1) above, DMWBD reserves the right to (i) conduct an investigation of an applicant (which may include, but not be limited to, conducting a site visit to the applicant's place of business, and or requesting documentation from the applicant) to verify that the applicant meets all of the eligibility criteria set forth in Executive Law section 314 and section 144.2 of this Part, and (ii) reject or deny certification if DMWBD is not satisfied that the applicant meets all of the eligibility criteria set forth in Executive Law section 314 and section 144.2 of this Part.

3. After verification by the DMWBD that an applicant has satisfied all of the criteria in section 144.10(1)(i)–(v), and 144.10(2) if applicable, such applicant shall become certified as a minority or women-owned business enterprise without completing the New York State minority and woman owned business enterprise certification application.

4. The process described in section 144.4 of this part will apply to Supplemental Applications.

Text of proposed rule and any required statements and analyses may be obtained from: Thomas P Regan, New York State Department of Economic Development, 30 South Pearl Street, Albany NY 12245, (518) 292-5123, email: tregan@empire.state.ny.us

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

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

Section 314(2-a)[c] of the Executive Law authorizes the Director of the Division of Minority and Women Business Enterprise Development (the ''Division'') to establish a procedure, rules and regulations, enabling the Division to accept federal certification verification for minority and women-owned business enterprise (''MWBE'') applicants in lieu of requiring the applicant to complete the state certification process.

LEGISLATIVE OBJECTIVES:

The rulemaking accords with the public policy objective the Legislature sought to advance because it establishes criteria for acceptance of federal certification standards which will streamline the state MWBE certification process for businesses that have already undergone the certification process under an existing federal certification program and ultimately increase their access to contracting opportunities. It is the public policy of the State to develop reasonable standards for accepting such certification in order to increase certification efficiency, avoid duplication of efforts between state and federal programs and get more businesses certified as soon as possible so that more businesses might access contracting opportunities.

NEEDS AND BENEFITS:

The rule is required under the statute to establish criteria for the acceptance of federal certification verification for minority and women-owned business enterprise applicants in lieu of requiring the applicant to complete the state certification process. The rule has several benefits. First, the rule streamlines the state certification process to enable the Division to certify business enterprises which already have required federal certification without undertaking the entire, lengthy state certification process. Second, the rule necessarily enables certain businesses to access contracting opportunities sooner than they might normally be able to which will benefit these companies as well as the State in terms of potential job growth. Third, accepting applicants with federal certifications on a ''fast track'' basis will reduce the amount of backlog the program currently has as many pending applications have federal certification(s) and these type of applications can now be processed more quickly.

COSTS:

I. Costs to private regulated parties (the Business applicants): None. The regulation will not impose any additional costs to the business applicants beyond the existing program.

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

III. Costs to the State government: None. While the Division will have to review and process federally certified applicants in a different manner than other firms, this will not impose any significant costs to New York State as a result of the rule making.

LOCAL GOVERNMENT MANDATES:

None. Local governments are not mandated to participate in the MWBE program.

PAPERWORK:

The rule will require federally certified entities to submit a copy of their original application filed with a federal certifying organization along with a two page Fast Track application/release (developed by the Division). The Fast Track application/release will be completed and notarized by the applicant and the Division reserves the right to conduct an investigation of the applicant. This requirement is not burdensome on applicants since even with the potential of additional informational requests pursuant to an investigation by the Division, the overall demands on the applicant have been greatly reduced and the hours required by the state to process the applications will likely be greatly reduced.

DUPLICATION:

The rule will not duplicate or exceed any other existing Federal or State statute or regulation.

ALTERNATIVES:

The Department rejected the alternative of not promulgating this rule because section 314(2-a)(c) of the Executive Law required its promulgation.

FEDERAL STANDARDS:

The rule does not exceed any Federal standard; this rule works in conjunction with the federal DBE program as outlined in Title 49 Part 26 of the CFR and section 8(a) of the Small Business Act of 1968; see also 13 CFR Part 124.

COMPLIANCE SCHEDULE:

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

Regulatory Flexibility Analysis

Application to the minority and women business enterprise program is entirely at the discretion of each eligible business enterprise. Neither Executive Law Article 15-A nor the proposed regulations impose an obligation on any local government or business entity to participate in the program. The proposed regulation does not impose any adverse economic impact, reporting, record-keeping, or other compliance requirements on small businesses and/or local governments. In fact, the proposed regulations may have a positive economic impact on small businesses as the changes created in the proposed regulations may increase the number of small businesses certified and able to access contracting opportunities throughout New York State. For clarification purposes, the changes crafted in the proposed regulation do not affect local governments. Because it is evident from the nature of the proposed rule that it will have either no substantive impact, or a positive impact, on small businesses and local governments, 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 minority and women business enterprise program is a statewide program. There are eligible businesses in rural areas of New York State. However, participation in the program is entirely at the discretion of eligible business enterprises. The program does impose some responsibility on those businesses which participate such as submitting applications and reports. However, the rule will not impose any substantial reporting, record keeping or other compliance requirements on public or private entities in rural areas. Therefore, the regulation will not have a substantial adverse economic impact on rural areas or reporting, record keeping or other compliance requirements on public or private entities in such rural areas. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

Job Impact Statement

The proposed regulation relates to the minority and women business enterprise (MWBE) Program. The regulation will not have a substantial adverse impact on jobs and employment opportunities. In fact, the proposed regulation, which results from a statutory-based requirement, will have either a positive impact or no impact on job growth throughout the State. A streamlined MWBE certification process for certain companies will enhance and increase these companies' contracting opportunities in the State. This could invariably lead to more business opportunities for these companies and ultimately job growth for New York state. Because it is evident from the nature of the proposed regulations 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.

Education Department

EMERGENCY RULE MAKING

No Child Left Behind Act of 2001 (NCLB) - School Accountability

I.D. No. EDU-26-09-00004-E

Filing No. 750

Filing Date: 2009-06-30

Effective Date: 2009-07-01

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

Action taken: Amendment of sections 100.2(p), 120.2, 120.3 and 120.4 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 210(not subdivided), 215(not subdivided), 305(1), (2), (20), 309(not subdivided), 3713(1) and (2)

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

Specific reasons underlying the finding of necessity: The purpose of the proposed amendment is to conform the Commissioner's Regulations with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program, as granted by the United States Department of Education (USED) on January 8, 2009, in order to increase the percentage of schools designated for Improvement that are able to make adequate yearly progress for two consecutive years and be returned to Good Standing. The State and local educational agencies, including school districts, BOCES and charter schools, are required to comply with NCLB as a condition to their receipt of federal funding under Title I of the Elementary and Secondary Education Act of 1965 (ESEA), as amended.

On January 8, 2009, former Education Secretary Spellings informed Commissioner Mills of New York's approval to participate in the United States Department of Education's (USED) Differentiated Accountability Pilot Program as a part of its system of interventions under section 1116 of the ESEA. The purpose of the proposed amendment is to conform the Commissioner's Regulations with the approved plan and to support the implementation of Differentiated Accountability. The proposed amendment will:

(1) reduce the current number of school accountability categories by eliminating dual Title I and non-Title I streams of improvement, integrating federal and State accountability systems and collapsing identifications for improvement into three simplified phases, each of which provides schools with diagnostic tools, planning strategies, and supports and interventions specific to that phase in the improvement process and the school's category of need;

(2) allow for differentiation in the improvement process, permitting schools and districts to prepare and implement school improvement plans that best match a school's designation;

(3) better align the SURR and NCLB processes and ensure that schools with systemic and persistent failure fundamentally restructure or close;

(4) maximize SED's limited resources and utilize the resources of USNY while implementing School Quality Review Teams, Joint Intervention Teams, and Distinguished Educators to schools in improvement;

(5) strengthen the capacity of districts to assist schools to improve; and

(6) empower parents by increasing combined participation in Public School Choice (PSC) and Supplemental Educational Services (SES) by offering SES in the first year of a school's identification for improvement and school choice only after an identified school has failed to make AYP.

Emergency adoption of these regulations is necessary for the preservation of the general welfare in order to implement the NCLB Differentiated Accountability Pilot Program in the 2009 -2010 school year, by ensuring that school accountability decisions based on 2008-2009 school year assessment data are shared with the field in a timely manner in accordance with the Differentiated Accountability program; that affected school districts and schools are provided with the necessary information to appropriately carry out their responsibilities under the NCLB, and that the Differentiated Accountability system of supports and interventions are timely provided.

It is anticipated that the proposed amendment will be presented to the Board of Regents for permanent adoption at the September 14-15 meeting, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by the State Administrative Procedure Act.

Subject: No Child Left Behind Act of 2001 (NCLB) - school accountability.

Purpose: To implement the NCLB Differentiated Accountability Pilot Program.

Substance of emergency rule: The State Education Department has amended subdivision (p) of section 100.2 of the Regulations of the Commissioner of Education, subdivisions (g)-(i) of section 120.2; subdivisions (a) and (g) of section 120.3; and subdivisions (b) and (f) of section 120.4 of the Regulations of the Commissioner of Education, as an emergency action, effective July 1, 2009, to conform the Commissioner's Regulations with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program as granted by the United States Department of Education, particularly in terms of revising school accountability to increase the percentage of schools designated for Improvement that are able to make adequate yearly progress (AYP) for two consecutive years and be returned to Good Standing.

The substantive amendments to the regulations are as follows:

Section 100.2(p)(2)(ii)(a) is amended to replace the term ''identified'' with ''designated'' and to replace the phrase ''school requiring academic progress'' with ''school in Improvement, Corrective Action or Restructuring.''

Section 100.2(p)(5)(vii) is amended to replace the term ''identified'' with ''designated'' and to replace the phrase '' a school requiring academic progress'' with ''a school in Improvement (year 1).''

The current paragraph 100.2(p)(6), School Requiring Academic Progress, is repealed and a new paragraph 100.2(p)(6), Differentiated Accountability for Schools, is added, beginning with the 2009-2010 school year. More specifically, the new paragraph 100.2(p)(6) will:

(1) integrate federal and State accountability systems;

(2) reduce the current number of school accountability categories by eliminating dual Title I and non-Title I streams of improvement;

(3) collapse identifications for improvement into three simplified accountability phases; Improvement, Corrective Action and Restructuring, based upon the number of years that a school failed to make adequate yearly progress on an accountability performance criterion and/or accountability indicator;

(4) further differentiate each phase into three categories of intervention: Basic, Focused and Comprehensive, based upon the number of accountability groups that failed to make adequate yearly progress in an accountability performance criterion and/or accountability indicator for which a school has been identified;

(5) determine a school's accountability designation for the 2009-2010 school year based upon the school's accountability status for the 2008-2009 school year and the school's AYP for the 2007-2008 and 2008-2009 school years;

(6) provide schools with diagnostic tools, planning strategies, and supports and interventions specific to that phase in the improvement process and the school's category of need;

(7) allow for differentiation in the accountability process, permitting schools and districts to prepare and implement two-year school improvement/corrective action/restructuring plans that best match a school's designation;

(8) better align the School Under Registration Review (SURR) and NCLB processes and ensure that schools with systemic and persistent failure fundamentally restructure or close;

(9) maximize SED's limited resources and utilize the resources of the University of the State of New York (USNY) to assign School Quality Review Teams, Joint Intervention Teams, and Distinguished Educators to schools in improvement; strengthen the capacity of districts to assist schools to improve; and

(10) empower parents by increasing combined participation in Public School Choice (PSC) and Supplemental Educational Services (SES) by providing for SES in the first year of a school's identification for improvement and PSC only after an identified school has failed to make AYP.

Section 100.2p(9) is amended to reference subparagraph 100.2(p)(5)(vi) rather than 100.2(p)(5)(vii) due to general reorganization of the section.

Section 100.2p(10) is amended to set forth the action that is to be taken when a school has been designated as Improvement, Corrective Action, or Restructuring and has been placed on registration review. More specifically, under the amended regulations, a school designated as Improvement (year 1) or Corrective Action (year 1) shall modify its plan to meet the requirements of a restructuring plan for implementation no later than the beginning of the next school year following the year identified for registration review. The amended regulations also provide that a school designated as Restructuring (advanced) may be warned of revocation of registration unless an acceptable plan for closure or phase out has been submitted. In addition, a school identified for registration review may be identified for phase out or closure if after two full academic years of implementing a restructuring plan progress has not been demonstrated.

Section 100.2p(11) is amended to eliminate the provision allowing a board of education to replace a school under registration review with a redesigned school, and to provide for the phase out or closure of such.

Conforming amendments are also made to section 120.2(g), (h) and (i), section 120.3 (a) and (g) and section 120.4(b) and (f), for purposes of ensuring consistency with the above amendments to section 100.2(p).

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-26-09-00004-P, Issue of July 1, 2009. The emergency rule will expire September 27, 2009.

Text of rule and any required statements and analyses may be obtained from: Chris Moore, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Ave, Albany, NY 12234, (518) 486-1713, email: p16education@mail.nysed.gov

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

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

Education Law section 210 authorizes the 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 the professions in the State.

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

Education Law section 305(1) and (2) provide the Commissioner, as chief executive officer of the State's education system, with general supervision over all schools and institutions subject to the Education Law, or any statute relating to education, and responsibility for executing all educational policies of the Regents. Section 305(20) provides the Commissioner shall have such further powers and duties as charged by the Regents.

Education Law section 309 charges the Commissioner with the general supervision of boards of education and their management and conduct of all departments of instruction.

Education Law section 3713(1) and (2) authorize the State and school districts to accept federal law making appropriations for educational purposes and authorize the Commissioner to cooperate with federal agencies to implement such law.

LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the above authority and is necessary to establish criteria and procedures ensuring State and local educational agency (LEA) compliance with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program, as granted by the U.S. Department of Education (USDE).

NEEDS AND BENEFITS:

Section 100.2(p) is amended to establish criteria and procedures ensuring State and LEA compliance with the NCLB school accountability provisions. The State and LEAs are required to comply with the NCLB as a condition to their receipt of federal funds under Title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA).

The Differentiated Accountability Pilot Program requires the State to implement a new method of categorizing schools identified for improvement; to use differentiated diagnostic tools to assist schools and districts to develop and implement appropriate plans to address the needs of students; to vary the intensity and interventions to match the academic reasons that led to a school's identification; to compress the length of time a school is supported through improvement; to merge elements of the State and NCLB accountability systems; and to reverse the order of Supplemental Educational Services and Public School Choice.

On January 8, 2009, former USDE Secretary Margaret Spellings approved New York's request to participate in the Differentiated Accountability Pilot Program. The proposed rule will conform the Commissioner's Regulations with the approved Pilot Program to:

(1) integrate federal and State accountability systems;

(2) reduce the current number of school accountability categories by eliminating dual Title I and non-Title I streams of improvement;

(3) collapse identifications for improvement into three simplified phases: Improvement, Corrective Action and Restructuring, based upon the number of years that a school failed to make adequate yearly progress (AYP) on an accountability performance criterion and/or accountability indicator for which it has been identified;

(4) further differentiate each phase into three categories of intervention: Basic, Focused and Comprehensive, based upon the number of accountability groups that failed to make AYP;

(5) determine a school's accountability designation for the 2009-2010 school year on the school's accountability status for the 2008-2009 school year and the school's AYP status for the 2007-2008 and 2008-2009 school years;

(6) provide schools with diagnostic tools, planning strategies, and supports and interventions specific to that phase in the improvement process and the school's category of need;

(7) allow for differentiation in the accountability process, permitting schools and districts to prepare and implement school improvement plans that best match a school's designation;

(8) better align the SURR and NCLB processes and ensure that schools with systemic and persistent failure fundamentally restructure or close;

(9) maximize SED's limited resources and utilize the resources of USNY to assign School Quality Review Teams, Joint Intervention Teams, and Distinguished Educators to schools in improvement; strengthen the capacity of districts to assist schools to improve; and

(10) empower parents by increasing combined participation in Public School Choice (PSC) and Supplemental Educational Services (SES) by offering SES in the first year of a school's identification for improvement and PSC only after an identified school has failed to make AYP.

COSTS:

Cost to the State: None.

Costs to local government: The rule is necessary to conform the Commissioner's Regulations with the State's approval to participate in the NCLB Differentiated Accountability Pilot Program, as granted by the United States Department of Education. The State and LEAs, including school districts and charter schools, are required to comply with the NCLB as a condition for their receipt of federal funding under Title I of the ESEA.

The proposed amendment may impose costs on LEAs with schools that are in Improvement, Corrective Action, or Restructuring status. These costs would consist of the reasonable and necessary costs associated with the activities required under Differentiated Accountability of SQR teams and curriculum auditors, Joint Intervention Teams and Distinguished Educators. However, the State Education Department anticipates mitigating these costs to schools districts by using State Education Department staff or staff contracted by the Department to serve on SQR and Joint Intervention Teams or as Distinguished Educators. In addition, we anticipate that LEAs that receive Contract for Excellence funding will be able to consider the costs of SQR, curriculum auditors, Joint Intervention Teams and Distinguished Educators to be an allowable program and activity. No additional costs have been identified with respect to the implementation of

improvement plans, given the similarities in current requirements and an inability to determine differences aside from those in respect to depth of focus.

Because of the number of schools involved, and the fact that the services and activities required to be provided will vary greatly from school to school, depending on the academic circumstances and needs presented in each school, a complete cost statement cannot be provided. In the event that persons serving as members of an SQR or Joint Intervention team or as a Distinguished Educator are not State Education Department staff or staff contracted for by the State Education Department, the estimated reasonable and necessary annual expenses will range from approximately $900 to $40,000 per school. These estimates are based on the number of anticipated hours that a school district will be required to engage the services of a consultant multiplied by the consulting fees that shall be paid in accordance with Commissioner's Regulations 100.16 (c)(1). More specifically: For a school designated as Improvement/Basic, it is anticipated that two days (16 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of $57/hour, resulting in costs totaling $912. For a school designated as Corrective Action, it is anticipated that thirteen days (104 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of $72/hour, resulting in costs totaling $7,488. For a school designated as Restructuring/Advanced, it is anticipated that thirty days (240 hours) will be required to engage the services of a consultant multiplied by consulting fees in the amount of $102, as well as 20 days (160 hours) will be required to engage the services of a Distinguished Educator, multiplied by consulting fees in the amount of $112/hour, resulting in costs totaling $42,400. These estimates presume, to the extent appropriate, that the Commissioner appoints qualified employees of the district of location to serve as consultants, that there will be no replacement costs incurred by the district for these employees, and that, in general, the consultants will incur no overnight and minimal travel expenses.

Cost to private regulated parties: None.

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

LOCAL GOVERNMENT MANDATES:

The proposed rule is necessary to conform the Commissioner's Regulations to the Differentiated Accountability Pilot Program. LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to receipt of federal funding under Title I of the ESEA, as amended. The rule will not impose any additional program, service, duty or responsibility beyond those imposed by State and federal statutes.

PAPERWORK:

A public school or charter school subject to the provisions of 100.2(p)(6) that has been newly designated as Improvement shall participate in a school quality review. All Improvement schools shall develop an improvement plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Corrective Action shall participate in a curriculum audit. All Corrective Action schools shall develop a corrective action plan no later than three months following designation; implement the plan no later than the beginning of the next school year following designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Restructuring shall participate in an assessment of the educational program. All Restructuring schools shall develop a restructuring plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school in receipt of Title I funds that has been designated as a school in the Improvement, Corrective Action, or Restructuring phase shall arrange for the provision of supplemental education services (SES) and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to SES.

A school in receipt of Title I funds that has been designated as a school in the Improvement (year 2), Corrective Action, or Restructuring phase shall provide public school choice to eligible students and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to public school choice.

DUPLICATION:

The rule does not duplicate, overlap or conflict with State and federal requirements, and is necessary to conform the Commissioner's Regulations to the Differentiated Accountability Pilot Program.

ALTERNATIVES:

There were no significant alternatives and none were considered. The rule is necessary to conform the Commissioner's Regulations to the Differentiated Accountability Pilot Program.

FEDERAL STANDARDS:

The rule does not exceed any minimum standards of the federal government for the same or similar subject areas, and is necessary to conform the Commissioner's Regulations to the Differentiated Accountability Pilot Program.

COMPLIANCE SCHEDULE:

The rule is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program. The State and LEAs are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA.

It is anticipated that regulated parties may achieve compliance with the rule by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The rule is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program as granted by the United States Department of Education, particularly in terms of revising school accountability to increase the percentage of schools designated for Improvement that are able to make adequate yearly progress for two consecutive years and be returned to Good Standing. The proposed rule applies to school districts, boards of cooperative educational services (BOCES) and charter schools. Local educational agencies, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the Elementary and Secondary Education Act of 1965, as amended.

The proposed rule 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 rule that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local government:

EFFECT OF RULE:

The proposed rule generally applies to school districts, boards of cooperative educational services and charter schools that receive funding as local educational agencies (LEAs) pursuant to the federal Elementary and Secondary Education Act of 1965 (ESEA), as amended.

COMPLIANCE REQUIREMENTS:

The proposed rule is necessary to establish criteria and procedures, relating to school accountability, to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program, as granted by the United States Department of Education. LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to receipt of federal funding under Title I of the ESEA, as amended.

A public school or charter school subject to the provisions of 100.2(p)(6), beginning with the 2009-2010 school year, shall implement the requirements set forth [by] in the Differentiated Accountability Pilot Program.

A public school or charter school subject to the provisions of 100.2(p)(6) that has been newly designated as Improvement shall participate in a school quality review. All Improvement schools shall develop an improvement plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Corrective Action shall participate in a curriculum audit. All Corrective Action schools shall develop a corrective action plan no later than three months following designation; implement the plan no later than the beginning of the next school year following designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Restructuring shall participate in an assessment of the educational program. All Restructuring schools shall develop a restructuring plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school in receipt of Title I funds that has been designated as a school

in the Improvement, Corrective Action, or Restructuring phase shall arrange for the provision of supplemental education services (SES) and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to SES.

A school in receipt of Title I funds that has been designated as a school in the Improvement (year 2), Corrective Action, or Restructuring phase shall provide public school choice to eligible students and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to public school choice.

PROFESSIONAL SERVICES:

The proposed rule does not impose any additional professional services requirements on school districts, BOCES or charter schools.

COMPLIANCE COSTS:

The rule is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program, as granted by the United States Department of Education, relating to school accountability. The State and LEAs, including school districts and charter schools, are required to comply with the NCLB as a condition for their receipt of federal funding under Title I of the ESEA, as amended.

The rule may impose costs on LEAs with schools that are in Improvement, Corrective Action, or Restructuring status. These costs would consist of the reasonable and necessary costs associated with the activities required under Differentiated Accountability of SQR teams and curriculum auditors, Joint Intervention Teams and Distinguished Educators. However, the State Education Department anticipates mitigating these costs to schools districts by using State Education Department staff or staff contracted by the Department to serve on SQR and Joint Intervention Teams or as Distinguished Educators. In addition, we anticipate that LEAs that receive Contract for Excellence funding will be able to consider the costs of SQR, curriculum auditors, Joint Intervention Teams and Distinguished Educators to be an allowable program and activity. No additional costs have been identified with respect to the implementation of improvement plans, given the similarities in current requirements and an inability to determine differences aside from those in respect to depth of focus.

Because of the number of schools involved, and the fact that the services and activities required to be provided will vary greatly from school to school, depending on the academic circumstances and needs presented in each school, a complete cost statement cannot be provided. In the event that persons serving as members of an SQR or Joint Intervention team or as a Distinguished Educator are not State Education Department staff or staff contracted for by the State Education Department, the estimated reasonable and necessary annual expenses will range from approximately $900 to $40,000 per school. These estimates are based on the number of anticipated hours that a school district will be required to engage the services of a consultant multiplied by the consulting fees that shall be paid in accordance with Commissioner's Regulations 100.16 (c)(1). More specifically: For a school designated as Improvement/Basic, it is anticipated that two days (16 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of $57/hour, resulting in costs totaling $912. For a school designated as Corrective Action, it is anticipated that thirteen days (104 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of $72/hour, resulting in costs totaling $7,488. For a school designated as Restructuring/Advanced, it is anticipated that thirty days (240 hours) will be required to engage the services of a consultant multiplied by consulting fees in the amount of $102, as well as 20 days (160 hours) will be required to engage the services of a Distinguished Educator, multiplied by consulting fees in the amount of $112/hour, resulting in costs totaling $42,400. These estimates presume, to the extent appropriate, that the Commissioner appoints qualified employees of the district of location to serve as consultants, that there will be no replacement costs incurred by the district for these employees, and that, in general, the consultants will incur no overnight and minimal travel expenses.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule does not impose any new technological requirements on school districts, BOCES and charter schools. Economic feasibility is addressed under the Compliance Costs section above.

MINIMIZING ADVERSE IMPACT:

The proposed rule is in response to recent guidance provided by the U.S. Department of Education and is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program as granted by the United States Department of Education, relating to school accountability. LEAs, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed rule has been carefully drafted to meet specific federal and State requirements.

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. In addition, copies of the proposed rule will be provided to each charter school to give them an opportunity to participate in this proposed rule making. Copies of the proposed rule were also provided to the State Committee of Practitioners (COP), which consists of teachers, parents, district and building-level administrators, members of local school boards, and pupil personnel services staff, who are representative of all constituencies from various geographical locations across the State. The COP includes teachers and paraprofessionals from around the State representing a variety of grade levels and subject areas, directors of teacher-preparation institutions, officials and educators representing the New York City Board of Education, several other urban and rural school systems, nonpublic schools, parent advocacy groups, teacher union representatives and community-based organizations.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed rule applies to school districts, boards of cooperative educational services (BOCES) and charter schools that receive funding as local educational agencies (LEAs) pursuant to the federal Elementary and Secondary Education Act of 1965 (ESEA), as amended, 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.

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

The proposed rule is necessary to establish criteria and procedures, relating to school accountability, to conform the Commissioner's Regulations with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program as granted by the United States Department of Education, particularly in terms of revising school accountability to increase the percentage of schools designated for Improvement that are able to make adequate yearly progress for two consecutive years and be returned to Good Standing. LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to receipt of federal funding under Title I of the ESEA, as amended.

A public school or charter school subject to the provisions of 100.2(p)(6), beginning with the 2009-2010 school year, shall implement the requirements set forth in the Differentiated Accountability Pilot Program.

A public school or charter school subject to the provisions of 100.2(p)(6) that has been newly designated as Improvement shall participate in a school quality review. All Improvement schools shall develop an improvement plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Corrective Action shall participate in a curriculum audit. All Corrective Action schools shall develop a corrective action plan no later than three months following designation; implement the plan no later than the beginning of the next school year following designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Restructuring shall participate in an assessment of the educational program. All Restructuring schools shall develop a restructuring plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school in receipt of Title I funds that has been designated as a school in the Improvement, Corrective Action, or Restructuring phase shall arrange for the provision of supplemental education services (SES) and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to SES.

A school in receipt of Title I funds that has been designated as a school in the Improvement (year 2), Corrective Action, or Restructuring phase shall provide public school choice to eligible students and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to public school choice.

The proposed rule does not impose any additional professional services requirements on school districts, BOCES or charter schools.

COSTS:

The rule is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program, as granted by the United States Department of

Education, relating to school accountability. The State and LEAs, including school districts and charter schools, are required to comply with the NCLB as a condition for their receipt of federal funding under Title I of the ESEA, as amended.

The rule may impose costs on LEAs with schools that are in Improvement, Corrective Action, or Restructuring status. These costs would consist of the reasonable and necessary costs associated with the activities required under Differentiated Accountability of SQR teams and curriculum auditors, Joint Intervention Teams and Distinguished Educators. However, the State Education Department anticipates mitigating these costs to schools districts by using State Education Department staff or staff contracted by the Department to serve on SQR and Joint Intervention Teams or as Distinguished Educators. In addition, we anticipate that LEAs that receive Contract for Excellence funding will be able to consider the costs of SQR, curriculum auditors, Joint Intervention Teams and Distinguished Educators to be an allowable program and activity. No additional costs have been identified with respect to the implementation of improvement plans, given the similarities in current requirements and an inability to determine differences aside from those in respect to depth of focus.

Because of the number of schools involved, and the fact that the services and activities required to be provided will vary greatly from school to school, depending on the academic circumstances and needs presented in each school, a complete cost statement cannot be provided. In the event that persons serving as members of an SQR or Joint Intervention team or as a Distinguished Educator are not State Education Department staff or staff contracted for by the State Education Department, the estimated reasonable and necessary annual expenses will range from approximately $900 to $40,000 per school. These estimates are based on the number of anticipated hours that a school district will be required to engage the services of a consultant multiplied by the consulting fees that shall be paid in accordance with Commissioner's Regulations 100.16 (c)(1). More specifically: For a school designated as Improvement/Basic, it is anticipated that two days (16 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of $57/hour, resulting in costs totaling $912. For a school designated as Corrective Action, it is anticipated that thirteen days (104 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of $72/hour, resulting in costs totaling $7,488. For a school designated as Restructuring/Advanced, it is anticipated that thirty days (240 hours) will be required to engage the services of a consultant multiplied by consulting fees in the amount of $102, as well as 20 days (160 hours) will be required to engage the services of a Distinguished Educator, multiplied by consulting fees in the amount of $112/hour, resulting in costs totaling $42,400. These estimates presume, to the extent appropriate, that the Commissioner appoints qualified employees of the district of location to serve as consultants, that there will be no replacement costs incurred by the district for these employees, and that, in general, the consultants will incur no overnight and minimal travel expenses.

MINIMIZING ADVERSE IMPACT:

The proposed rule is in response to recent approval granted by the U.S. Department of Education and is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program, relating to school accountability. LEAs, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed rule has been carefully drafted to meet specific federal and State requirements. Because these requirements are uniformly applicable State-wide to school districts, BOCES and charter schools, it was not possible to prescribe lesser requirements for rural areas or to exempt them from such requirements.

RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from the Department's Rural Advisory Committee, whose membership includes schools located in rural areas. In addition, copies of the proposed rule will be provided to each charter school. Copies of the proposed rule were also provided to the State Committee of Practitioners (COP), which consists of teachers, parents, district and building-level administrators, members of local school boards, and pupil personnel services staff, who are representative of all constituencies from various geographical locations across the State. The COP includes teachers and paraprofessionals from around the State representing a variety of grade levels and subject areas, directors of teacher-preparation institutions, officials and educators representing the New York City Board of Education, several other urban and rural school systems, nonpublic schools, parent advocacy groups, teacher union representatives and community-based organizations.

Job Impact Statement

The proposed rule is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program as granted by the United States Department of Education. The proposed amendment applies to school districts, boards of cooperative educational services (BOCES) and charter schools, and implements the NCLB Differentiated Accountability Pilot Program in order to increase the percentage of schools designated for Improvement that are able to make adequate yearly progress for two consecutive years and be returned to Good Standing. Local educational agencies, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the Elementary and Secondary Education Act of 1965, as amended.

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

NOTICE OF ADOPTION

Physical Education Instruction, Coaching Qualifications, and Extension of Eligibility for Interscholastic Athletics

I.D. No. EDU-09-09-00006-A

Filing No. 724

Filing Date: 2009-06-29

Effective Date: 2009-07-16

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

Action taken: Amendment of section 135.4 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 305(1) and (2), 803(5) and 3204(2)

Subject: Physical education instruction, coaching qualifications, and extension of eligibility for interscholastic athletics.

Purpose: To revise physical education instruction requirements for elementary programs and establish qualifications and appropriate training of coaches.

Text or summary was published in the March 4, 2009 issue of the Register, I.D. No. EDU-09-09-00006-P.

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

Revised rule making(s) were previously published in the State Register on May 13, 2009.

Text of rule and any required statements and analyses may be obtained from: Chris Moore, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Ave., Albany, NY 12234, (518) 486-1713, email: legal@mail.nysed.gov

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Special Education Programs and Services for Students with Disabilities

I.D. No. EDU-14-09-00005-A

Filing No. 726

Filing Date: 2009-06-29

Effective Date: 2009-07-16

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

Action taken: Amendment of sections 200.1, 200.2, 200.4, 200.5, 200.6, 200.9 and 200.15 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207 (not subdivided), 3208(1), (5), 3602(i)(2), 3713(1) and (2), 4002(1), (3), 4308(3) and 4355(3), 4401(2), (9), 4402(1), (7) and 4410(13); and L. 2008, ch. 323

Subject: Special education programs and services for students with disabilities.

Purpose: To conform Commissioner's Regulations to changes in the federal IDEA regulations and to ch. 323, L. 2008.

Substance of final rule: The Commissioner of Education has amended sections 200.1, 200.2, 200.4, 200.5, 200.6, 200.9 and 200.15 of the Commissioner's Regulations, effective July 16, 2009, relating to the provision

of special education to students with disabilities. The following is a summary of the substance of the amendments.

Section 200.1, as amended, makes a technical amendment to the definition of travel training; and adds the definition of declassification support services consistent with the definition that was inadvertently deleted from section 100.2(u) of the Commissioner's Regulations.

Section 200.2, as amended, makes a technical amendment relating to board of education written policies.

Section 200.4, as amended, makes a technical amendment and corrects cross citations relating to declassification support services and requests to the committee on special education (CSE) pursuant to section 4005 of the Education Law; and conforms State regulations to federal requirements relating to participation in regular class.

Section 200.5, as amended, makes a technical amendment relating to State complaint procedures; adds certain cross citations; conforms State regulations to federal requirements relating to parent consent, including revocation of parent consent for special education and related services, and meeting notice; and repeals language in the prior notice requirements relating to the provision of a free appropriate public education after graduation with the receipt of a local high school or Regents diploma to be consistent with Education Law.

Section 200.6, as amended, corrects a cross citation relating to staffing requirements.

Section 200.9, as amended, makes a technical amendment relating to financial reporting requirements for approved programs.

Section 200.15, as amended, makes a technical amendment relating to personnel qualifications and conforms State regulations to Chapter 323 of the New York State Laws of 2008 relating to procedures for prevention of abuse, maltreatment or neglect of students in residential placements.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 200.4(d)(2).

Text of rule and any required statements and analyses may be obtained from: Chris Moore, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Avenue, Albany, NY 12234, (518) 486-1713, email: legal@mail.nysed.gov

Revised Regulatory Impact Statement

Since publication of the Notice of Proposed Rule Making in the State Register on April 8, 2009, the following nonsubstantial revisions were made to the proposed rule:

In subparagraph (viii) of paragraph (2) of subdivision (d) of section 200.4 of the Commissioner's Regulations, underlining, which was inadvertently omitted, was added under the term ''students'' to denote this as new language, as follows:

''(viii) Participation in regular class. The IEP shall provide:

(a) an explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular class and in the activities described in subparagraph (v) of this paragraph; or. . .''

The clauses in subparagraph (vi) of paragraph (2) of subdivision (l) of section 200.5, incorrectly numbered as (1) and (2), have been lettered as clauses (a) and (b), thus providing for the correct designation of clauses pursuant to the Department of State's rulemaking practice and procedures (19 NYCRR § 261.4).

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 the Notice of Proposed Rule Making in the State Register on April 8, 2009, nonsubstantial revisions were made to the proposed rule as described in the Statement Concerning the Regulatory Impact Statement.

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 the Notice of Proposed Rule Making in the State Register on April 8, 2009, nonsubstantial revisions were made to the proposed rule as described in the Statement Concerning the Regulatory Impact Statement.

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 the Notice of Proposed Rule Making in the State Register on April 8, 2009, nonsubstantial revisions were made to the proposed rule as described in the Statement Concerning the Regulatory Impact Statement.

The proposed rule, as revised, is necessary in order to ensure compliance with federal regulations and State law relating to the education of students with disabilities, ages 3-21; and to make certain technical amendments, including correction of cross citations. The proposed revised rule will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the rule that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on April 8, 2009 the State Education Department received the following comments on the proposed amendments.

Section 200.1(ooo) - Declassification Support Services

1. COMMENT:

Adding the definition of declassification support services will help schools and students to know what these mean and how to access them.

DEPARTMENT RESPONSE:

Comment is supportive in nature and no response is necessary.

2. COMMENT:

Clarify what is meant by ''other appropriate support services'' in the definition of declassification support services and if this means resource room or consultant teacher services. Provide guidance or add language to the regulations to clarify what declassification support services are.

DEPARTMENT RESPONSE:

The term ''other appropriate support services'' is the same term as previously found in [the] section 100.1(q) of the Regulations of the Commissioner of Education definition of declassification support services. Such term includes general education support services provided by the district to aid a student in moving from special education to full-time general education, such as remedial instruction, positive behavioral supports, supplementary supports and services, accommodations, program or instructional modifications and student support team services. Consultant teacher services are special education services and would therefore not be an appropriate declassification support service. However, if the district provides nondisabled students with resource room programs, it may offer this as a declassification support service.

Section 200.5(b) - Consent

3. COMMENT:

Regulations should be revised to state that the district cannot use a due process procedure to override a parent's refusal to consent to a reevaluation of the student and that disputes between parents and districts around reevaluations should be resolved through other processes than due process hearings.

DEPARTMENT RESPONSE:

It would be inconsistent with federal law and regulation to make the revision proposed by the commenter. The proposed amendment to section 200.5(b)(3) of the Regulations of the Commissioner of Education is necessary to clarify, consistent with section 300.300(c)(1) of the Code of Federal Regulations, that if a parent refuses to consent to a reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the procedural safeguards in section 200.5(h) through (k) of the Regulations (i.e., mediation or impartial due process hearing). The proposed amendment also repeals language which provides that a district may, but is not required to, continue to pursue a reevaluation by using due process procedures if a parent has failed to respond to a request for consent for a reevaluation, as section 200.5(b)(1)(i)(b) of the Regulations of the Commissioner of Education, consistent with federal requirements, provides that parental consent need not be obtained for a reevaluation if the district can demonstrate that it has made reasonable efforts to obtain consent and the student's parent failed to respond.

4. COMMENT:

The regulations should clarify how long the district would not be in violation of providing a free appropriate public education (FAPE) to a student when a parent revokes consent (e.g., until the end of the term of the individualized education program (IEP)).

DEPARTMENT RESPONSE:

When a parent revokes consent for special education services, it releases the school district from liability for providing FAPE from the time the parent revokes consent for special education and related services until the time, if any, that the child is evaluated and deemed eligible, once again, for special education and related services.

5. COMMENT:

Regulations should clarify if a district is required to annually request consent to evaluate a student whose parent has revoked consent in order to meet its obligation of child find.

DEPARTMENT RESPONSE:

Children who have previously received special education and related services and whose parents subsequently revoke consent should not be treated any differently in the child find process than any other child. Students whose parents revoke consent should be identified, located and offered an evaluation in the same manner as any other child if the child is suspected of having a disability and being in need of special education and related services. A district must obtain informed written parental consent before conducting an initial evaluation. A parent who previously revoked consent for the continued provision of special education and related ser-

vices, like any parent of a child suspected of having a disability, may refuse to provide consent for an initial evaluation.

6. COMMENT:

The proposed regulation may result in school districts discontinuing special education services until cases go to impartial hearing when there is a dispute over particular services such as a change in a special education service or class size ratio.

DEPARTMENT RESPONSE:

If a parent and the Committee on Special Education (CSE) disagree about whether a child would be provided FAPE if the child did not receive a particular special education or related service, the parent may request a due process hearing to obtain a ruling that the service with which the parent disagrees is or is not appropriate for their child. Once a due process complaint is sent to the district, during the resolution process time period, and while waiting for the decision of any impartial due process hearing, the student must remain in his or her current educational placement. Unless the parent submits a written notice to the school district that he/she is revoking consent for the provision of all special education services to the child, the district may not cease providing special education services to the child.

Section 200.15 - Procedures for prevention of abuse, maltreatment or neglect of students in residential placements

7. COMMENT:

The proposed procedures for prevention of abuse, maltreatment or neglect of students in residential placements should be extended to non-residential public schools to ensure these children have the same protections and are afforded the same notification, training and right to legal protections as residential students.

DEPARTMENT RESPONSE:

The proposed amendment conforms section 200.15 of the Regulations of the Commissioner of Education relating to procedures for prevention of abuse, maltreatment or neglect of students in residential placements to Chapter 323 of the NYS Laws of 2008, which amended NYS Social Services Law and Mental Hygiene Law relating to the requirements for the protection of children in residential facilities from abuse and neglect. [Article 23-B of Education Law and section 100.2(hh) of the Regulations of the Commissioner of Education establishes] Procedures for reporting allegations of child abuse in a public school educational setting are set forth in Article 23-B of Education Law and section 100.2(hh) of the Regulations of the Commissioner of Education.

Other

8. COMMENT:

CSEs will be unable to meet the regulation that requires a school district to invite in advance a representative of an appropriate day placement or a residential placement as the determination for placement is made at the CSE meeting after a review of all evaluations.

DEPARTMENT RESPONSE:

The comment is beyond the scope of the proposed regulations. If the CSE recommends placement in a school operated by an agency or school other than the school district in which the student would normally attend if the student did not have a disability or if the education of a student residing in a facility operated or supervised by a State agency is the responsibility of the school district, the school district must ensure that a representative of that agency or school attends the CSE meeting. In the instance when a private school placement is recommended but the specific school has not yet been identified, the CSE may need to conduct another CSE meeting once the specific private school is identified if determined necessary by the parent, CSE or agency in order to develop the IEP to be implemented in that agency.

NOTICE OF ADOPTION

Requirements for and Processing of Teaching Certificates

I.D. No. EDU-14-09-00006-A

Filing No. 723

Filing Date: 2009-06-29

Effective Date: 2009-07-15

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

Action taken: Amendment of sections 80-1.2, 80-1.6, 80-1.8 and 80-5.9 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 210, 212, 305, 3001, 3003, 3004, 3006, 3007, 3009 and 3604

Subject: Requirements for and processing of teaching certificates.

Purpose: Streamline certain aspects of certificate evaluation and processing, in light of the reduction in available resources.

Text or summary was published in the April 8, 2009 issue of the Register, I.D. No. EDU-14-09-00006-P.

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

Text of rule and any required statements and analyses may be obtained from: Christine Moore, New York State Education Department, 89 Washington Avenue, Room 148, Albany, NY 12234, (518) 473-4921, email: cmoore@mail.nysed.gov

Assessment of Public Comment

The proposed rule was published in the State Register on April 8, 2009. Below is a summary of written comments received by the State Education Department concerning the proposed rule making and the Department's assessment of these comments.

COMMENT: One commentor raised a question about how the proposed amendment which provides for a three year active status for applications was intended to interface with the Patriot Plan legislation (Chapter 106 of the Laws of 2003), stating that the Legislature, in passing that law, intended to mitigate the home front complications that can occur when New Yorkers are called or ordered to active duty. The provisions of the Patriot Plan automatically extend the terms of any license, certificate or registration held by active duty personnel. The commentor stated that the language of the proposed rule and supporting impact statements do not clarify how the Department would treat applicants who are mobilized during the time period when their application is pending, and asked that the Department review the proposals for consistency with the provisions and spirit of the Patriot Plan legislation to ensure that it does not inadvertently create new complications for those New Yorkers who are mobilized to serve their country.

RESPONSE: The Education Department understands the concerns of the commentor and anticipates addressing these concerns in a future rule making, in order to provide an extension to the three year timeframe for applications to remain in active status for individuals called to active military duty. Those individuals called to active military service, and, therefore, unable to complete their application within the three-year period, will be allowed additional time to meet the certification requirements in accordance with the Patriot Plan.

NOTICE OF ADOPTION

Supplementary Bilingual Education Extension for Certificates in Classroom Teaching Service and Pupil Personnel Services

I.D. No. EDU-14-09-00007-A

Filing No. 728

Filing Date: 2009-06-29

Effective Date: 2009-07-15

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

Action taken: Amendment of sections 80-2.9, 80-4.3 and 80-5.18 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 305(1), (2), (7), 3001(2), 3004(1) and 3006(1)(b)

Subject: Supplementary bilingual education extension for certificates in classroom teaching service and pupil personnel services.

Purpose: Establish a supplementary bilingual education extension, to provide bilingual instruction/service in demonstrated shortage area.

Text or summary was published in the April 8, 2009 issue of the Register, I.D. No. EDU-14-09-00007-P.

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

Text of rule and any required statements and analyses may be obtained from: Christine Moore, New York State Education Department, 89 Washington Avenue, Room 148, Albany, NY 12234, (518) 473-4921, email: cmoore@mail.nysed.gov

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Superintendents' Conference Days

I.D. No. EDU-14-09-00008-A

Filing No. 725

Filing Date: 2009-06-29

Effective Date: 2009-07-16

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

Action taken: Amendment of section 175.5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided) and 3604(8)

Subject: Superintendents' conference days.

Purpose: Extend for four years provision allowing use of up to two superintendents' conference days for teacher rating of State assessments.

Text or summary was published in the April 8, 2009 issue of the Register, I.D. No. EDU-14-09-00008-P.

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

Text of rule and any required statements and analyses may be obtained from: Chris Moore, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Ave., Albany, NY 12234, (518) 486-1713, email: legal@mail.nysed.gov

Assessment of Public Comment

The agency received no public comment.

Department of Environmental Conservation

NOTICE OF ADOPTION

To Implement the Requirements for the Use of Ultra Low Sulfur Diesel Fuel and Best Available Retrofit Technology

I.D. No. ENV-41-08-00016-A

Filing No. 752

Filing Date: 2009-06-30

Effective Date: 30 days after filing

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

Action taken: Amendment of Part 200 and addition of Part 248 to Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305, 19-0323, 71-2103 and 71-2105

Subject: To implement the requirements for the use of ultra low sulfur diesel fuel and best available retrofit technology.

Purpose: The primary purpose of the proposed new Part 248 is to address the public health threat posed by the combustion of diesel fuel.

Text or summary was published in the October 8, 2008 issue of the Register, I.D. No. ENV-41-08-00016-P.

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

Text of rule and any required statements and analyses may be obtained from: Joseph Iannotti, P.E., NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3255, (518) 402-8292, email: airregs@gw.dec.state.ny.us

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

Assessment of Public Comment

Comments received from October 8, 2008 through 5:00 P.M., December 4, 2008

The New York State Department of Environmental Conservation (Department) is proposing to establish 6 NYCRR Part 248, Use of Ultra Low Sulfur Diesel Fuel and Best Available Retrofit Technology for Heavy Duty Vehicles, which is designed to implement the requirements of the Diesel Emissions Reduction Act of 2006 (DERA). The purpose of DERA and Part 248 is to address the public health threat posed by the combustion of diesel fuel in certain heavy duty vehicles (HDVs).

The Department proposed Part 248 on October 8, 2008. Public hearings were held during the week of November 24, 2008 in Albany, Avon, and Long Island City, New York, and the public comment period closed at 5:00 P.M. on December 4, 2008. The Department received written and oral comments from 385 commentors on the proposed regulation. All of these comments have been reviewed, summarized, and responded to by the Department.

The purpose of this summary document is to identify and summarize major concerns from commentors and the Department's response as described below.

Commentors in support of the regulation included those associated with various environmental groups/associations and retrofit device substrate manufacturers. Some commentors strongly supported implementation of the regulation, and identified significant adverse impact to human health associated with exposure to diesel exhaust from older HDVs. Commentors identified specific health issues associated with diesel particulate matter, as well as suggesting public health costs associated with these health effects. Several commentors noted that retrofitting HDVs with after treatment devices per the regulatory requirements will reduce diesel exhaust particulate matter (PM) and its associated health threat from those vehicles. Further, some commentors noted that the retrofit devices already exist and that the implementation of the retrofit requirements is timely. The benefit from retrofitting vehicles as compared to the health expense to treat asthma attacks which may be attributed to diesel exhaust exposure were also discussed by several commentors. Other commentors suggested that the benefits of retrofits have not been clearly demonstrated, or that retrofits will not have a demonstrable effect on air quality. The Department expresses general agreement that air quality and public health benefit from reduced diesel emissions, and referred to the discussion of health impact in the Regulatory Impact Statement.

Commentors opposed to the regulation in general, or to specific regulatory requirements, included various contractors, contractor associations, public transit authorities and State agencies and authorities. Several commentors noted that there is a significant cost impact associated with retrofitting HDVs, and that the impact is particularly pronounced with small businesses or subcontractors with affected HDVs. The commentors indicate that some of those entities may elect to not bid on state contracts. It was commented that bid prices on state contract work may increase in order to cover the cost of retrofitting contractor/subcontractor HDVs. Also, some commentors noted that the regulatory definition of ''contractor'' was too broad and should not include subcontractors such as those with HDVs delivering materials to state contract sites, or that there should be specific contract dollar limits below which the regulation do not apply, or that the regulations should not apply to subcontractors at all. The Department responded by acknowledging that contractors may elect not to bid on state contract work due to the retrofit requirement but that those contractors who retrofit their HDVs may have an advantageous bidding position over those who have not retrofit their HDVs on future state contract work. The Department also indicated that contractors might be expected to increase bid costs in order to recover the cost of compliance of retrofitting. In response to comments concerning the inclusion of subcontractors, the Department believes that DERA requires all vehicles, including subcontractors' vehicles, operated ''on behalf of'' state agencies and authorities to comply with the regulatory requirements.

A number of comments were received indicating extensive cost and technical issues associated with retrofit of heavy duty diesel vehicles. These comments suggest high costs for some equipment, technical difficulty with fitting retrofit equipment onto vehicles, safety concerns associated with some retrofit devices, and concerns about the functionality of vehicles and equipment after retrofit. The Department responded to these comments by further discussing the process to determine that a retrofit is applicable to a specific application, and that the retrofit will not inhibit the functionality of a vehicle if that retrofit has been properly selected for the vehicle and its use, by a competent service provider. The Department also reminded commentors that the regulations specifically exempt a large portion of non-road equipment. Also, the regulation provides that only those retrofit devices which have undergone verification by the United States Environmental Protection Agency (US EPA) or California Air Resources Board (CARB) can be used, and that this verification process considers the technical demands and limitations associated with the specific use of the vehicle. The Department acknowledges that the cost to retrofit vehicles may be significant; these costs are identified in the Regula-

tory Impact Statement, but DERA does not provide for a consideration of the cost impacts of the regulation, except as it relates to the addition of NOx control in the retrofit technology assessment process.

Commentors indicated that the regulatory timeframe to install the retrofits and demonstrate compliance was unreasonable. These comments also suggested that the phase in period be extended, or that compliance for vehicles within five years of retirement be excluded from consideration. The Department responded that the compliance schedule is stated in DERA and therefore can not be revised in regulation. The Department also reiterated that the DERA was signed in to law in August 2006, thereby giving regulated entities adequate time to evaluate their fleets, and develop and implement a compliance strategy.

Several comments were received related to the relationship between contractors and subcontractors, and state agencies and contractors. These comments focused on the mechanism for an agency to use to require compliance by a contractor, as well as the mechanism for a contractor to require compliance by a subcontractor. Similar concerns were identified for reporting. Comments were also received questioning the enforcement mechanism, particularly among contractors and subcontractors, and the Department's authority to enforce against contractors and subcontractors. The Department responded by indicating its expectation that state agencies will require contractor compliance through language in the contracts, and in bidding documents. The Department expects that similar provisions will be included in agreements between contractors and their subcontractors. The Department reaffirmed its authority to enforce the regulations against any and all entities subject to the regulatory requirements.

Several commentors requested clarification on various aspects of the regulation including specific HDVs affected by the regulation, applicability of the regulation, regulatory definitions, enforcement, and waiver provisions. Those commentors included mostly contractor affiliated entities or state agency/public authority entities. The Department responded to those requested clarifications which included specific references to the regulatory definitions of ''HDV'' (which exempts most off road construction vehicles) and ''contractor''. Also, the Department noted that enforcement of the regulation will be performed by the Department against any entities subject to the regulation. The Department also noted that compliance monitoring of contractors will be conducted by the contracting agency. The Department further responded that if the retrofit option is selected for affected HDVs, only those HDVs determined to have no applicable verified retrofit technologies are eligible for a waiver determination by the Department.

Some state agencies and authorities commented that state budget issues and state procurement requirements may limit their ability to comply with the regulatory requirements. Agencies commented that some small contractors may be reluctant to retrofit vehicles that are used under contract. Agencies also echoed or otherwise supported comments of contractors related to various technical issues identified, and concern over reporting requirements. The Department indicated in the response that the state agencies and authorities are obligated under DERA to accomplish retrofits, and to ensure compliance by their contractors. The Department expects that contract costs may increase as contractors seek to recover their investment in retrofit technology. DERA requires the Department to report annually on program success. The Department will seek and require reporting through the state agencies, since it is those agencies which have a contractual relationship with their contractors. Technical issues must be identified within the evaluation of applicable technology for each and every vehicle subject to the regulations.

Comments from all commentors and the Department's response to those comments can be found in the Department's ''Assessment of Public Comments'' document.

NOTICE OF ADOPTION

Portable Fuel Containers Which Are Used by New York State Residents to Transport Gasoline and Fill Fuel Tanks

I.D. No. ENV-43-08-00008-A
Filing No. 751
Filing Date: 2009-06-30
Effective Date: 30 days after filing

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

Action taken: Amendment of Parts 200 and 239 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 19-0101, 19-0105, 19-0301, 19-0303, 19-0305, 71-2103 and 71-2105

Subject: Portable fuel containers which are used by New York State residents to transport gasoline and fill fuel tanks.

Purpose: Make NYS regulations consistent with applicable federal regulations, minimize VOC emissions from gas cans.

Substance of final rule: The proposed revisions to Parts 239 and 200 are consistent with the Federal Rule, 40 CFR Part 59, which will be effective January 1, 2009.

The Department is proposing to revise Section 239-1.1, ''Applicability,'' to expand the applicability of Part 239 to advertising of portable fuel containers (PFCs).

Revisions are also proposed for Section 239-2.1, ''Definitions.'' The proposed rulemaking adds a definition for ''kerosene'' to Part 239 and expands the definition of ''portable fuel container'' to include a container which holds kerosene.

The Department is proposing to replace Subpart 239-3, ''Performance Standards for Portable Fuel Containers and Spill-Proof Spouts,'' to establish updated performance standards. The current language in Subpart 239-3 describes very specific design requirements and more complex testing for spouts and containers. The proposed new language defines the more broad standards described in 40 CFR Part 59 which result in lower volatile organic compound (VOC) emissions.

The Department is proposing to eliminate those portions of Subpart 239-4, ''Exemptions,'' and Subpart 239-5, ''Innovative Products,'' which allow exemptions based on California Air Resources Board (CARB). These proposed revisions are necessary in order to conform with the Federal Rule, 40 CFR Part 59, which will be effective January 1, 2009.

The Department is also proposing to revise Subpart 239-6, ''Administrative requirements,'' and Subpart 239-8, ''Test procedures,'' in order to conform with the Federal Rule, 40 CFR Part 59. The proposed revisions to Subpart 239-8 remove references to the CARB test methods.

Throughout the proposed rulemaking, revisions have been made to indicate that the regulations would take effect on September 1, 2009.

Section 200.9 of 6 NYCRR Part 200 contains a list of documents that have been referenced by the Department in regulations contained in 6 NYCRR Chapter III, Air Resources. The Department is proposing to amend this list to reflect references necessary to amending Part 239.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 239-3.1, 239-4.1(b)(2), (c) and 200.9.

Text of rule and any required statements and analyses may be obtained from: Ona Papageorgiou, NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3251, (518) 402-8396, email: airregs@gw.dec.state.ny.us

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

Revised Regulatory Impact Statement

STATUTORY AUTHORITY

The following sections of the Environmental Conservation Law (ECL), taken together, authorize the New York State Department of Environmental Conservation (Department) to establish and implement the Portable Fuel Container Spillage Control regulations: 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, and 19-0305.

LEGISLATIVE OBJECTIVES

The Legislative goal of these ECL provisions, as stated in 19-0103, is to maintain the purity of New York's air resources. The proposed revisions to Part 239 are intended to meet this goal.

The revisions to Part 239 are among a series of sustained actions undertaken by New York State, in conjunction with EPA and other States, to

control emissions of ozone precursors, including nitrogen oxides and volatile organic compounds (VOCs), so that New York State and States in the Ozone Transport Region (OTR) may attain the ozone national ambient air quality standards (NAAQS).

NEEDS AND BENEFITS

New York faces a significant public health challenge from ground-level ozone, which causes health effects ranging from respiratory disease to death. In response to this public health problem, New York has enacted a series of regulations designed to control ozone and its chemical precursors which include VOCs.

In 2002, the Department promulgated regulations designed to limit or reduce the amount of VOCs released into the atmosphere from portable fuel containers. 'See 6 NYCRR Part 239 (PFC regulation)'. Consistent with New York's obligations under the Act, New York submitted its PFC regulation to EPA as part of New York's State Implementation Plan (SIP). In turn, EPA approved the incorporation of Part 239 into New York's SIP.

The Department now proposes to revise Part 239 to implement consistent regulations limiting the amount of VOCs released into our atmosphere. Since the adoption of Part 239 in 2002, problems have been identified relating to spillage from the new, compliant, PFCs. The automatic shutoff feature was intended to help eliminate spillage while starting/stopping fuel flow, but it has been found to be incompatible with many types of target fuel tanks. Furthermore, customers have found them difficult to use, resulting in increased spillage. Current regulation requires testing for both evaporation and permeation. This requires more testing than necessary. In addition, PFCs have been manufactured with a large amount of variability in the quality of their parts. The revisions modify the existing spout requirements by eliminating the current automatic shutoff feature, fill height and flow rate standards. This allows the manufacturers more design flexibility to produce PFCs that are easier to use and compatible with target tanks. To address the complicated testing, the revisions combine evaporation and permeation standards into a new diurnal standard to simplify compliance testing. Two test methods will be replaced by one that represents both losses. Finally, to address variability in quality, PFC certification will be required.

There are two types of ozone: stratospheric and ground level ozone. Ozone in the stratosphere is naturally occurring and is desirable because it shields the earth from harmful ultraviolet rays from the sun which may cause skin cancer. In contrast, ground level ozone or smog, which results from the mixing of VOCs and NOx on hot, sunny summer days, can harm humans and plants. The primary ozone NAAQS was established by EPA at a level where the attainment and maintenance of which is requisite to protect the public health. In the northeastern United States the ozone nonattainment problem is pervasive as concentrations of ozone often exceed the level of the NAAQS by mid-afternoon on a summer day.

It is well-settled that ground-level ozone causes a host of major health problems, and recent studies have demonstrated a definitive link between even short-term ozone exposure and death in humans. 'See generally' Senate Committee on Environment and Public Health, S. Rep. No. 101-228 (1990), 'reprinted in' 1990 U.S.C.C.A.N. 3385. The United States Senate has recognized that a growing body of scientific evidence indicates that over the long term, chronic exposure to ozone may produce accelerated aging of the lung analogous to that produced by cigarette smoke exposure. 'Id'. In 1995, EPA recognized that ''[m]uch of the ozone inhaled reacts with sensitive lung tissues, irritating and inflaming the lungs, and causing a host of short-term adverse health consequences including chest pains, shortness of breath, coughing, nausea, throat irritation, and increased susceptibility to respiratory infections'' '60 Fed. Reg. 4712-13 (Jan. 24, 1995)'. Moreover, two recent studies have shown a definitive link between short-term exposure to ozone and human mortality. 'See' 292 'Journal of the American Medical Asssn.' 2372-78 (Nov. 17, 2004); 170 'Am. J. Respir. Crit. Care Med.' 1080-87 (July 28, 2004) (observing significant ozone-related deaths in the New York City Metropolitan Area). Even exercising healthy adults can experience 15 percent to 20 percent reductions in lung function from exposure to low levels of ozone over several hours.

Children and outdoor workers are especially at risk from exposure to ozone. Because children's respiratory systems are still developing, they are more susceptible than adults; this problem is exacerbated because ozone is a summertime phenomenon. Children are outside playing and exercising more often during the summer which results in children being exposed to ozone more than adults. Outdoor workers are also more susceptible to lung damage because of their increased exposure to ozone during the summer months when they are more likely to be working outdoors.

In July 2006, EPA again reaffirmed the serious public health consequences of ozone. EPA recognized a number of epidemiological and controlled human exposure studies that: suggest that asthmatic individuals are at greater risk for a variety of ozone-related effects including increased respiratory symptoms, increased medication usage, increased doctors' visits, emergency department visits, and hospital admissions; and provide highly suggestive evidence that short-term ambient ozone exposure contributes to mortality. 'See' 'Fact Sheet: Review of National Ambient Air Quality Standards for Ozone Second Draft Staff Paper, Human Exposure and Risk Assessments and First Draft Environmental Report', U.S. Environmental Protection Agency, July 2006.

Furthermore, on March 12, 2008, EPA Administrator Stephen Johnson announced a new ozone NAAQS of 0.075 ppm. In announcing a lower ozone standard, EPA recognized that scientific evidence indicates that adverse health effects occur with ozone levels below the current standard, particularly in those with respiratory illnesses. EPA also recognized that repeated exposures to low levels of ozone damage vegetation, trees and crops, leading to susceptibility to disease, damaged foliage and reduced crop yields.

Ground level ozone also interferes with the ability of plants to produce and store food. This compromises growth, reproduction and overall plant health. By weakening sensitive vegetation, ozone makes plants more susceptible to disease, pests and environmental stresses. Ozone has been shown to reduce yields for many economically important crops ('e.g.', corn, kidney beans, soybeans). Ozone damage to long-lived species such as trees (by killing or damaging leaves) can significantly decrease the natural beauty of an area, such as the Adirondacks.

Implementation of the Part 239 revisions will, in concert with similar regulations adopted by other States and other measures undertaken by New York, lower levels of ozone in New York State and will decrease the adverse public health and welfare effects described above. In enacting the Title I ozone control requirements of the 1990 CAA amendments, Congress recognized the hazards of ozone pollution and mandated that States, especially those in the OTR, implement stringent regulatory programs in order to meet the ozone NAAQS.

COSTS

Costs to Regulated Parties and Consumers:

The cost of the proposed regulations will affect all manufacturers in a similar way. There are currently eight manufacturers that are members of the Portable Fuel Container Manufacturers Association (PFCMA). Most of these members have already designed PFCs which are compliant with the proposed regulation because the State of California is already enforcing these requirements in its regulations. Furthermore, all manufacturers will be required to have compliant PFCs as of January 1, 2009, when the federal regulations take effect. The State of New York will not be placing any additional cost requirements on the manufacturers or consumers.

Costs to State and Local Governments:

There are no direct costs to State and local governments associated with this proposed regulation. No record keeping, reporting, or other requirements will be imposed on local governments. The authority and responsibility for implementing and administering Part 239 resides solely with the Department. Requirements for recordkeeping and reporting are applicable only to the person(s) who manufactures, sells, supplies, or offers for sale portable fuel containers.

Costs to the Regulating Agency:

There will be no increase in administrative costs to the regulating agency.

LOCAL GOVERNMENT MANDATES

No mandates will be imposed on local governments.

PAPERWORK

No additional paperwork will be imposed by this rulemaking on manufacturers, distributors or sellers of PFCs beyond what will be required under federal regulations that take effect on January 1, 2009. Manufacturers will be required maintain records relating to:

1) applications to EPA;
2) construction and origin of all components of the PFC;
3) all emission tests;
4) all tests to diagnose emission control performance;
5) all other relevant information or events; and
6) lot numbers.

All records must be kept for at least five years.

DUPLICATION

The proposed revisions to Part 239 are consistent with the federal rule, 40 CFR Part 59.600-59.699.

ALTERNATIVES

The following alternatives have been evaluated to address the goals set forth above. These are:

1. Take No Action:

The ''Take No Action'' alternative is not acceptable because New York needs the additional emissions reductions as soon as possible in order to meet its attainment goals. Moreover, this alternative would not address the spillage concerns associated with portable fuel containers under the current regulations and would allow New York residents to continue use of non user-friendly PFCs. It would also result in state regulations which are inconsistent with the federal regulations that will take effect on January 1,

2009. Lastly, failing to adopt the proposed regulations would leave New York without authority to enforce against the sale of PFCs in the State of New York that are not compliant with federal requirements. For these reasons, DEC rejected this option.

2. Adopt the proposed revisions to Part 239:

Under this option, Part 239 will be consistent with 40 CFR Part 59.600-59.699. This will provide the manufacturers with more flexibility to manufacture a more user-friendly PFC. While the regulations will be the same as federal requirements, maintaining Part 239 will allow NYSDEC to enforce this regulation in the future. This enforcement option is necessary because the EPA has not shown any willingness to enforce its consumer products regulations adopted under 40 CFR Part 59. This is the alternative that DEC has elected to pursue.

FEDERAL STANDARDS

The proposed revisions to Part 239 are necessary to comply with the Federal Rule (40 CFR Part 59).

COMPLIANCE SCHEDULE

The proposed revisions would take effect on September 1, 2009, and compliance with the proposed changes would be required as of that date. However, federal regulations also apply to PFCs, and recent changes to those regulations take effect on January 1, 2009. All PFCs manufactured on or after January 1, 2009 will have to be compliant with the federal standards set forth in 40 CFR Part 59.

This proposed rulemaking contains a ''sell-through'' provision. Between September 1, 2009 and December 31, 2009, PFCs manufactured prior to January 1, 2009 could be sold or distributed if they were compliant on December 31, 2008. As of January 1, 2010, only PFCs compliant with the proposed revisions to Part 239 could be distributed or sold.

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

No changes have been made to the Regulatory Flexibility Analysis, Rural Area Flexibility Analysis or Job Impact Statement since the last publication.

Assessment of Public Comment

1) Comment: The gas cans that are currently available are difficult to use and present spill risks during use. There are some target tanks which do not allow the entire spout to enter the tank and result in spilling along the sides of the particular tank. The commenter is encouraged that the Department is acting to revise the regulations concerning ''spill-proof'' portable fuel containers (PFCs).

Response: The Department appreciates this comment.

2) Comment: Allow the sale of regular flexible spouts until the new better designed spouts are available. To allow the sale of the spill-prone spouts that have demonstrated adverse impacts is worse than allowing the sale of regular flexible spouts that were available before these requirements took effect.

Response: 40 CFR 59.602 and 6 NYCRR Part 239-3.1 prohibit the sale and use of non compliant spouts. Allowing the sale and use of flexible spouts, which are non compliant, would violate the Federal and state law cited above, and result in increased VOC emissions and risk to human health.

3) Comment: The commenter expressed uncertainty as to what the testing requirements proposed in 239-8.1 will involve. The commenter expressed that the testing should include consumer testing of spout designs under real world conditions before they are put to market to ensure they are practical to use and work as intended.

Response: Testing procedures may be found at 40 CFR 59.650-59.653, which are incorporated into the revised rule by reference. The testing procedures consider numerous conditions, including conditions associated with a typical user. To ensure that the easier to use products are made available to New York State residents the Department has reached out to the Portable Fuel Container Manufacturers Association and has already granted Innovative Product status defined in 6 NYCRR Part 239-5 to portable fuel containers which meet the new federal standard and are easier to use. The Department anticipates that the revised rule will enable manufactures to produce user-friendly and compliant PFCs.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Deer Management Permits

I.D. No. ENV-28-09-00009-P

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

Proposed Action: Amendment of section 1.20 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303 and 11-0913

Subject: Deer management permits.

Purpose: To amend procedures for the issuance and use of deer management permits.

Text of proposed rule: Amend paragraph 1.20 (b)(2) of 6 NYCRR as follows:

(2) Initial application period. The deadline for the initial application period is October [15th] *1st*. In order to receive consideration, applications for the initial application period made by phone, internet or at license issuing agents shall be submitted on or before October [15th] *1st* for that license year. Applications submitted by mail shall be postmarked on or before October [15th] *1st* for that license year.

Amend paragraph 1.20 (b)(4) of 6 NYCRR as follows:

(4) Application fees. All applications must include the fee required in accordance with section 11-0913 of the Environmental Conservation Law. This fee will be waived for holders of junior archery, [sportsman, resident and nonresident super-sportsman, and conservation legacy] *junior hunting, and lifetime sportsman (if bought prior to October 1, 2009)* license types. [Fees and/or m]*M*onies received in excess of the application fee will not be refunded.

Add new subdivision 1.20 (l) of 6 NYCRR as follows:

(l) "Sale of DMPs." DMP tags may not be sold.

Text of proposed rule and any required statements and analyses may be obtained from: Gordon R. Batcheller, N.Y.S. Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4754, (518) 402-8885, email: WildlifeRegs@gw.dec.state.ny.us

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

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

Additional matter required by statute: A programmatic environmental impact statement is on file with the Department of Environmental Conservation.

This action was not under consideration at the time this agency's regulatory agenda was submitted.

Regulatory Impact Statement

1. Statutory authority:

Section 11-0303 of the Environmental Conservation Law (ECL) directs the Department of Environmental Conservation (the department) to develop and carry out programs that will maintain desirable species in ecological balance, and to observe sound management practices. This directive is to be met with regard to ecological factors, the compatibility of production and harvest of wildlife with other land uses, the importance of wildlife for recreational purposes, public safety, and protection of private premises. Section 11-0913 provides for the issuance of Deer Management Permits (DMPs), including the fee for the application and processing of those permits.

2. Legislative objectives:

Deer management permits are the basic tool for managing New York's deer herd. The annual harvest of antlerless deer (primarily female deer) is essential to maintain ecological balance between deer and their habitats. The legislative objective of section 11-0913 ("Deer management permits") is to provide the tools necessary to manage the deer herd.

3. Needs and benefits:

The department proposes to amend three aspects of the DMP program. There are three components to this proposal: (1) Establishing October 1st as the deadline for the "initial application period," (2) Prohibiting the sale of DMPs, and (3) Establishing hunting license types for which the $10 DMP application fee is waived.

October 1 Application Deadline

The current regulation establishes October 15th as the application deadline. The earlier application period of October 1st is needed to provide enough time to process applications, to identify wildlife management units where additional DMPs will be made available, and to mail those additional applications in time for the beginning of the Southern Zone bowhunting season.

Prohibiting the Sale of DMPs

The department's Division of Law Enforcement has identified the sale of DMPs as an emerging law enforcement concern. During last year's hunting season, several regions uncovered schemes to sell DMPs via several commercial internet outlets. Such sale is not currently prohibited but if this situation is allowed to proliferate, the sale of DMPs will compromise deer management by complicating the calculation of DMP quotas that are based on hunter participation and success.

Since the sale of deer management assistance permits (DMAPs) is already prohibited pursuant to 6 NYCRR section 1.30, the prohibition on selling DMPs will establish a clear and uniform policy consistent with the premise that hunting opportunities should be provided with both equity and fairness and not to the "highest bidder." This practice should be ended by regulation to assure that the deer management system is not compromised.

Waiving the $10 DMP Application Fee

Legislation signed into law in 2009 to increase license fees for hunting, trapping, and angling includes an amendment to subdivision 7 of ECL section 11-0913 addressing the DMP application fee ($10).

The department is proposing to waive the DMP application fee for three categories of licenses: (1) Junior archery, (2) Junior hunting, and (3) Lifetime sportsman (if bought prior to October 1, 2009). All other categories of licensees would be required to pay the $10 DMP application fee.

Under the old law, the department's regulations provided for a DMP fee waiver for all authorized license types, including the conservation legacy and super-sportsman" license types. Under the new law, the department proposes to use the waiver authority for three license types (junior and lifetime), but not for the "super-sportsman."

The department's proposal is needed to ensure that the program is delivered with fairness and equity. In the case of the new law, two major categories of license types have been removed from the waiver authority: sportsman and conservation legacy. The department does not have the authority to waive the DMP fees for these license buyers. While the department does have the authority to waive the DMP application fee for the super-sportsmen license, the use of this authority will be widely viewed as unfair. Moreover, if the department were to waive the DMP fee for resident super-sportsman, very few people will continue to buy the higher priced conservation legacy license, and consequently we will sell fewer habitat/access stamps and subscriptions to the *Conservationist* (both are included in this license type). Finally, by requiring a DMP fee for resident super-sportsman, the department will collect an additional $1 million (or more) in revenue.

4. Costs:

None, beyond normal administrative costs.

5. Local government mandates:

There are no local governmental mandates associated with this proposed regulation.

6. Paperwork:

No additional paperwork is associated with this proposed regulation.

7. Duplication:

There are no other regulations similar to this proposal.

8. Alternatives:

Maintaining the October 15th application deadline for DMPs will unnecessarily complicate DMP processing and issuance. October 15 is very close to the opening of the Southern Zone bowhunting season, and the department strives to complete DMP issuance prior to that date. The October 1st deadline application is needed to ensure that hunters receive their DMPs in time for hunting.

In the absence of a prohibition on the sale of DMPs, this practice will undoubtedly proliferate and subject the DMP application and issuance process to the vagaries of market economics. Moreover, it will complicate law enforcement. For this reason, the department has rejected the no action alternative.

Waiving the DMP fee for resident super-sportsman will create a sense of injustice among holders of other license types. It will also create confusion among license buyers. For this reason, the department has rejected the no action alternative.

9. Federal standards:

There are no federal standards associated with this proposal.

10. Compliance schedule:

Hunters will be able to comply with the new regulations as soon as they are adopted.

Regulatory Flexibility Analysis

The proposed regulation has no effect on small businesses or local governments. It simply amends the procedures for issuing deer management permits, and stipulates that deer management permits may not be sold. Therefore, the department has determined that a Regulatory Flexibility Analysis for Small Businesses and Local Governments is not needed.

Rural Area Flexibility Analysis

The proposed regulation has no effect on rural areas. It simply amends the procedures for issuing deer management permits, and stipulates that deer management permits may not be sold. Therefore, the department has determined that a Rural Area Flexibility Analysis is not needed.

Job Impact Statement

The proposed regulation does not affect jobs. It simply amends the procedures for issuing deer management permits, and stipulates that deer management permits may not be sold. Therefore, the department has determined that a Job Impact Statement is not needed.

Department of Health

EMERGENCY RULE MAKING

Ocean Surf Bathing Beaches and Automated External Defibrillators (AEDs)

I.D. No. HLT-28-09-00004-E
Filing No. 722
Filing Date: 2009-06-25
Effective Date: 2009-06-25

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

Action taken: Amendment of Subpart 6-2 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 225

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

Specific reasons underlying the finding of necessity: Chapter 500 of the Laws of 2008 was signed on September 4, 2008. This law requires amendments to the State Sanitary Code (SSC) to mandate automated external defibrillator (AED) equipment and at least one lifeguard trained in AED use, and for all HOA ocean surf beaches to be supervised by qualified surf lifeguards. The Public Health Law (PHL) amendments became effective January 2, 2009 and the chapter law mandates the Department of Health amend the SSC on or before the effective date to provide for implementation of the new requirements. Enacting this regulation as an emergency pending routine rulemaking will protect swimmers during the spring and early summer bathing seasons.

Requiring AED equipment and at least one lifeguard trained in the use of an AED at surf beaches during all hours of operation enable better emergency response for sudden cardiac arrest. Sudden cardiac arrest is one of the leading causes of death in the United States and the administration of a defibrillator within the first few minutes has been shown to be highly successful in preventing death. The presence of an AED and lifeguard trained in its use at a surf beach can decrease delays in AED administration, which was previously dependent on off-site Emergency Medical Services response.

The PHL specifies that the SSC must be amended to require all ocean surf beaches operated by a HOA to have qualified surf lifeguards on duty, including HOAs in Suffolk County and New York City (NYC), which are currently exempt from Subpart 6-2. Although this PHL amendment only specifies that surf lifeguards be provided, the SSC is being changed to require all ocean surf beaches owned or operated by HOAs to comply with Subpart 6-2 in its entirety. Compliance with Subpart 6-2 of the SSC is essential to protect the public, protect lifeguards while performing their job duties, and to ensure consistency with requirements for operation for other surf beaches. Subpart 6-2 of the SSC requires rescue and first aid equipment, elevated lifeguard stands, and safety plans, and specifies the number and positioning of lifeguards. These requirements are necessary to ensure lifeguards are able to protect swimmers and not place their own safety at risk during rescue activities.

Subject: Ocean Surf Bathing Beaches and Automated External Defibrillators (AEDs).

Purpose: Mandate required ocean surf beaches to be supervised by a surf lifeguard trained in AED operation and provide and maintain onsite AED.

Text of emergency rule: Subdivision (i) of Section 6-2.2 is added as follows:

(i) Public Access Defibrillation (PAD) program shall mean a program that complies with Section 3000-b of the Public Health Law, including the availability of an automated external defibrillator, the identification of an emergency health care provider, the development of a collaborative agreement and successful staff completion of training in the operation of an automated external defibrillator.

* * *

Paragraph (2) of Section 6-2.3(a) is amended as follows:

(2) those, excluding ocean beaches in Nassau County*, Suffolk*

County, and New York City, that are owned and operated by a condominium (i.e., property subject to the Article 9-B of the Real Property Law, also known as the Condominium Act), a property commonly known as a cooperative, in which the property is owned or leased by a corporation, the stockholders of which are entitled, solely by reason of their ownership of stock in the corporation, and occupy apartments for dwelling purposes, provided an ''offering statement'' or ''prospectus'' has been filed with the Department of Law, or an incorporated or unincorporated property association, all of whose members own residential property in a fixed or defined geographical area with deeded rights to use, with similarly situated owners, a defined bathing beach, provided such bathing beach is used exclusively by members of the condominium, cooperative apartment project or corporation or association and their family and friends.

* * *

Subparagraph (i) is added to Section 6-2.17(a)(4) as follows:

(i) At ocean surf beaches, at least one Supervision Level I aquatic supervisory staff possessing a current certificate of training in the operation and use of an automated external defibrillator approved by a nationally-recognized organization or the state emergency medical services council shall be present at all hours of beach operation. Records of the training shall be maintained available for review during inspections.

* * *

Clause (a) is added to Section 6-2.17(b)(1)(ii) as follows:

(a) At ocean surf beaches, at least one automated external defibrillator shall be provided by the operator and maintained on-site. The beach operator shall implement a PAD program as defined in Section 6 2.2(i) of this Subpart and maintain the following records on-site for inspection:

- *A copy of the collaborative agreement between an emergency health care provider and the ocean surf beach operator;*
- *A copy of the notification to the regional emergency medical services council of the existence, location, and type of automated external defibrillator; and*
- The records of automated external defibrillator maintenance and testing specified by the manufacturer's standards.

* * *

Subdivision (c) of Section 6-2.17 is amended as follows:

(c) Safety plan. Operators of bathing beaches must develop, update and implement a written beach safety plan, consisting of: procedures for daily bather supervision, injury prevention, reacting to emergencies, injuries and other incidents, providing first-aid and summoning help. *At ocean surf beaches, the safety plan shall be developed in consultation with an individual having adequate ocean surf lifeguarding experience.* The safety plan shall be approved by the permit-issuing official and kept on file at the beach. Approval will be granted when all the components of this section are addressed so as to protect the health and safety of the bathers, and the plan sets forth procedures to insure compliance with this Subpart.

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 September 22, 2009.

Text of rule and any required statements and analyses may be obtained from: Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

The Public Health Council is authorized by Section 225 (4) of the Public Health Law (PHL) to establish, amend and repeal sanitary regulations to be known as the State Sanitary Code (SSC) subject to the approval of the Commissioner of Health. PHL Section 225 (5) (a) provides that the SSC may deal with any matter affecting the security of life and health of the people of the State of New York. In 2008, two amendments (Chapter 500 of the Laws of 2008) were made to PHL Section 225. The first added new Section 225 (5-c), requiring any public or private surf beach or swimming facility be supervised by a surf lifeguard and provide and maintain on-site automated external defibrillator (AED) equipment. Further, at least one lifeguard who has been trained in the operation and use of an AED must be present during all periods of required supervision. The second amendment added a new Section 225 (5-a) requiring surf lifeguards to supervise surf beaches used for swimming or bathing which are owned or operated by a homeowners association (HOA). HOA facilities, with the exception of those located in Nassau County, are currently exempt from Subpart 6 2 of the SSC. The PHL amendments became effective January 2, 2009 and the chapter law mandates the Department of Health amend the SSC to provide for implementation of the new requirements.

Legislative Objectives:

The legislative objective of Chapter 500 of the Laws of 2008 was to enhance the protection of public health and safety. The proposed amendments to the SSC, Subpart 6-2 Bathing Beaches will further this legislative objective and are required by statute.

Needs and Benefits:

Relating to AED Requirements:

The benefit of AED equipment and at least one lifeguard trained in the use of an AED at surf beaches during all hours of operation improves emergency response for sudden cardiac arrest. Sudden cardiac arrest is one of the leading causes of death in the United States and the administration of a defibrillator within the first few minutes has been shown to be highly successful in preventing death. The presence of an AED and of a lifeguard trained in its use at a surf beach will decrease delays in AED administration, which was previously dependent on a response from a generally off-site emergency medical services provider.

Related to Surf Lifeguard:

New PHL requirements specify that the SSC must be amended to require all ocean surf beaches operated by a HOA to have qualified surf lifeguards on duty, including HOAs in Suffolk County and New York City (NYC), which are currently exempt from Subpart 6-2. Although this PHL amendment only specifies that surf lifeguards be provided, the SSC is being changed to require all ocean surf beaches owned or operated by HOAs to comply with Subpart 6-2 in its entirety. Compliance with Subpart 6 2 of the SSC is essential to protect the public and protect lifeguards while performing their job duties. Subpart 6 2 of the SSC requires rescue and first aid equipment, elevated lifeguard stands, and safety plans, and specifies the number and positioning of lifeguards. These requirements are necessary to ensure lifeguards are able to protect swimmers and not place their own safety at risk. A requirement for ocean surf beach safety plans to be developed in consultation with an individual with ocean surf beach lifeguarding experience is added to ensure staff who are knowledgeable in lifeguarding practices and emergency procedures have input in establishing the safety plan.

Costs to Regulated Parties:

The proposed amendments affect approximately 95 surf beach operations: 60 municipal, 6 HOAs, 3 temporary residences, 25 beach clubs, and 1 community college, in NYC and Nassau and Suffolk Counties. Each of the 95 ocean surf beaches may incur costs associated with purchasing and maintaining AED equipment and establishing a Public Access Defibrillation (PAD) Program at the facility. Some may already have and maintain AEDs but the number, if any, is unknown. The cost of an AED device ranges from $1,100 to $3,000. There will be additional expenses related to maintenance and service of the AED. Periodic battery replacement is required (every 3 to 7 years, depending on the AED); replacement batteries average between $50 and $400. Some AED units have the option of using rechargeable batteries; costs range from $415 to $680 for batteries, including chargers. Replacement of pediatric or adult defibrillation pads is necessary after use, and unused pads must be replaced every 2-5 years depending on the unit. Pad replacement is estimated to be between $30 and $100 per set. Alternatively, AEDs can be leased for approximately $70 to $130 per month. Although the law only requires one AED per facility, some beaches may choose to provide more than one AED to facilitate a timely response.

In addition to the cost for purchasing an AED, surf beach operators

must develop and implement a PAD program for their facility, which includes obtaining medical direction and program management. Costs for a PAD program, medical direction, and program management are estimated to be between $500 and $1500 a year. Municipalities that have physicians serving as health officers may have no additional expenses associated with medical direction. A single PAD program can be utilized for multiple beaches that have the same owner/operator, such as municipally operated beaches, the NYC Parks Department, and Nassau County Parks.

Training and certification in the use of the AED are incorporated in most cardiopulmonary resuscitation (CPR) certification programs and are not expected to add any additional expenses to beaches that are already supervised by lifeguards. CPR/AED training courses range from $75 to $110, but may be also included as part of lifeguard training courses. Lifeguards must renew their CPR/AED certification annually; re-certification courses range from $40 to $75.

There are two HOA ocean surf beaches in Suffolk County and one HOA ocean surf beach in NYC previously exempt that will now be regulated under Subpart 6-2. Although previously exempt from Subpart 6-2 of the SSC, the NYC HOA ocean surf beach has been regulated under Article 167 of the NYC Health Code and will have no additional expenses to comply with Subpart 6-2 of the SSC. Costs associated with Subpart 6-2 compliance for the two HOA surf beaches in Suffolk County are as follows:

Surf Lifeguard Training and Salary - Surf lifeguard training is estimated to cost between $200 and $500. Certifications are valid for up to three years from the date of issuance. CPR training courses range from $75 to $110; however, CPR training may be included in lifeguard training courses. Annual CPR re-certification is required, and is estimated to be between $40 and $75. Lifeguard salaries range from $11 to $21 dollars per hour. One of the HOA in Suffolk County is known to already supply lifeguards. One lifeguard must be provided for each 50 yards of beach open for swimming. At this time, the length of beach that is used for swimming is unknown; however, beach operators may restrict the area open for swimming to minimize expenses.

Initial Equipment Cost - The cost of equipment, including lifeguard chairs and rescue and first aid equipment, ranges from $1,470 to $3,970, for each required lifeguard. It is likely that beaches have some or all of the required equipment already.

Permit fee - There is an annual permit fee of $230 to operate a bathing beach in Suffolk County.

Drinking fountains and bathhouse facilities - No additional expense is anticipated for these facilities since beach use is restricted to residents, and their living quarters are expected fulfill these needs.

Costs to the Department of Health:

The cost for routine printing and distribution of the amended code will be the only cost to the State. There will be no cost to State Health Department District Offices as there are no ocean surf beaches within the jurisdiction of any District Office.

Costs to State and Local Government:

The proposed amendments affect approximately 95 beach operations in three local health department jurisdictions: 34 in Nassau County, 52 in Suffolk County, and 9 in NYC. The estimated burden to local health departments is minimal, as the inspection frequency would not change for NYC and Nassau County, and the number of permitted ocean surf beaches in Suffolk County would increase by 2 to a total of 52 regulated ocean surf beaches. Local governments that operate surf beaches will have the same costs described in the section entitled ''Costs to Regulated Parties.''

Paperwork/Reporting:

The proposed amendments require the beach operator to have available on-site records of AED program management and use, and copies of certifications in AED training for lifeguards. In addition, operators will need to amend their facility safety plan to reflect the deployment and use of AEDs, and must develop a PAD program. Initiation of the PAD program includes development of a collaborative agreement that is submitted to the appropriate Regional Emergency Medical Services Council (REMSCO). The PAD program specifies requirements for notifying REMSCO of the existence, location, and type of AED; and reporting every AED use.

The two HOA surf beaches in Suffolk County will have additional paperwork and record keeping associated with Subpart 6-2 compliance. Annually, each beach operator must apply for and obtain a permit to operate from the Suffolk County Department of Health. Daily logs indicating the number of bathers using the beach, number of lifeguards on duty, weather conditions, water clarity, and reported rescues, injuries, or illnesses must be maintained. In addition, owners/operators are required to report certain injury or illness incidents to the permit-issuing official within 24 hours, and must maintain records of lifeguard certifications and a written safety plan.

Local Government Mandates:

The proposed revisions impose a new responsibility of establishing a PAD program upon 60 municipalities that operate surf beaches. Local health department staff are responsible for enforcing the amendments to the bathing beach regulations as part of their existing program responsibilities.

Duplication:

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

Alternatives Considered:

Because the PHL amendment required that surf lifeguards be provided at all ocean surf beaches, but did not mandate compliance with Subpart 6-2 of the SSC in its entirety, one alternative considered was to limit the SSC modifications to only mandating that surf lifeguards be provided. This option was rejected to ensure that lifeguards are provided with the necessary safety equipment and safety plans to protect the public and themselves and to maintain consistency with requirements for operation for other surf beaches.

Federal Standards:

At this time, there are no Federal standards pertaining to AEDs or public safety (lifeguards, safety equipment, etc.) at surf beaches.

Compliance Schedule:

These regulations will be effective upon filing with the Secretary of State.

Regulatory Flexibility Analysis

Effect of Rule:

There are 95 ocean surf bathing beaches in New York City (NYC) and Nassau and Suffolk Counties, all of which will be affected by the proposed rule that will require ocean surf beaches to provide and maintain automated external defibrillator (AED) equipment and a lifeguard trained in its use. Thirty-five (35) of these ocean surf beaches are considered small businesses, and include 25 beach clubs, 3 temporary residences (e.g., hotels and motels), 1 community college, and 6 homeowners associations (HOA). The remaining 60 ocean surf bathing beaches are owned and operated by municipalities.

Ninety-two (92) of the 95 ocean surf beaches are regulated under Subpart 6-2 Bathing Beaches of the State Sanitary Code (SSC), and 1 beach is regulated under Article 167 of the NYC Health Code. The proposed amendment that will require all HOA owned and operated ocean surf beaches to be permitted and regulated under Subpart 6-2 will affect the 2 HOA beaches (small businesses) in Suffolk County that are currently exempt from Subpart 6-2 regulations.

Compliance Requirements:

The proposed amendments require the beach operator to have available on-site records of AED program management and use, and copies of certifications in AED training for lifeguards. In addition, operators will need to amend their facility safety plan to reflect the deployment and use of AEDs, and must develop a PAD program. Initiation of the PAD program includes development of a collaborative agreement that is submitted to the appropriate Regional Emergency Medical Services Council (REMSCO). The PAD program specifies requirements for notifying REMSCO of the existence, location, and type of AED; and reporting every AED use.

The two HOA surf beaches in Suffolk County will have additional paperwork and record keeping associated with Subpart 6-2 compliance. Annually, each beach operator must apply for and obtain a permit to operate from the Suffolk County Department of Health. Daily logs indicating the number of bathers using the beach, number

of lifeguards on duty, weather conditions, water clarity, and reported rescues, injuries, or illnesses must be maintained. In addition, owners/operators are required to report certain injury or illness incidents to the permit-issuing official within 24 hours, and must maintain records of lifeguard certifications and a written safety plan.

Other Affirmative Acts:

Chapter 500 of the Laws of 2008 was signed on September 4, 2008. This law requires amendments to the SSC to mandate beach operators implement a Public Access Defibrillation (PAD) program in compliance with Section 3000-b of the PHL, including the presence of AED equipment and a surf lifeguard trained in AED use. Additionally, the law requires SSC amendments mandating all HOA ocean surf beaches to be supervised by qualified surf lifeguards. The benefits of these changes are specified below.

Related to AED Requirements:

The benefit of AED equipment and at least one lifeguard trained in the use of an AED at surf beaches during all hours of operation improves emergency response for sudden cardiac arrest. Sudden cardiac arrest is one of the leading causes of death in the United States and the administration of a defibrillator within the first few minutes has been shown to be highly successful in preventing death. The presence of an AED and of a lifeguard trained in its use at a surf beach will decrease delays in AED administration, which was previously dependent on a response from a generally off-site emergency medical services provider.

Related to Surf Lifeguard:

New PHL requirements specify that the SSC must be amended to require all ocean surf beaches operated by a HOA to have qualified surf lifeguards on duty, including HOAs in Suffolk County and New York City (NYC), which are currently exempt from Subpart 6-2. Although this PHL amendment only specifies that surf lifeguards be provided, the SSC is being changed to require all ocean surf beaches owned or operated by HOAs to comply with Subpart 6-2 in its entirety. Compliance with Subpart 6 2 of the SSC is essential to protect the public, protect lifeguards while performing their job duties, and to ensure consistency with requirements for operation for other surf beaches. Subpart 6 2 of the SSC requires rescue and first aid equipment, elevated lifeguard stands, and safety plans, and specifies the number and positioning of lifeguards. These requirements are necessary to ensure lifeguards are able to protect swimmers and not place their own safety at risk. A requirement for ocean surf beach safety plans to be developed in consultation with an individual with ocean surf beach lifeguarding experience is added to ensure staff who are knowledgeable in lifeguarding practices and emergency procedures have input in establishing the safety plan.

Professional Services:

Facilities initiating PAD programs must identify a New York State licensed physician or New York State-based hospital knowledgeable and experienced in emergency cardiac care to serve as the Emergency Health Care Provider (EHCP). The EHCP participates in the collaborative agreement developed by the facility and EHCP.

Compliance Costs:

The proposed amendments affect approximately 95 surf beach operations: 60 municipal, 6 HOA, 3 temporary residences, 25 beach clubs, and 1 community college, in NYC and Nassau and Suffolk Counties. Each of the 95 ocean surf beaches may incur costs associated with purchasing and maintaining AED equipment and establishing a Public Access Defibrillation (PAD) Program at the facility. Some may already have and maintain AEDs but the number, if any, is unknown. The cost of an AED device ranges from $1,100 to $3,000. There will be additional expenses related to maintenance and service of the AED. Periodic battery replacement is required (every 3 to 7 years, depending on the AED); replacement batteries average between $50 and $400. Some AED units have the option of using rechargeable batteries; costs range from $415 to $680 for batteries, including chargers. Replacement of pediatric or adult defibrillation pads is necessary after use, and unused pads must be replaced every 2-5 years depending on the unit. Pad replacement is estimated to be between $30 and $100 per set. Alternatively, AEDs can be leased for approximately $70 to $130 per month. Although the law only requires one AED per facility, some beaches may choose to provide more than one AED to facilitate a timely response.

In addition to the cost for purchasing an AED, surf beach operators must develop and implement a PAD program for their facility, which includes obtaining medical direction and program management. Costs for a PAD program, medical direction, and program management are estimated to be between $500 and $1500 a year. Municipalities that have physicians serving as health officers may have no additional expenses associated with medical direction. A single PAD program can be utilized for multiple beaches that have the same owner/operator, such as municipally operated beaches, the NYC Parks Department, and Nassau County Parks.

Training and certification in the use of the AED are incorporated in most cardiopulmonary resuscitation (CPR) certification programs and are not expected to add any additional expenses to beaches that are already supervised by lifeguards. CPR/AED training courses range from $75 to $110, but may be also included as part of lifeguard training courses. Lifeguards must renew their CPR/AED certification annually; re-certification courses range from $40 to $75.

There are two HOA ocean surf beaches in Suffolk County and one HOA ocean surf beach in NYC previously exempt that will now be regulated under Subpart 6-2. Although previously exempt from Subpart 6-2 of the SSC, the NYC HOA ocean surf beach has been regulated under Article 167 of the NYC Health Code and will have no additional expenses to comply with Subpart 6-2 of the SSC. Costs associated with Subpart 6-2 compliance for the two HOA surf beaches in Suffolk County are as follows:

Surf Lifeguard Training and Salary - Surf lifeguard training is estimated to cost between $200 and $500. Certifications are valid for up to three years from the date of issuance. CPR training courses range from $75 to $110; however, CPR training may be included in lifeguard training courses. Annual CPR re-certification is required, and is estimated to be between $40 and $75. Lifeguard salaries range from $11 to $21 dollars per hour. One of the HOA in Suffolk County is known to already supply lifeguards. One lifeguard must be provided for each 50 yards of beach open for swimming. At this time, the length of beach that is used for swimming is unknown; however, beach operators may restrict the area open for swimming to minimize expenses.

Initial Equipment Cost - The cost of equipment, including lifeguard chairs and rescue and first aid equipment, ranges from $1,470 to $3,970, for each required lifeguard. It is likely that beaches have some or all of the required equipment already.

Permit fee - There is an annual permit fee of $230 to operate a bathing beach in Suffolk County.

Drinking fountains and bathhouse facilities - No additional expense is anticipated for these facilities since beach use is restricted to residents, and their living quarters are expected fulfill these needs.

Economic and Technological Feasibility:

The proposal is technologically feasible because it requires use of existing technology for AED equipment.

The proposal is believed to be economically feasible because it reflects only actual costs related to purchase and maintenance of the AED and related to surf lifeguard requirements necessary for compliance with the PHL. The cost difference between providing surf lifeguards at HOA surf beaches as required by the new PHL amendments and costs of requiring all HOA surf beaches to conform to all Subpart 6-2 is justified in order to protect the public and protect lifeguards while performing their job duties. Additionally, HOA beaches in Nassau County are already required by law to comply with SSC requirements.

Minimizing Adverse Impact:

The proposed amendments are largely dictated by PHL; therefore, the aforementioned costs associated with purchase of AED equipment, training, and PAD program development are necessary to follow this mandate. Training costs may be reduced by having lifeguards take a combined CPR/AED training course for their annual CPR re-certification. Municipalities or parks departments that have multiple beach facilities or use AEDs in other settings may be able to receive discounts by purchasing AED units and equipment in bulk. Munici-

palities that have physicians serving as health officers may have no additional expenses associated with an EHCP. In addition, a single EHCP/PAD program can be utilized for multiple beaches that have the same owner/operator, such as a municipality (e.g. the NYC Park Department, Nassau County).

Granting of variances to surf beaches which allows time for compliance may be considered as an option when related to equipment purchase, etc. Because the PHL amendment requires that surf lifeguards be provided at all ocean surf beaches, but did not mandate compliance with Subpart 6-2 of the SSC in its entirety, one alternative considered was to limit the SSC modifications to only mandating that surf lifeguards be provided. This option was rejected to ensure that lifeguards are provided with the necessary safety equipment and safety plans to protect the public and themselves and to maintain consistency with requirements for operation for other surf beaches.

Small Business and Local Government Participation:

All three LHDs with ocean surf beaches in their jurisdiction have conducted outreach to the affected parties to inform them of the PHL change and future changes to the SSC. Department staff contacted the two HOA in Suffolk County that were previously not regulated to assess the impact of the rule change. The HOAs reported that expenses associated with complying with Subpart 6 2 of the SSC will have a minimal impact in that, when open, both beaches are already supervised by qualified ocean surf lifeguards and they already provide elevated lifeguard stands, first aid and CPR equipment, and spine boards. One beach reported needing a new rescue board and torpedo buoy (rescue can), while the other stated that they already possess the rescue equipment. Additionally, both HOAs reported having AED equipment, which is positioned or can be summoned to the beach within minutes of an emergency, and that all lifeguards are trained in AED use.

Some outreach has been conducted with lifeguarding staff at municipal facilities. The Suffolk County Department of Health and NYC Department of Health and Mental Hygiene officials were contacted and support the proposed revisions to enforce Subpart 6 2 of the SSC in its entirety at HOAs.

Rural Area Flexibility Analysis

No Rural Area Flexibility Analysis is required pursuant to Section 202-bb of the State Administrative Procedure Act. The 95 ocean surf bathing beaches in New York State are located in Nassau and Suffolk Counties and New York City. These jurisdictions are not considered rural areas, as they do not meet the criteria for a rural area under Executive Law Section 481(7), which defines a rural area as either counties within the state having less than 200,000 population, or counties with 200,000 or greater population that contain towns with population densities of 150 persons or less per square mile.

Job Impact Statement

No Job Impact Statement is required pursuant to Section 201-a (2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will have no substantial adverse impact on jobs and employment opportunities. The amendment may increase employment opportunities, as it now requires all ocean surf beaches owned or operated by a homeowners association in Suffolk County to provide surf lifeguards in accordance with Subpart 6-2 of the State Sanitary Code.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

PASRR SCREEN Requirements

I.D. No. HLT-28-09-00015-P

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

Proposed Action: Amendment of section 400.12 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2803(2)

Subject: PASRR SCREEN Requirements.

Purpose: Remove outdated language; revise incorrect language; remove SCREEN from regulation text and replace with reference.

Text of proposed rule: Pursuant to the authority vested in the State Hospital Review and Planning Council and the Commissioner of Health by section 2803(2) of the Public Health Law, section 400.12 of Part 400 of Article 3 of Subchapter A of Chapter V of Title 10 (Health) of the New York State Code of Rules and Regulations is hereby amended as follows:

§ 400.12 [Forms (criteria for level of care and SCREEN)] *Level of care criteria*

(a) New York State criteria for level of care. (1) Minimum qualification for residential health care facility care: The patient is qualified for residential health care facility care [as indicated by] *and such care is consistent with all applicable federal requirements as documented on* the patient screening instrument (SCREEN) [referral guidelines (SCREEN Parts IIB and IIIC)].

(2) Skilled nursing facility care. Patients in the following resource utilization groups meet the requirements for skilled nursing facility level of care [(see Appendix 13-A, infra, for resource utilization groups)]:

Special Care A
Special Care B
Heavy Rehabilitation A
Heavy Rehabilitation B
Clinically Complex A
Clinically Complex B
Clinically Complex C
Clinically Complex D
Severe Behavioral A
Severe Behavioral B
Severe Behavioral C
Reduced Physical Functioning A
Reduced Physical Functioning B
Reduced Physical Functioning C
Reduced Physical Functioning D
Reduced Physical Functioning E

[In order for a skilled nursing facility to admit or retain patients in the following resource utilization groups, the case must be referred to a physician member of the facility's utilization review agent to override the level of care criteria and determine the appropriate level of care in accordance with 10 NYCRR 416.9(a) and (b).]

[Clinically Complex A]
[Severe Behavioral A]
[Reduced Physical Functioning A]
[Reduced Physical Functioning B]

[(3) Health-related facility care. Patients in the following resource utilization groups meet the requirements for health-related facility level of care:]

[Clinically Complex A]
[Severe Behavioral A]
[Reduced Physical Functioning A]
[Reduced Physical Functioning B]

[For a health-related facility to admit or retain a specific patient in one of the following resources utilization groups, not designated as appropriate for health-related facility care, the case must be referred to a physician member of the facility's utilization review agent to override the level of care criteria and determine the appropriate level of care in accordance with 10 NYCRR 421.13(a) and (b):]

[Special Care A]
[Special Care B]
[Heavy Rehabilitation A]
[Heavy Rehabilitation B]
[Clinically Complex B]
[Clinically Complex C]
[Clinically Complex D]
[Severe Behavioral B]
[Severe Behavioral C]
[Reduced Physical Functioning C]
[Reduced Physical Functioning D]
[Reduced Physical Functioning E]

* * *

SCREEN Form DOH 695 (4/93) is removed in its entirety and replaced with the following language:

The SCREEN Form DOH 695 shall be maintained by the department, in such form and format as prescribed by the department in compliance with federal law, and shall be accessible at: http://www.health.state.ny.us/forms/

Text of proposed rule and any required statements and analyses may be obtained from: Katherine Ceroalo, DOH, Bureau of House Counsel, Regulatory Affairs Unit, Room 2438, ESP, Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.state.ny.us

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

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

This action was not under consideration at the time this agency's regulatory agenda was submitted.

Regulatory Impact Statement

Statutory Authority:

The statutory authority for the promulgation of these regulations is contained in section of 2803 (2) of the Public Health Law (PHL) which authorizes the State Hospital Review and Planning Council to adopt regulations, subject to the approval of the commissioner. Such regulations implement the purpose and provisions of Article 28 of the Public Health Law to establish minimum standards governing the operation of health care facilities and to establish standards and procedures which federal law and regulation require for nursing homes to qualify as providers pursuant to titles XVIII and XIX of the federal social security act.

Legislative Objectives:

The legislative objective of Article 28 of the Public Health Law includes the protection and promotion of the health of the residents of the state by assuring the efficient provision of health services of the highest quality. An additional objective of PHL § 2803(2)(a)(v) is to ensure that medical facilities provide quality services that meet federal minimum standards.

Needs and Benefits:

The federal Omnibus Budget Reconciliation Act of 1987 (OBRA 87) mandated Pre-Admission Screening Resident Review (PASRR) for all individuals applying to certified Medicaid Residential Health Care Facilities to screen for serious mental illness (MI) and/or mental retardation/developmental disability (MR/DD). The legislative intent was to assure that persons with serious mental illnesses, mental retardation or developmental disabilities who require residential health facility care are appropriately placed to provide for their treatment needs. Each state is responsible for administering its own PASRR program.

The New York State Department of Health PASRR process implements the requirements of CFR 42, Part 483, Subpart C using the SCREEN form referenced in 10 NYCRR Section 400.12. The SCREEN, Department of Health (DOH) form 695 4/93, is used to carry out the initial assessment and identification of individuals with suspected mental illness, mental retardation, and developmental disabilities.

The existence of the SCREEN, DOH form 695 4/93, in regulation means that any time the form is updated a regulatory action is required to remove the old form and insert the new. This is a time consuming process that utilizes State resources and delays implementation of revisions which keep the PASRR process in alignment with federal requirements.

The existing SCREEN form will be removed from the regulation and replaced with language identifying where the most current version of the SCREEN form is located. Outdated language and references to regulations that have expired will be removed.

Costs:

Costs to Regulated Parties:

Implementation and continued compliance with 400.12 will not be affected by the removal of the SCREEN form DOH 695 4/93. The form is currently, and will continue to be, available to users through the DOH Distribution Center. In addition, users may choose to access the form electronically through the DOH website, and the HPN (Health Provider Network).

Costs to the agency and State will be minimized in the future due to an anticipated reduction in utilization of staff resources to promulgate regulatory action when the form is updated. The agency may realize savings by avoiding the potential of penalties related to use of a process that is not in full alignment with federal requirement.

The department will incur minimal cost to post and maintain the form electronically.

However, it is anticipated that the cost will be absorbed by resources already allocated to the existing electronic structure.

Local Government Mandates:

This amended 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 burden will be imposed upon the department, state, or regulated parties. Users opting to print their own forms from the electronic version will incur the cost of supplies and paper, which will result in a savings to the department.

Duplication:

This regulation does not duplicate any other federal or state regulation.

Alternatives:

The State must, by law, implement the federal requirements for preadmission screening and resident review. The benefit of having the most accurate SCREEN form on the website is significant, i.e. accessibility to the public of the most convenient format to document compliance with federal requirements.

Federal Standards:

This amendment implements, but does not exceed any minimum standards of the federal government.

Compliance Schedule:

Federal regulations are now in effect, and this amended regulation will be effective at the earliest date possible, consistent with the State Administrative Procedure Act requirements.

Regulatory Flexibility Analysis

No regulatory flexibility analysis is required. The proposed amendments do not impose an adverse economic impact on small businesses, nor do they impose additional recordkeeping, reporting or other compliance requirements.

Rural Area Flexibility Analysis

The proposed rule will not impose an adverse economic impact on rural facilities as defined within Articles 28, 36, or 40 of the Public Health Law, nor will it impose any additional recordkeeping, reporting and other compliance requirements.

Job Impact Statement

The department has determined that the proposed revision will have no impact on jobs and employment opportunities, other than those associated with retraining requirements for the use of the revised SCREEN form. Initial training is currently required of all individuals that will be using the SCREEN form, and is not considered an additional burden associated with the proposed revisions. Training to update individuals certified to use the old SCREEN form will be provided by the Department's contractor, and is an expected consequence of any updates to the SCREEN form. Individuals that do not obtain training on the updated SCREEN form will lose their certification privileges and therefore, will not be qualified to perform SCREEN assessments.

Department of Labor

EMERGENCY RULE MAKING

New York State Worker Adjustment and Retraining Notification Act (WARN)

I.D. No. LAB-07-09-00013-E

Filing No. 729

Filing Date: 2009-06-26

Effective Date: 2009-06-27

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

Action taken: Addition of Part 921 to Title 12 NYCRR.

Statutory authority: Labor Law, section 860-f

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

Specific reasons underlying the finding of necessity: The effective date of the regulations coincides with the effective date of their authorizing legislation, the New York Worker Adjustment and Retraining Notification (WARN) Act, a new law that becomes effective February 1, 2009. The Act governs the provision of notice to certain employees who will lose employment through plant closings, mass layoffs, or reductions in work hours. The purpose of the authorizing statute is to ensure that the employees are aware of future actions that will affect their employment so that they can take steps to secure new employment, be retrained for more readily available work, and otherwise make arrangements to provide for their needs and those of their families when their employment ends. The law is also intended to ensure the ability of the Department of Labor and its partner, the Workforce Investment Board, to provide Rapid Response services to the affected employees prior to their employment loss. These services include providing employees with information regarding unemployment insurance, job training, and reemployment services. These regulations fill in gaps found in the law in order to more fully inform employees of their obligations and workers of their rights under the law.

The emergency promulgation of these regulations is necessitated by the dramatic job losses currently being suffered within the state, the need to ensure that the notice requirements detailed in the regulation are available to protect workers affected by such job losses, and the needs to provide reemployment services to these workers in order to return them quickly to work. The State's private-sector job count has now dropped for nine consecutive months. Since the State's private sector job count peaked in August 2008, New York has lost 212,200 private sector jobs, erasing more

than half of the 400,000 jobs added during the State's last economic expansion from 2003 to 2008. After seasonal adjustment, New York State's unemployment rate increased from 7.7 percent in April, 2009 to 8.2 percent in May, 2009, its highest level since February 1993. New York City's rate increased from 6.0 percent in November 2008 to 7.0 percent in December 2008 to 9.2 percent in May 2009, the highest since October 1997. Outside of New York City, the unemployment rate was 7.7 percent in May 2009. The number of unemployed state residents increased over the month by 51,000 to 802,400 in May, its highest level since July 1976.

The impact of these job losses on workers, their families, and their communities can be staggering, more so if workers are unaware that plant closings and layoffs are coming. The state WARN Act is designed to give workers time to avoid long periods of unemployment by affording them time to search for new work, retrain for more secure long-term employment, and take advantage of reemployment services which will ensure a quick return to work after their former employment ends. The proposed rules will ensure timely notice to the Department and early intervention of Rapid Response teams in situations involving employment losses so that workers can quickly transition into new employment or retraining following the loss of their jobs. Such activities also avoid or shorten periods of unemployment, thereby reducing employer charges associated with the receipt of unemployment insurance by their former employees. On the other hand, employees need to know of the availability of unemployment insurance benefits following these employment losses since the program is designed to provide an economic safety net to the workers and their families. All efforts that will quickly transition workers into new employment when their former jobs end, or that ensure some continued income during unemployment, will allow workers to continue to make needed purchases such as housing, food, heat and other utilities and to maintain the payment of school and property taxes that support their local community.

Enacting emergency regulations, which will immediately clarify the scope, timing, and content of the notice requirements, supports the goals set forth above and protects the general welfare of the state.

Subject: New York State Worker Adjustment and Retraining Notification Act (WARN).

Purpose: To provide government enforcement and more advance notice to a larger number of workers than under the federal WARN law.

Substance of emergency rule: The proposed rule creates a new section of regulations designated as 12 NYCRR Part 921 entitled ''New York State Worker Adjustment and Retraining Notification Act'' created under Chapter 475 of the Laws of 2008. This Act requires employers of fifty (50) or more employees to provide at least ninety (90) days notice to affected employees and representatives of affected employees, the New York State Department of Labor, and local workforce partners before ordering a plant closing, mass layoff, or reduction in work hours that falls within the employment losses covered by the law. At least twenty-five (25) employees must be affected for the notice requirement to be triggered. The rule contains exceptions to the notice requirement for certain employers who are making good faith efforts to avoid employment losses and have reasonable expectation that these efforts will successfully forestall the plant closing, mass layoff, or reduction in work hours.

Many employers in the State are already subject to the federal WARN Act (29 USC §§ 2101 - 2109 and 20 CFR 639.3). The State WARN Act expands the notice requirements to a larger group of employers and, concomitantly, extends its protections to more employees. The State Act also gives the Commissioner of Labor the authority to enforce the law on behalf of affected employees who did not receive appropriate notice of a plant closing, mass layoff, or covered reduction in work hours from their employer in violation of the law. Labor Law § 860-f(1) states that the Commissioner of Labor ''shall prescribe such rules as may be necessary to carry out this article.''

Subpart 921-1, entitled ''Purpose and Definitions'' sets forth the purpose and defines the terms used in the part. Section 921-1.1(d) defines ''employer'' as ''any business enterprise, whether for-profit or not-for-profit, that employs fifty (50) or more employees within New York State, excluding part-time employees, or fifty (50) or more employees within the state that work in aggregate at least 2,000 hours per week.'' Section 92 1-1.1(a) defines ''affected employee'' as ''an employee who may reasonably be expected to experience an employment loss as the result of a proposed plant closing, mass layoff, relocation, or covered reduction in hours by the employer.''

Subpart 921-2, entitled ''Notice,'' requires covered employers to provide notice to affected employees at least 90 calendar days prior to an event that triggers the notice requirement. This section enumerates the factors that trigger the notice requirement. It further spells out the contents of the notice, how notice is to be served and who must receive notice.

Subpart 921-3, entitled ''Extension or Postponement of Mass Layoff Period'' requires an employer to give additional notice if the triggering event is extended or postponed. Section 921-3.1 states that an ''employer that previously announced and carried out a short-term layoff of six (6) months or less which is being extended beyond six (6) months due to business circumstances (e.g., unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff must give notice required under the Act and this Part as soon as it becomes reasonably foreseeable that an extension is required.'' Section 921-3.2 states that ''if, after notice has been given, an employer decides to postpone a plant closing, mass layoff, or covered reduction in work hours for less than ninety (90) days, additional notice shall be given as soon as possible after the decision to postpone.'' This subpart also prohibits ''rolling notice''.

Subpart 921-4, entitled ''Transfers,'' states that ''notice is not required when an employer offers to transfer an employee to a different site of employment within a reasonable commuting distance with no more than a six (6)-month break in employment, regardless of whether the employee accepts such employment, or when an employer offers to transfer the employee to any other site of employment regardless of distance with no more than a six (6)-month break in employment and the employee accepts within thirty (30) days of the offer or of the closing or layoff, whichever is later.''

Subpart 921-5, entitled ''Temporary Employment,'' states that ''notice is not required if the closing is of a temporary facility, or if the closing or layoff results from the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility, project, or undertaking.'' This subpart also makes clear that the burden of proof is on the employer to show that the job was understood to be temporary.

Subpart 921-6, entitled ''Exceptions,'' provides exceptions to the 90-day notice period for which the employer bears the burden of proof. This subpart includes exceptions for faltering companies, unforeseeable business circumstances, natural disasters, strikes or lockouts, and economic strikers.

Subpart 921-7, entitled ''Enforcement by the Commissioner of Labor,'' describes the administrative procedure followed by the Department when a WARN violation is suspected or alleged. Section 921-7.2 states that an employer who fails to give notice, as required, is subject to a civil penalty of $500 for each day of the employer's violation. Section 921-7.3 states that an employer who fails to give notice is liable to each employee for back pay and the value of any benefits to which the employee would have been entitled. Further this subpart provides for an administrative appeal to the Commissioner and then an appeal under Article 79 of the CPLR.

Subpart 921-8, entitled ''Confidentiality of Information Obtained by the Commissioner of Labor,'' requires that information obtained by the Commissioner through the administration of this Act be maintained as confidential and not be published or open to public inspection.

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. LAB-07-09-00013-EP, Issue of February 2, 2009. The emergency rule will expire August 24, 2009.

Text of rule and any required statements and analyses may be obtained from: Maria Colavito, Esq., New York State Department of Labor, State Office Campus, Building 12, Room 508, Albany, New York 12240, (518) 457-4380, email: nysdol@labor.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

Labor Law § 860 as added by Chapter 475 of the Laws of 2008 sets forth the requirements of the State Worker Adjustment and Retraining Notification Act. Section 860-f states that the Commissioner of Labor shall prescribe such rules as may be necessary to carry out Article 25-A of the Labor Law.

2. Legislative objectives:

Article 25-A establishes the New York State Worker Adjustment and Retraining Notification (WARN) Act which is intended to provide more advance notice to a larger number of workers who are laid off from their jobs than under the federal WARN law. Under the State WARN, companies with at least 50 employees must provide at least 90 days' notice to affected employees and their representatives, the New York Department of Labor, and the local Workforce Investment Board(s) where at least 25 of the employees will suffer an employment loss as a result of a plant closing, mass layoff, or a covered reduction in work hours by their employer. These provisions will allow the Department of Labor's Rapid Response Unit to provide workers with reemployment and retraining services well in advance of their loss of employment. This early intervention is designed to reduce or avoid periods of unemployment, ensure that workers are aware of job placement and retraining services, and, if attempts to transition workers into new employment are unsuccessful, make them aware of the availability of unemployment insurance benefits as an economic safety net for them and their families. Under the Act, the Commissioner of Labor

is required to enforce the law by recovering back wages on behalf of workers whose employers failed to give timely notice and by imposing penalties against such employers.

3. Needs and benefits:

Workers whose employment is affected as a result of plant closings, mass layoffs, or significant reduction of hours require early and adequate notice to find new employment and prepare for their future. As the downturn in the economy increasingly impacts companies large and small, larger numbers of workers are impacted by such events. Over the past quarter, more than 100,000 private sector jobs have been lost in New York State. At the time of this writing, the State's seasonally-adjusted unemployment rate jumped from 6 percent in November to 7 percent in December, hitting a 14-year high and nearly equaling the nationwide 7.2 percent rate. The November-to-December unemployment rate spike was the biggest since the Department of Labor began tracking the state's rate in 1976. Unemployment insurance covers less than half of the unemployed and does not capture any of the long term unemployed, persons in non-covered employment who lost jobs, and others such as new entrants and those reentering the job market. Moreover, certain job sectors in the state, such as manufacturing, continue to decline, signaling a need to prepare workers exiting jobs in this sector with retraining to take other jobs in the economy. All in all, the current economic climate makes it essential to provide the Department with early access to workers who will be losing employment so that they can receive information and assistance that will return them to work as soon as possible following their job loss.

A federal WARN law has existed for a number of years; the law, however, does not apply to small and medium sized businesses; it only applies to firms with at least 100 employees where at least 50 workers have been affected by employment loss. As a result, large numbers of workers are not receiving the benefit of early warning of adverse employment events. If the State WARN law had been in effect in the 2007-2008 fiscal year, between 24,000 to 48,000 additional workers in at least 973 additional firms in New York would have been entitled to receive advance notice of layoffs. Fiscal Policy Institute, ''The Role of Worker Notification in a New Economic Strategy for New York,'' May 19, 2008. At the same time, the federal law does not provide an enforcement mechanism for workers aggrieved by an employer's failure to comply. By contrast, the state statute allows the Commissioner of Labor to enforce the law against violating employers and to collect back wages and benefits and impose penalties as a deterrent to future violations.

Early intervention to assist workers with obtaining new jobs is key to avoiding the economic impact of large-scale employment losses on workers, their families, and their communities. Large-scale job losses addressed by the state law impact employee spending and lead to the general decline of the local economy. This affects businesses that serve the workforce, adversely impacts local sales and property taxes, housing values, and the like. The Department of Labor's Dislocated Worker Unit provides rapid response activities to workers to transition them into new employment as quickly as possible after a job loss. They do this by providing access to and information about dislocated worker re-employment assistance, unemployment insurance benefit information, job training, and other services. The state WARN Act increases the benefit to be derived from these services by giving workers more time to plan their reemployment strategy and more time to obtain retraining (if needed). Moreover, the notice provided to the Department under the state law and rule will include detail that will assist the Department in providing such services including the names of affected workers. Early intervention leading to reemployment also reduces dependence upon unemployment insurance benefits for laid off workers. Although such benefits are a critical economic safety net for workers and their families, reemployment is always preferable and provides greater income to workers. Reemployment reduces UI charges to individual employers and also UI benefit costs. Reduction of UI benefit costs is particularly beneficial to the state at this point in time since the State expects it will have to borrow from the federal government over the course of the upcoming year in order to support benefit payments.

The state Act and regulations also meet a significant need by providing workers with an effective mechanism to seek redress for employer violations of the notice requirements. Currently, the federal WARN law requires aggrieved employees to bring private lawsuits to sue for redress; neither the federal nor state departments of labor have the authority to enforce the federal WARN law. Private actions are a remedy that has been very seldom used over the years given that workers who fail to receive the required federal WARN notice typically lack the resources to sue their employers. Instead, they must focus their efforts and savings on finding new employment to support their families. The State WARN Act and these emergency regulations, however, give the Commissioner of Labor the authority to recover back wages and benefits on behalf of such workers and to impose civil penalties against employers who fail to provide the required WARN notice.

4. Costs:

It is impossible to predict the potential cost of the rule on regulated parties with any certainty. As noted elsewhere in this document, employers with 100 or more employees are already required to provide WARN notice for covered employment losses. The rule extends notification requirements to covered employment losses involving employers with 50 or more employees. There are 9,388 employers in the state who have between 50 and 100 employees. However, these employers will not necessarily be impacted by the rule unless they engage in a plant closing, mass layoff, or reduction in work hours that meets the numerical notice triggers set forth in the Act and the rule. Moreover, the number of employers set forth above is inflated because it includes employers with part-time employees who are not included in the numerical trigger computations referenced in the rule.

For those employers who are subject to the rule, costs of providing notice include preparation of the notice and mailing or delivery of the notice to affected workers, their representatives, the Department, and the local Workforce Investment Boards. The Department has attempted to keep such costs to a minimum by allowing employers to include notices with paychecks or direct deposit statements already provided to employees. Moreover, for those employers in New York already required to provide notice under the federal WARN Act, additional costs will be associated with providing notice to more employees, i.e. nominal postage costs or somewhat higher costs associated with other delivery methods which the employer may elect to use. However, since the notice will be a one page sheet of information, such postage charges should be minimal. The rule would not preclude an employer from utilizing the same notice to meet both state and federal notice requirements so long as the notice includes all information required under the proposed rule.

Apart from employee notice, which must be provided individually to all affected employees, only three other notices (Department of Labor, employee representatives, and local Workforce Investment Boards) are typically required. The only exceptions to this would involve circumstances in which employees may be represented by different unions or where covered employment sites are served by multiple Workforce Investment Boards. Under these circumstances, more than one notice may be required. In the event an employer has already given notice of a mass layoff and extends the duration of that layoff, or in the event an employer has given notice of a plant closing, mass layoff, relocation, or covered reduction in work hours and postpones that action for which notice was given, that employer must also give notice of the extension or postponement as soon as possible. Finally, the rule also requires that an employer, who elects to pay affected employees sixty days of pay and benefits to avoid liability and penalties for failure to provide the required notice, must still provide notice to affected employees notifying them of the potential availability of unemployment insurance and reemployment services. This notice must be provided with the final paycheck or through a separate notice provided at the time of termination. As elsewhere, the rule specifically provides the content of the notice for the convenience of regulated parties.

Employers who wish to assert an exception to the notice requirement will have to provide the Commissioner with documentary and other evidence that they fit one or more of the various exception categories. While such evidence should already exist in many circumstances, e.g. copies of loan or grant applications soliciting capital to continue business operations, other evidence may have to be compiled by the employer in response to an investigation of the employer's failure to provide timely notice, e.g. documentation of the effects of a unexpected, serious downturn in the economy on the employer's business operation.

Employers who fail to comply with the regulation would be subject to penalties, back pay, and other damages, as well as costs associated with their defense. The rule allows the Commissioner to forego damages and penalties where the employer timely makes payment equivalent to sixty days of pay and benefits to employees within three weeks of termination.

Minimal costs may be incurred by labor unions representing employees affected by plant closings, layoffs, and covered reductions in work hours but these costs would typically involve normal representational and information activities. Similarly, costs associated with WIB and Departmental responses to employment losses would be part of regularly funded workforce services and unemployment insurance activities.

5. Paperwork:

In addition to documentation discussed above, the proposal may result in increased paperwork for the Department. The Department's enforcement will require paperwork associated with investigations and, where necessary, hearings to determine violations and to impose appropriate penalties.

Employers charged with violating the law will have to document activities that would support their claim to exemptions from the notice provisions. In the event of appeals, there will be additional paperwork for the Department and employers to reproduce the hearing record and prepare necessary court filings.

6. Local government mandates:

The state WARN law does not apply to any units of local government so the regulations do not affect such entities. A local government may bring a civil action on behalf of any affected employee(s) and may recover attorney's fees from the court.

7. Duplication:

There is no duplication of existing state rules or regulations. There is some overlap of the proposed rules with federal rules governing the federal WARN; the Department has drafted state regulations to be consistent with federal rules to the extent possible, while still meeting the spirit and intent of the more stringent state law.

Rather than create new administrative rules to govern the WARN enforcement process, the Department's current procedural rules for Departmental hearings under 12 NYCRR Part 701 will be used for any administrative hearings conducted under the WARN Act, thereby avoiding duplication in this regard.

8. Alternatives:

The Department believes the promulgation of regulations will ensure that employers and employees impacted by the WARN Act are fully aware of their rights and responsibilities under law. Since the passage of the Act, regulated parties have been contacting the Department in large numbers requesting clarification of many provisions contained in statute, and requesting regulations to address these issues.

The Department has considered a number of other alternatives and, where possible, has selected those that will minimize the adverse impact of the rule. Wherever state and federal WARN laws contain identical requirements, these regulations track federal regulations for the federal WARN which have been in place for more than a decade. Where federal WARN regulations did not address issues pertinent to the state Act, or were inconsistent with the legislative intent behind the state law, the Department adopted different requirements. Rather than requiring a separate state and federal notice for those employers who are subject to both state and federal notice requirements, the Department chose to allow a single form of notice to be used so long as the notice contains all the information elements required under the state regulation. While the Department included a requirement that the WARN notice apprise affected employees of the availability of unemployment insurance and reemployment services, it chose to include in the rule the actual language that may be used by employers for this purpose. The Department also chose to allow delivery of the notice along with other routine contacts with employees such as with their paychecks or direct deposit slips should the employer choose to do so in order to avoid costs associated with separate delivery.

In considering whether an employer's out of state workers would count toward determining the size of the workforce needed to cover an employer under the state WARN Act, the Department noted that federal regulations count workers at foreign sites of employment to determine whether an employer's workforce would subject the employer to the federal Act, even though the foreign sites would not be covered. Since one of the main goals of the WARN Act is to require small and medium-sized businesses in the state to provide advance layoff notices and to extend the Department's rapid response to these additional firms, the Department determined that the regulations should be limited to companies' New York workforce.

The Department also considered alternatives regarding the scope of employee notice under the proposed rule. While the Department could have limited the information contained in the notice to that which is required by federal law, the Department believes it is critical that the notice contain information which employees can use to hasten their return to work following termination of employment. While the Federal WARN rules encourage, but do not require the inclusion of useful information on dislocated worker assistance programs, the Department chose to require the notices to contain information on the potential availability of unemployment insurance and reemployment services. By providing the actual language which employers can use to satisfy this requirement, the Department minimized the impact of the requirement on the regulated community.

The Department also considered the alternative of creating a separate enforcement procedure for the state WARN Act, but instead decided to utilize the administrative procedure currently in place for other administrative hearings conducted by the Department.

9. Federal standards:

Federal standards implementing the federal WARN law exist and are found at 29 USC §§ 2101 - 2109 and 20 CFR 639.3. However, consistent with a less stringent federal law, such regulations provide a shorter period of notice, cover fewer employers, and do not permit administrative enforcement of the law. Since the Commissioner of Labor is required to enforce the Act, additional provisions not contained in the federal WARN regulations were included to ensure that information regarding notice requirements, investigations, and determinations in the state regulations sufficiently inform all affected parties of their rights and obligations and ensure a fair and thorough determination of violations based on the requirements of the Act.

10. Compliance schedule:

The Act takes effect February 1, 2009. Employers planning layoffs or other employment losses subject to the Act on or after February 1st must provide at least 90 days' notice prior to the planned termination date.

Regulatory Flexibility Analysis

1. Effect of rule:

The New York State Worker Adjustment and Retraining Notification (WARN) Act (Chapter of the Laws of 2008, effective February 1, 2009) requires businesses in New York with 50 or more employees to provide notice at least 90 days prior to a plant closing, mass layoff, or covered reduction in work hours where at least 25 of the employees will experience an employment loss from such event. Prior to the Act, only larger firms with at least 100 workers covered by the federal WARN law were required to provide 60 days notice of such events. The state WARN notice must be given to the affected employees and their representatives, the New York Department of Labor, and the local Workforce Investment Board(s) where the employment losses occur. If the State WARN had been in effect during the 2007-2008 fiscal year, between 24,000 to 48,000 additional workers at 973 small and medium-sized firms in New York would have been entitled to receive such advance notice. Such notice would have allowed the Department to deploy Rapid Response staff to assist workers with reemployment and return them quickly to work after their employment loss. It is estimated that at least the same number of smaller and medium-sized businesses will be required to serve WARN notices in 2009, though the number may actually be larger given the current economic climate.

State, local, and tribal governments are not subject to the requirements of the rule.

The WARN notice will enable the Department of Labor to provide workers with access to and information concerning dislocated worker assistance, unemployment benefits, job training, and job opportunities. Most of the workers for these smaller-sized businesses are expected to remain with their employers until their last day of employment in order to continue to receive income.

2. Compliance requirements:

Employers of 50 or more employees, other than part-time employees, will be required to provide a WARN notice to the required parties under the WARN Act containing information set forth in the rule. Such employers must also maintain records to support any exception they may claim from the notice requirement so that they may share this information with the Department should it commence an investigation into the employer's failure to provide timely notice. Employers in New York are already required to maintain accurate and complete payroll records in order to comply with state laws relating to wages and unemployment taxes. These records allow employers to know the size of their workforce and the hours worked by employees in order to determine whether a WARN notice is required. Information regarding employees who will be affected by a plant closing, mass layoff or covered reduction in work hours would have been developed and documented during the planning phase for such actions; therefore necessary information would be readily available to employers to assure compliance with the WARN notice requirements. To the extent that bumping rights might exist in the place of employment, these rights would be established in the employer's collective bargaining agreement with the union representing its workers. The rule acknowledges that information specifically identifying individuals affected by bumping rights may not be available at the time notice is required and simply requires that the notice contain a statement whether bumping rights exist. Finally, the records required to support a WARN exception claim are records that should already be in the employer's possession as, for example, under the faltering company exception where the employer applied for loans or was seeking clients or capital to keep its business open.

3. Professional services:

Employers covered by this rule are not expected to require professional services to comply with the rule. As noted above, information that must be included in the notice to the Department, the Workforce Investment Board, employees, and their representatives is simple, straightforward, and already available to the employer. It includes information regarding the planned action, the individuals who will be impacted, and employer contact information. The Department has included a requirement that the notice contain a statement for employees and their representatives regarding potential eligibility for unemployment insurance benefits and various reemployment services available from the Department. The Department has included the content of this notice in the rule to minimize the impact of the requirement on the employers.

Employers who are cited for a violation of the notice requirement may elect to hire legal counsel to defend such action.

4. Compliance costs:

The adoption of the regulations is expected to result in minimal costs to employers. They will be required to file a WARN notice with the required parties; costs associated with providing the notice will depend upon the number of employees affected and the means of delivery selected by the

employer. The rule permits delivery of the notice to be included with employee pay or direct deposit statements. Notice may also be personally delivered to individual employees at the workplace. Should employers choose to send the notice via first class mail, postage costs would still be minimal as the notice should be no more than a one or two page document. Apart from employee notice, which must be provided individually to all affected employees, notices to the Department of Labor, employee representatives, and local Workforce Investment Boards are required. Again, postage costs associated with such delivery should be nominal. In some circumstances, employees suffering an employment loss may be represented by different unions. In those cases, notices would be required to be sent to each of the different unions. In rare circumstances where places of employment are served by multiple Workforce Investment Boards, more than one notice may be required.

In the event an employer has already given notice of a mass layoff and extends the duration of that layoff, or in the event an employer has given notice of a plant closing, mass layoff, relocation, or covered reduction in work hours and postpones that action for which notice was given, that employer must give notice of the extension or postponement as soon as possible.

Employers who wish to assert an exception to the notice requirement will have to provide the Commissioner with documentary and other evidence that they fit one or more of the various exception categories. While such evidence should already exist in many circumstances, e.g. copies of loan or grant applications soliciting capital to continue business operations, other evidence may have to be compiled by the employer in response to an investigation of the employer's failure to provide timely notice, e.g. documentation of the effects of a unexpected, serious downturn in the economy on the employer's business operation.

Employers who fail to comply with the regulation would be subject to penalties, back pay and other damages, as well as costs associated with their defense. The rule allows the Commissioner to forego damages and penalties where the employer timely makes payment equivalent to sixty days of pay and benefits to employees within three weeks of termination.

Minimal costs may be incurred by labor unions representing employees affected by plant closings, layoffs, and covered reductions in work hours but these costs would typically involve normal representational and information activities. Similarly, costs associated with WIB and Departmental responses to employment losses would be part of regularly funded workforce services and unemployment insurance activities.

5. Economic and technological feasibility:

The adoption of these emergency regulations is not expected to create an undue burden on employers. Larger employers that are required to file a WARN notice with the Department in compliance with the federal WARN law may file a single notice so long as it meets the notice requirements set forth in the regulations. Consistent with current federal WARN regulations, notice must be provided using a method that ensures the timely receipt of notice by the required parties, such as first class mail or personal delivery. While the rules do also permit notice to be provided along with paychecks or direct deposit receipts, they do not permit electronic service of notice as this means is not considered reliable and not all employees may have email accounts.

6. Minimizing adverse impact:

The proposed rule is being promulgated in response to dozens of requests received from employers, their attorneys, workers, and worker representatives seeking clarification and guidance on the scope and requirements of the state WARN statute. The Department has sought to minimize adverse impact upon the regulated community by including provisions in the rule that address the issues and concerns raised in these inquiries. These provisions allow employers to better understand their obligations under the law, and inform employees of their rights under the law. This proposal is intended to assist employers to avoid violations while ensuring that workers receive the notice that will provide them with an opportunity to plan for their futures and support their families following employment termination.

The Department has taken a number of steps to minimize the adverse impact of the rule. Wherever state and federal WARN laws contain identical requirements, these regulations track federal regulations for the federal WARN which have been in place for more than a decade. For those employers who are subject to state and federal notice requirements, the Department will allow a single form of notice to be used so long as the notice contains all the information elements required under the state regulation. Where the Department included a requirement that the WARN notice apprise affected employees of the availability of unemployment insurance and reemployment services, the rule contains the actual language to be used by employers for this purpose. The rule allows delivery of the notice along with paychecks or direct deposit slips should the employer choose to do so, in order to avoid costs associated with separate delivery.

Another example of the Department's effort to minimize adverse impact involves the issue of whether an employer's out of state workers would count toward determining the size of the workforce needed to cover an employer under the state WARN Act. The federal regulations count workers at foreign sites of employment to determine whether an employer's workforce would subject the employer to the federal Act, even though the foreign sites would not be covered. Since one of the main goals of the WARN Act is to require small and medium-sized businesses in the state to provide advance layoff notices and to extend the Department's rapid response to these additional firms, the Department determined that the regulations should be limited to such companies' New York workforce.

The statute and regulation also minimize adverse impact by including exceptions to the notice requirement where the employer can demonstrate that providing the notice would adversely impact the business' efforts to obtain financing, customers, or other financial support that would allow it to remain open or avoid employment losses. Employers who assert this defense to a failure to provide timely notice must be able to demonstrate such efforts to the satisfaction of the Department.

As a whole, the proposed rules ensure the early intervention of the Department in situations involving employment losses so that workers can quickly transition into new employment or retraining following the loss of their jobs. Where such activities lead to reemployment, employers will not face benefit charges associated with the receipt of unemployment insurance by their former employees. If such activities do not serve to avoid unemployment, unemployment insurance benefits will provide an economic safety net to the workers and their families. All efforts which will either keep the workers employed, move them quickly into new employment, or ensure some continued income will assist their communities. Income allows workers to continue to make needed purchases including housing, food, utilities, etc. and to maintain the payment of school and property taxes that support their local community. This income is particularly important in rural communities which often have fewer commercial and industrial businesses to support their tax base and depend upon employed residents to financially support local business and governmental services.

7. Small business and local government participation:

The state WARN Act and the proposed rule does not apply to state, local, or tribal governments.

The Department discussed the WARN Act at the Summer Meeting of the Labor and Employment section of the New York State Bar Association and at the Fall Meeting of the New York Chapter of the Association of Corporate Counsel. Many individuals attending these meetings likely represent small businesses impacted by the rule. In addition, the Department published information on its website, issued press releases, and held press conferences regarding the passage of the state WARN Act. All of these activities prompted numerous contacts from businesses, corporate counsel, and worker representatives identifying areas of the statute which they felt required clarification in the regulations. The Department has attempted to address all these requests for clarification in the rule.

The Department also intends to publish a copy of the rule on its website and to mail copies to organizations representing business and labor for distribution to their constituency. These information activities will be in addition to the formal publication of the proposed rule in the State Register.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

Employers of fifty (50) or more employees in the state who engage in plant closings, mass layoffs, or reductions in work hours covered under the Act and the rule must provide notice of such employment losses under both the statute and the emergency rule. Such employers are located throughout the state and, therefore, all the state's rural areas are affected by the rule.

2. Reporting, recordkeeping and other compliance requirements; other professional services:

Rural area employers of 50 or more employees, other than part-time employees, who have a plant closing, mass layoff, or reduction in work hours covered by the Act will be required to provide a WARN notice to the required parties under the WARN Act containing information set forth in the rule. Such employers must also maintain records to support any exception they may claim from the notice requirement so that they may share this information with the Department should it commence an investigation into the employer's failure to provide timely notice. Employers in New York are already required to maintain accurate and complete payroll records in order to comply with state laws relating to wages and unemployment taxes. These records allow employers to know the size of their workforce and the hours worked by employees in order to determine whether a WARN notice is required. Information regarding employees who will be affected by a plant closing, mass layoff or covered reduction in work hours would have been developed and documented during the planning phase for such actions; therefore necessary information would be readily available to employers to assure compliance with the WARN notice requirements. To the extent that bumping rights might exist in the place of employment, these rights would be established in the employer's

collective bargaining agreement with the union representing its workers. The rule acknowledges that information specifically identifying individuals affected by bumping rights may not be available at the time notice is required and simply requires that the notice contain a statement whether bumping rights exist. Finally, the records required to support a WARN exception claim are records that should already be in the employer's possession as, for example, under the faltering company exception where the employer applied for loans or was seeking clients or capital to keep its business open.

Rural area employers covered by this rule are not expected to require professional services to comply with the rule. As noted above, information that must be included in the notice to the Department, the Workforce Investment Board, employees, and their representatives is simple, straightforward, and already available to the employer. It includes information regarding the planned action, the individuals who will be impacted, and employer contact information. The Department has included a requirement that the notice contain a statement for employees and their representatives regarding potential eligibility for unemployment insurance benefits and various reemployment services available from the Department. The Department has included the content of this notice in the rule to minimize the impact of the requirement on the employers.

Employers who are cited for a violation of the notice requirement may elect to hire legal counsel to defend such action.

3. Costs:

It is impossible to predict the potential cost of the rule on regulated parties with any certainty. As noted elsewhere in this rulemaking, employers with 100 or more employees are already required to provide WARN notice for covered employment losses. The rule extends notification requirements to covered employment losses involving employers with 50 or more employees. There are 9,388 employers in the state who have between 50 and 100 employees. Some of these employers will undoubtedly be located in rural areas. However, these employers will not necessarily be impacted by the rule unless they engage in a plant closing, mass layoff, or reduction in work hours that meets the numerical notice triggers set forth in the Act and the rule. Moreover, the number of employers set forth above is inflated because it includes employers with part-time employees who are not included in the numerical trigger computations referenced in the rule.

For those rural employers who are subject to the rule, costs of providing notice include preparation of the notice and mailing or delivery of the notice to affected workers, their representatives, the Department, and the local Workforce Investment Boards. The Department has attempted to keep such costs to a minimum by allowing employers to include notices with paychecks or direct deposit statements already provided to employees. Moreover, for those employers in New York already required to provide notice under the federal WARN Act, additional costs will be associated with providing notice to more employees, i.e. nominal postage costs or somewhat higher costs associated with other delivery methods which the employer may elect to use. However, since the notice will be a one page sheet of information, such postage charges should be minimal. The rule would not preclude an employer from utilizing the same notice to meet both state and federal notice requirements so long as the notice includes all information required under the proposed rule.

Apart from employee notice, which must be provided individually to all affected employees, only three other notices (Department of Labor, employee representatives, and local Workforce Investment Boards) are typically required. The only exceptions to this would involve circumstances in which employees may be represented by different unions, or where covered employment sites are served by multiple Workforce Investment Boards. Under these circumstances, more than one notice may be required. In the event an employer has already given notice of a mass layoff and extends the duration of that layoff, or in the event an employer has given notice of a plant closing, mass layoff, relocation, or covered reduction in work hours and postpones that action for which notice was given, that employer must also give notice of the extension or postponement as soon as possible. Finally, the rule also requires that an employer, who elects to pay affected employees sixty days of pay and benefits to avoid liability and penalties for failure to provide the required 90-day notice, must provide notice to affected employees notifying them of the potential availability of unemployment insurance and reemployment services. This notice must be provided with the final paycheck or through a separate notice provided at the time of termination. As elsewhere, the rule specifically provides the content of the notice for the convenience of regulated parties.

Employers who wish to assert an exception to the notice requirement will have to provide the Commissioner with documentary and other evidence showing that they fit one or more of the various exception categories. While such evidence should already exist in many circumstances, e.g. copies of loan or grant applications soliciting capital to continue business operations, other evidence may have to be compiled by the employer in response to an investigation of the employer's failure to provide timely notice, e.g. documentation of the effects of a unexpected, serious downturn in the economy on the employer's business operation.

Employers who fail to comply with the regulation would be subject to penalties, back pay and other damages, as well as costs associated with their defense. The rule allows the Commissioner to forego damages and penalties where the employer timely makes payment equivalent to sixty days of pay and benefits to employees within three weeks of termination.

Minimal costs may be incurred by labor unions representing employees affected by plant closings, layoffs, and covered reductions in work hours but these costs would typically involve normal representational and information activities. Similarly, costs associated with WIB and Departmental responses to employment losses would be part of regularly funded workforce services and unemployment insurance activities.

To the extent that early intervention and reemployment services offered by the Department through its Rapid Response activities reduce the number of workers who will ultimately claim unemployment insurance benefits as a result of the adverse employment action, covered employers will see UI charges decrease as a result of the rule.

4. Minimizing adverse impact:

The proposed rule is being promulgated in response to dozens of requests received from employers and attorneys representing them seeking clarification and guidance on the scope and requirements of the statute creating the state WARN program. The Department has sought to minimize adverse impact upon the regulated community by including language in the rule that addresses the issues and concerns raised in these inquiries.

Wherever feasible and desirable, these regulations track federal regulations for the federal WARN which have been in place for more than a decade. The Department will allow a single notice form to be used to satisfy both the state and federal notice requirements so long as the form contains all the information elements required under the state regulation. The Department has also drafted language to be included in the notice informing employees of the availability of Departmental programs and benefits as a service to employers. Service of notice is permitted along with paychecks or direct deposit slips should the employer choose to do so in order to avoid costs associated with separate delivery.

The statute and regulation also minimize adverse impact by including exceptions to the notice requirement where the employer can demonstrate that providing the notice would adversely impact the business' efforts to obtain financing, customers, or other financial support that would allow it to remain open or avoid employment losses. Employers who assert this defense to a failure to provide timely notice must be able to demonstrate such efforts to the satisfaction of the Department.

As a whole, the proposed rules ensure the early intervention of the Department in situations involving employment losses in rural areas so that workers can quickly transition into new employment or retraining following the loss of their jobs. Where such activities lead to reemployment, employers will not face benefit charges associated with the receipt of unemployment insurance by their former employees. If such activities do not serve to avoid unemployment, unemployment insurance benefits will provide an economic safety net to the workers and their families. All efforts which will either keep the workers employed, move them quickly into new employment, or ensure some continued income will assist their rural area communities. Income allows workers to continue to make needed purchases including housing, food, utilities, etc. and to maintain the payment of school and property taxes that support their local community. This income is particularly important in rural communities which often have fewer commercial and industrial businesses to support their tax base and depend upon employed residents to financially support local business and governmental services.

5. Rural area participation:

The Department discussed the WARN Act at the Summer Meeting of the Labor and Employment section of the New York State Bar Association and at the Fall Meeting of the New York Chapter of the State Association of Corporate Counsel. Individuals attending these events likely represent some clients located in rural areas. In addition, the Department published information on its website, issued press releases, and held press conferences regarding the passage of the state WARN Act. These efforts resulted in the Department receiving dozens of phone calls and written requests for clarification of various aspects of the law from all over the state. The Department has attempted to address all these requests for clarification in the emergency rule.

The Department intends to publish a copy of the rule on its website and to mail copies to organizations representing business and labor in all areas of the state, including rural areas, for their comment and distribution to their constituency, including those located in rural areas. These information activities will be in addition to the formal publication of the rule in the State Register.

Job Impact Statement

This rule requires notice to be provided to employees and other parties 90 days prior to covered plant closings, mass layoffs, relocations, and reductions in work hours at sites of employment subject to the rule. It is appar-

ent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment.

Assessment of Public Comment

The Department received comments from approximately five (5) interested parties during the comment period which commenced upon publication of the Notice of Proposed/Emergency Rule Making in the State Register on February 18, 2009. The parties requested clarification and/or modification to different sections of the rule. All comments received during the comment period were reviewed and assessed in accordance with the provisions of the State Administrative Procedure Act. The issues raised by these comments and descriptions of the changes made to the rule as a result of such comments are found below.

COMMENT: One (1) commenter suggested moving the language contained in § 921-1.1(d)(4) to Subpart 921-2 and clarifying that notice is not required merely because of a sale of a facility, but only where employees are going to be laid off.

RESPONSE: The Department adopted these suggestions, moved the language to Paragraph 921-2.1(b) and clarified that notice is not required merely because a sale of a business, but is required where employees suffer an employment loss.

COMMENT: One (1) commenter asked whether notice is required when all or part of a business is sold and the employee is offered employment by the buyer where there is less than a six-month break in employment.

RESPONSE: Notice is required in this situation, provided the numerical employee threshold is met, as the buyer is a third party and there is no way to know within the first ninety days, whether or not the buyer is indeed going to make the offer before there is a six-month break in employment.

COMMENT: One (1) commenter asked how the ''hours of work'' are calculated § 921-1.1(e)(1)(iii).

RESPONSE: The hours of work referenced are the average number of hours per week for the 90-day period prior to the employment loss.

COMMENT: One (1) commenter asked if part-time employees are counted in the number of employees suffering an employment loss under this provision.

RESPONSE: In determining if a numerical employee threshold is met, and consistent with the federal WARN Act, part-time employees are not counted in the number of employees suffering an employment loss.

COMMENT: One (1) commenter requested clarification on how the six-month period is calculated under § 921-1.1(e)(1)(iii).

RESPONSE: The Department has added language to clarify this provision. The six-month period is a period where employment is reduced by more than fifty-percent (50%) during each of six (6) consecutive months.

COMMENT: One (1) commenter asked whether the covered reductions in hours must affect 25 employees and 33% of the employees at a single site or 250 employees, regardless if they constitute 33% of the employment at the site.

RESPONSE: Yes, the 25/33% threshold does apply to the covered reduction in hours. The language has been updated to clarify this requirement.

COMMENT: One (1) commenter suggested deleting the last part of the last sentence in § 921-1.1(e)(2) and § 921-4.1(d) because ''constructive discharge'' is not defined.

RESPONSE: The Department has rejected this suggestion. Where an employee suffers a constructive discharge, an employment loss has occurred and, therefore, notice is required. A constructive discharge occurs, for example, when there are substantial changes to the terms and conditions of employment that an employee is effectively forced to retire or quit. The Department has chosen to not define the term ''constructive discharge'', as there is a substantial body of case law, upon which the Department will rely to illustrate the term.

COMMENT: One (1) commenter suggests that this § 921-1.1(k) should be amended to reflect the fact that at least 25 employees must be affected for a relocation to be covered by the WARN Act.

RESPONSE: The Department agrees with this suggestion and has updated the definition of relocation.

COMMENT: One (1) commenter requested clarification as to whether, under § 921-1.1(m), non-contiguous sites in the same geographic area that do not share the same staff or operational purposes will be considered a single-site of employment.

RESPONSE: The Department has clarified the definition of ''single-site'' of employment to exclude non-contiguous sites in the same geographic area that do not share the same staff or operational purpose. However, if the employees at one location physically travel to the second location in a support capacity to the operations at the second site, they may be considered a single-site. For example where employees at a maintenance facility travel to an operational site for maintenance purposes, and therefore supports the operations at the operational site, a single-site of employment could be found.

COMMENT: One (1) commenter suggested there is not statutory authority for requiring notice of a plant closing.

RESPONSE: The Department disagrees with this comment. Where there is a plant closing, there is an employment loss and therefore notice is required.

COMMENT: One (1) commenter asked for clarification on whether or not the Department will allow for employee waivers of the WARN Act notice requirement under § 921-2.1.

RESPONSE: The Department will not allow waivers because of the great potential for abuse; however, it is important to note that the Department is not discouraging employers from negotiating and offering payments to its employees. Voluntary payments not required by a severance plan are credited toward an employer's liability.

COMMENT: One (1) commenter asked whether the 90-day look ahead-look back period under § 921-2.1(b)(1) is used for all employment losses, or only where two or more employment losses, on their own, do not trigger the notice requirement.

RESPONSE: The federal WARN regulations only require the 90-day look ahead look behind period where there are two ore more employment losses that do not individually trigger the notice requirement. The Department has modified the language in § 921-2.1(b)(2)(i) to be consistent with the federal regulations.

COMMENT: One (1) commenter suggested deleting 921-2.1(e) because it is beyond the scope of authority of the NYS WARN Act.

RESPONSE: This comment is inaccurate. The Department has changed the language to read exactly as it is written in the NYS WARN Act § 860-i.

COMMENT: Two (2) commenters suggested that the Department allow for electronic notice to affected employees with the burden of proof on the employer to show the electronic communication was received.

RESPONSE: The Department agrees with these comments and has added language under § 921-2.2 allowing for electronic notice to employees. The burden of proof is on the employer to show the email was received and opened by each affected employee.

COMMENT: One (1) commenter requested clarification that this requirement constitutes compliance wit the federal requirement of notification to the chief elected official found in 20 CFR 639.7.

RESPONSE: No, notice to the local Workforce Investment Board does not satisfy the federal WARN requirement of providing notice to the chief elected official found in 20 CFR 639.7.

COMMENT(A): Two (2) commenters suggested that the names of affected employees are not necessary for the WARN notice as such information should remain confidential.

COMMENT(B): Three (3) commenters are concerned that § 921-8.1(c) allows for the release of the names of affected employees if requested under FOIL.

RESPONSE (A AND B): The Department recognizes these concerns and has added language as an assurance that the names of individuals will not be released. Even without this additional language, the names are protected under the Personal Privacy Protection Law and falls within the invasion of personal privacy exception found in the Freedom of Information Law.

COMMENT: Two (2) commenters suggested the language in § 921-2.3(b)(5) and § 921-2.3(c)(7) is confusing and may encourage employees to apply for UI before they are eligible.

RESPONSE: The Department has modified the language to make it clear that an employee is not eligible for unemployment insurance benefits until they are no longer employed.

COMMENT: One (1) commenter requested clarification as to how a reasonable commuting distance under § 921-4.1(b) will be measured.

RESPONSE: The description of a ''reasonable commuting distance'' has been moved to the definition section. The definition is consistent with how a reasonable commuting distance is determined under New York State unemployment insurance case law. This definition of reasonable commuting distance allows for its consistent application with the meaning found in the federal WARN regulations (20 CFR 639.5(b)(1),(2) and (3)) and the meaning given to it by the Internal Revenue Service at 26 CFR 1.119-1(d)(4), i.e., consideration should be give to the following factors: geographic accessibility of the work place, the quality of the roads, customarily available transportation and the usual travel time.

COMMENT: One (1) commenter questioned the statutory authority for allowing the application of the faltering company (§ 921-6.2) and unforeseeable business circumstances (§ 921-6.3) exceptions to mass layoffs, relocations and covered reductions in work hours; and the statutory authority for allowing the application of the natural disaster (§ 921-6.4). exception to relocations and covered reductions in work hours.

RESPONSE: The faltering company, unforeseeable business circumstances and natural disaster exceptions apply to all employment losses covered under the WARN Act. With regard to the exceptions, the regulations do not distinguish between plant closings, mass layoffs, relocations or covered reductions in work hours - there is no practical reason to do so.

While the statute is not explicit on this point, mass layoffs, relocations and covered reductions in work hours can all result from unforeseeable business circumstances and natural disasters, and can occur even after a faltering company has taken steps to avoid these results through attempts to raise capital etc.

The intent of the WARN Act is to require employers to provide 90 days notice to affected employees of all employment losses, with very limited exceptions. The Department has taken steps to ensure that employers do not use these exceptions hastily. Under those exceptions, it is the burden of the employer to establish each component of the exception applies in their situation. The stringent requirements of proof for this exception are not easily met. The Department will apply all exceptions narrowly.

COMMENT: One (1) commenter asked if ''sound and reasonable business judgment'' mentioned in § 921-6.3(b) is similar to the ''commercially reasonable business judgment'' used in the federal WARN regulations.

RESPONSE: The Department agrees and has adopted the commercially reasonable business judgment to be consistent with the federal WARN regulations.

COMMENT: One (1) commenter suggested that an employer should be able to avoid a civil penalty under § 921-7.2(a) if it pays its employees the required amount within three weeks of the date of the triggering event, not within three weeks of the date the employer orders the event.

RESPONSE: As this was the intent of the NYS WARN Act, the Department has modified language to clarify this intent.

COMMENT: One (1) commenter suggested the calculations for average and final rates of compensation found in § 921-7.3 are insufficient for employees who are not compensated hourly.

RESPONSE: The Department has added language to make the calculation more suitable for salary employees. The compensation received will be divided by the number of days the employee was in active employment status.

COMMENT: One (1) commenter suggested the calculations for average and final rates of compensation found in § 921-7.3 are insufficient for employees that earn commission.

RESPONSE: The Department has added language to make the calculation more suitable for commission employees. The compensation received will be divided by the number of days the employee was in active employment status. Further, if the final rate of pay is significantly higher than the average rate of pay, the Department has discretion to use the average rate of compensation, rather than the final.

COMMENT: One (1) commenter noted that § 921-7.5 does not provide for recourse beyond the Appellate Division and that the Department should seek to enforce such judgments where the employer appeals to the Court of Appeals.

RESPONSE: The Department has added language to clarify that the Department will enforce a final determination made by the State of New York Court of Appeals, not just the Appellate Divisions of the Supreme Court.

Office of Mental Health

EMERGENCY RULE MAKING

Comprehensive Outpatient Programs

I.D. No. OMH-22-09-00013-E
Filing No. 749
Filing Date: 2009-06-29
Effective Date: 2009-06-29

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

Action taken: Amendment of Part 592 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 31.04, 43.02; Social Services Law, sections 364 and 364-a

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

Specific reasons underlying the finding of necessity: The amendments are a result of the enacted State Budget and the Financial Management Plan.

Subject: Comprehensive Outpatient Programs.

Purpose: To adjust the Medicaid reimbursement associated with certain outpatient programs regulated by OMH.

Text of emergency rule: 1. Subdivision (b) of Section 592.5 of Title 14 NYCRR is amended to read as follows:

(b) If the local governmental unit shall not have designated such providers of service or entered into agreements ensuring that comprehensive outpatient mental health services shall be available within the county, the Commissioner of Mental Health may directly designate providers of services as comprehensive outpatient providers pursuant to this Part.

(1) Any provider of service designated by the [commissioner] *Commissioner* shall meet the requirements of this Part. Any comprehensive outpatient program which fails at any time to meet the requirements set forth in [paragraph] *paragraphs* [(a)](1), (2) or (3) *of subdivision (a)* of this section shall have its supplemental medical assistance payments suspended until such time as the program substantially meets such requirements, as determined by the [commissioner] *Commissioner*. For purposes of this subdivision, a program which has failed to receive a renewed operating certificate of at least six months duration [as set forth in section 588.13(g)(4) of this Title] may be deemed to have met such requirement if it has submitted a plan of corrective action that has been approved by the [commissioner] *Commissioner* or his/her designee; has been visited to verify implementation of such plan; and has been issued an operating certificate of at least six months in duration.

(2) Prior to designating such providers, the [commissioner] *Commissioner* shall notify the local governmental unit of his*/her* intention to directly designate comprehensive outpatient programs within such county and shall provide the local governmental unit with an opportunity to respond.

2. Subdivisions (c), (d), (e), and (k) are amended and a new subdivision (l) is added to section 592.8 of Title 14 NYCRR as follows:

(c) The supplemental rate, for providers with at least one Level I comprehensive outpatient program, shall be calculated as follows:

(1) For outpatient mental health programs *other than clinics* which are designated Level I providers pursuant to this Part, grants received for the local fiscal year ended in 2001 for upstate and Long Island based providers, and for the local fiscal year ended in 2001 for New York City based providers, *as well as grants received for subsequent fiscal years which have been identified for inclusion by the Office of Mental Health* shall be added, if applicable, to the annualized eligible deficit approved in the calculation of the previous supplemental rate. *Effective January 1, 2009, the amount of the grant funding utilized in calculation of the rate supplement was reduced as follows:*

(i) if the rate supplement effective immediately prior to January 1, 2009 was less than $100 per visit, no reduction to the grant funding used in the rate calculation will be made;

(ii) if the rate supplement immediately prior to January 1, 2009 was greater than or equal to $100 but less than $250, a reduction of 3 percent shall be made to the grant funding used in the rate calculation, provided, however, that the resultant rate calculated effective January 1, 2009 in accordance with paragraph (3) of this subdivision shall not result in a rate lower than the highest rate for the providers described in subparagraph (i) of this paragraph;

(iii) if the rate supplement immediately prior to January 1, 2009 was greater than or equal to $250 but less than $300, a reduction of 5 percent shall be made to the grant funding used in the rate calculation, provided, however, that the resultant rate calculated effective January 1, 2009 in accordance with paragraph (3) of this subdivision shall not result in a rate lower than the highest rate for the providers described in subparagraph (ii) of this paragraph;

(iv) if the rate supplement immediately prior to January 1, 2009 was greater than or equal to $300, a reduction shall be made to the grant funding used in the rate calculation that is the greater of 10 percent of the grant funding or an amount necessary to reduce the rate supplement to $300, provided, however, that the resultant rate calculated effective January 1, 2009 in accordance with paragraph (3) of this subdivision shall not result in a rate lower than the highest rate for the providers described in subparagraph (iii) of this paragraph;

(2) For clinic treatment programs which are designated Level I

programs pursuant to this Part, grants received for the local fiscal year ended in 2001 for upstate and Long Island based providers, and for the local fiscal year ended in 2001 for New York City based providers, as well as grants received for subsequent fiscal years which have been identified for inclusion by the Office of Mental Health shall be added, if applicable, to the annualized eligible deficit approved in the calculation of the previous supplemental rate. Effective January 1, 2009, the amount of the grant funding utilized in calculation of the rate supplement was reduced as follows:

(i) if the rate supplement effective immediately prior to January 1, 2009 was less than $100 per visit, no reduction to the grant funding used in the rate calculation will be made;

(ii) if the rate supplement immediately prior to January 1, 2009 was greater than or equal to $100 but less than $250, a reduction of 3 percent shall be made to the grant funding used in the rate calculation, provided, however, that the resultant rate calculated effective January 1, 2009 in accordance with paragraph (3) of this subdivision shall not result in a rate lower than the highest rate for the providers described in subparagraph (i) of this paragraph;

(iii) if the rate supplement immediately prior to January 1, 2009 was greater than or equal to $250 but less than $300, a reduction of 5 percent shall be made to the grant funding used in the rate calculation, provided, however, that the resultant rate calculated effective January 1, 2009 in accordance with paragraph (3) of this subdivision shall not result in a rate lower than the highest rate for the providers described in subparagraph (ii) of this paragraph;

(iv) if the rate supplement immediately prior to January 1, 2009 was greater than or equal to $300, a reduction shall be made to the grant funding used in the rate calculation that is the greater of 10 percent of the grant funding or an amount necessary to reduce the rate supplement to $300, provided, however, that the resultant rate calculated effective January 1, 2009 in accordance with paragraph (3) of this subdivision shall not result in a rate lower than the highest rate for the providers described in subparagraph (iii) of this paragraph.

(3) The sum of grants received by the provider, as recalculated under paragraph (1) *or (2)* of this subdivision *as applicable*, shall be divided by the projected number of annual visits to the provider's designated programs. The projected number of annual visits shall be calculated as follows:

(i) *For outpatient programs other than clinic treatment programs, the* [The] combined total of outpatient mental health program visits reimbursed by medical assistance for each provider shall be calculated by using the average number of visits provided in the most recent three fiscal years multiplied by 90.9 percent. These visits shall include all visits reimbursed by Medicaid, including visits partially reimbursed by Medicare. Providers, who in the three most recent fiscal years earned less than the full Medicaid supplemental rate on visits partially reimbursed by Medicare, shall have the projected number of annual visits adjusted to reflect the lower supplemental revenue earned on Medicare/Medicaid dually eligible visits. The calculation of the Medicare/Medicaid adjusted visits shall be based on the percentage of Medicaid supplemental payments earned on Medicare/Medicaid dually eligible visits provided during the three most recent fiscal years and the number of dually eligible visits provided in the three most recent fiscal years. The Medicare/Medicaid adjusted visits are calculated by multiplying the projected annual volume of dually eligible visits by the average percentage of Medicaid supplemental revenue earned on these visits during the three most recent fiscal years.

(ii) *For clinic treatment programs, the combined total of outpatient mental health program visits reimbursed by medical assistance for each provider shall be calculated by using the average number of visits provided in the most recent three fiscal years multiplied by 90.9 percent, for rates effective prior to July 1, 2008. For rates effective July 1, 2008 and January 1, 2009, the higher of the number of paid visits from calendar year 2007 or the average number of paid visits provided in the calendar years 2005 - 2007, multiplied by 90.9 percent, shall be used. These visits shall include all visits reimbursed by Medicaid, including visits partially reimbursed by Medicare, and those for which payment has been made or approved by a Medicaid managed care organization. Providers, who in the three most recent fiscal years earned less than the full Medicaid supplemental rate on visits partially reimbursed by Medicare, shall have the projected number of annual visits adjusted to reflect the lower supplemental revenue earned on Medicare/Medicaid dually eligible visits. The calculation of the Medicare/Medicaid adjusted visits shall be based on the percentage of Medicaid supplemental payments earned on Medicare/Medicaid dually eligible visits provided during the three most recent fiscal years and the number of dually eligible visits provided in the three most recent fiscal years. The Medicare/Medicaid adjusted visits are calculated by multiplying the projected annual volume of dually eligible visits by the average percentage of Medicaid supplemental revenue earned on these visits during the three most recent fiscal years.*

(iii) Rates calculated pursuant to [subparagraph] *subparagraphs* (i) *or (ii)* of this paragraph are subject to appeal by the local governmental unit, or by the provider with the approval of the local governmental unit. Appeals pursuant to this paragraph shall be made within [one year] *120 days* after receipt of initial notification of the most recent supplemental reimbursement rate calculation. However, under no circumstances may the recalculated rate be higher than the rate cap set forth in paragraph [(3)] *(4)* of this subdivision.

[(3)]*(4)* The supplemental rate for a provider operating a licensed outpatient mental health program shall be the lesser of the rate calculated in paragraph [(2)] *(3)* of this subdivision or a rate cap as established by the Commissioner of Mental Health and approved by the Director of the Division of the Budget. *Effective January 1, 2009, the rate cap that shall be used in the calculation of the supplemental rate shall be $300.00 per visit.*

(d) Excess supplemental payments shall be recouped as follows:

(1) For outpatient programs other than clinic treatment programs, in [In] order to recoup supplemental payments for those visits in excess of 110 percent of the number of visits used to calculate the supplemental rate for a Level I provider, the Office of Mental Health may adjust the supplemental rates for the period in which the excess visits occurred. Such adjustments shall be made no more frequently than quarterly during the year. *The Office of Mental Health may recover such funds by requesting that the Department of Health withhold such funds from future Medicaid payments to the provider.*

(2) For clinic treatment programs, in order to recoup supplemental payments for those visits provided prior to July 1, 2008 in excess of 110 percent of the number of visits used to calculate the supplemental rate for a Level I program, the Office of Mental Health may adjust the supplemental rates for the period in which the excess visits occurred. Such adjustments shall be made no more frequently than quarterly during the year. The Office of Mental Health may recover such funds by requesting that the Department of Health withhold such funds from future Medicaid payments to the provider. For services provided July 1, 2008, and thereafter, the Office of Mental Health will no longer recover supplemental payments in excess of 110 percent of the number of visits used to calculate the supplemental rate of a Level I provider.

(e) [The following visit categories] *Collateral and group collateral visits for all clinic and continuing day treatment programs licensed pursuant to Part 587 of the Title* shall not be eligible for Medicaid supplemental rate, and shall be excluded from the Medicaid visit volume used to calculate rate adjustments for designated programs operated by general hospitals[:

(1) collateral and home visits for day treatment and continuing treatment programs licensed pursuant to Part 585 of this Title;

(2) collateral and group collateral visits for clinic programs licensed pursuant to Part 585 of this Title; and

(3) collateral and group collateral visits for all clinic and continuing day treatment programs licensed pursuant to Part 587 of this Title].

(k) *When a clinic treatment provider opens a new clinic program location, the supplemental rate shall be re-calculated to include the volume of Medicaid visits projected for the location in the provider's approved Application for Prior Approval Review. The funding used in calculation of the supplemental rate shall be increased by the amount calculated by multiplying the increased volume of Medicaid visits*

from the approved Application for Prior Approval Review by the Level II COPS supplement for the applicable program/region.

(l) Each general hospital, as defined by article 28 of the Public Health Law, which is operated by the New York City Health and Hospitals Corporation, which received a grant pursuant to section 41.47 of the Mental Hygiene Law for the local fiscal year ending in 1989*,* shall be designated as a Level I comprehensive outpatient program for all outpatient programs licensed pursuant to Part 587 of this Title. For purposes of calculating supplemental Medicaid rates pursuant to this Part, all such programs in the New York City Health and Hospitals Corporation are combined for a uniform supplemental Medical Assistance program rate.

3. Subdivision (b) is amended and a new subdivision (c) is added to section 592.10 of Title 14 NYCRR as follows:

(b) In order to recoup supplemental payments for those visits in excess of the number of visits used to calculate the supplemental rate under this section, the Office of Mental Health may adjust the supplemental rates for the period in which the excess visits occurred. Such adjustments shall be made no more frequently than quarterly during the year. *Effective with all services rendered July 1, 2008 and thereafter, no such recoupment of supplemental payments to clinic treatment programs shall be made.*

(c) Any program eligible to receive supplemental medical assistance reimbursement as a Level II Comprehensive Outpatient Program which fails at any time to meet the requirements set forth in this section shall have its supplemental medical assistance payments suspended until such time as the program substantially meets such requirements, as determined by the Commissioner. For purposes of this subdivision, a program which has failed to receive a renewed operating certificate of at least six months duration may be deemed to have met such requirement if it has submitted a plan of corrective action that has been approved by the Commissioner or his/her designee; has been visited to verify implementation of such plan; and has been issued an operating certificate of at least six months in duration.

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. OMH-22-09-00013-P, Issue of June 3, 2009. The emergency rule will expire August 27, 2009.

Text of rule and any required statements and analyses may be obtained from: Joyce Donohue, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: cocbjdd@omh.state.ny.us

Regulatory Impact Statement

1. Statutory authority: Subdivision (b) of Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

Subdivision (a) of Section 31.04 of the Mental Hygiene Law empowers the Commissioner to issue regulations setting standards for licensed programs for the provision of services for persons with mental illness.

Subdivision (a) of Section 43.02 of the Mental Hygiene Law grants the Commissioner the power to set rates for facilities licensed under Article 31 of the Mental Hygiene Law.

Sections 364 and 364-a of the Social Services Law give the Office of Mental Health responsibility for establishing and maintaining standards for care and services eligible for Medicaid reimbursement in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of Health.

Chapter 54 of the Laws of 2008 provides adjusted funding appropriations in support of amendments to Part 592. (Section 1, State Agencies, Office of Mental Health, lines 18-29 on page 393, lines 46-50 on page 403, and lines 1-7 on page 404.)

2. Legislative objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs. The amendments to Part 592 adjust the Medicaid reimbursement associated with certain outpatient treatment programs regulated by the Office of Mental Health (OMH) consistent with the enacted 2008-2009 state budget. These changes will be targeted in such a way as to provide general fiscal relief to providers most in need, as well as improve the quality and availability of services, all while recognizing the serious fiscal condition of the State. They will also equalize reimbursement fees for clinic treatment within geographic areas, as approved by the Division of Budget.

3. Needs and benefits: The enacted state budget for State Fiscal Year 2008-2009 provided for an approximately $5 million increase for clinic treatment programs in State share of Medicaid ($10 million gross Medicaid funds) through adjustments to the Medicaid fee supplements calculated in accordance with Part 592. This funding would have had a full annual value of $10 million in State share of Medicaid ($20 million in gross Medicaid funds) but was adjusted to reduce the highest rate supplements. This resulted in an increase of $4.39 million State share of Medicaid funds, with a full annual value of $7.54 million State share of Medicaid funds ($15.07 million in gross Medicaid funds).

Clinic treatment programs provide outpatient treatment designed to reduce symptoms, improve functioning and provide ongoing support to adults and children admitted to the program with a diagnosis of a designated mental illness. This rulemaking includes provisions to increase certain programs to a minimum payment level and removes the requirement to recover monies generated by paid visits in excess of 110 percent of the visits used to calculate the rate supplement effective July 1, 2008.

As a result of other actions proposed in the Financial Management Plan, there will be reductions made to the highest rate supplements. Providers with current rate supplements above $300 will have the funding used in the supplement calculation reduced by 10 percent; providers with rate supplements of $250-$300 will have the funding used in the supplement calculation reduced by 5 percent; and providers with rate supplements of $100-$250 will have the funding used in the supplement calculation reduced by 3 percent. OMH's intent in these proposals is to begin to move the reimbursement for mental health clinic services toward a more uniform reimbursement system, by raising the reimbursement amounts for the lowest paid providers and lowering the reimbursement amounts for the providers with the highest rates.

4. Costs:

a) Costs to regulated parties: The reduction of funding used in the calculation of the rate supplements will impact approximately one third or 102 of the approximately 317 providers currently receiving such a supplement. The impact of these reductions totals $4.93 million in gross Medicaid funds for the providers impacted by the reductions.

b) Costs to State and Local government and the agency: Medicaid services typically involve both a State and County share in matching the Federal portion. The annual State share of these outpatient initiatives is $7.54 million, with no impact to local governments, after netting the increase to provide general fiscal relief to providers most in need, with reductions to those providers with the highest rate supplements. The increase is being implemented after the local share Medicaid cap is already in place. (The local share Medicaid cap was an initiative included in the enacted State budget for 2005-2006, under which the state pays for increases in the local share of Medicaid after January 1, 2006.) The proposed changes to increase certain programs to a minimum payment level and remove the requirement to recover monies generated by paid visits in excess of 110 percent of the visits used to calculate the rate supplement were implemented effective July 1, 2008. The proposed changes to reduce the funding used in the calculation of the rate supplements for the providers with the highest supplement rates was effective January 1, 2009.

5. Local government mandates: These regulatory amendments will not involve or result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

6. Paperwork: This rule should not substantially increase the paperwork requirements of affected providers.

7. Duplication: These regulatory amendments do not duplicate existing State or federal requirements.

8. Alternatives: The application of the increased funding for certain outpatient programs consistent with the 2008-2009 enacted State budget resulted in increases for certain clinic treatment programs, and

allows clinic treatment programs to retain additional Medicaid rate supplement payments, should they increase the number of services they provide. The determination of the methodology to implement the supplement changes and the decision to allow clinic treatment programs to retain additional Medicaid rate supplement payments were made in consultation with the New York State Division of Budget, to be consistent with the enacted State budget. This allows for the continued strengthening and expansion of the ambulatory mental health system and supports a movement away from more expensive modalities of treatment. However, to address the serious fiscal condition of New York State, the Special Session of the Legislature included reductions in rate payments. The only alternative to this rulemaking would have been inaction, which would have resulted in the agency not being in compliance with the enacted State budget and amendments made as a result of the Legislative Special Session. Therefore that alternative was not considered.

9. Federal standards: The regulatory amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: This rulemaking will be effective upon adoption.

Regulatory Flexibility Analysis

The rulemaking will adjust the Medicaid reimbursement associated with certain outpatient treatment programs regulated by the Office of Mental Health. These changes are consistent with the 2008-09 enacted State budget. The changes are targeted in such a way as to provide general fiscal relief to providers most in need and improve the quality and availability of services, all while recognizing the serious fiscal condition of the State. The amendments equalize reimbursement fees for clinic treatment within geographic areas, as approved by the Division of Budget, and allow for movement toward establishing a more uniform reimbursement system by raising the reimbursement amounts for the lowest paid providers and lowering the reimbursement amounts for providers with the highest rates. There will be no adverse economic impact on small businesses or local governments, therefore, a regulatory flexibility analysis is not submitted with this notice.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this notice because the rulemaking, which serves to adjust Medicaid reimbursement associated with certain outpatient treatment providers, will not impose any adverse economic impact on rural areas. These changes are consistent with the 2008-09 enacted State budget. The changes are targeted in such a way as to provide general fiscal relief to providers most in need and improve the quality and availability of services, all while recognizing the serious fiscal condition of the State. The amendments equalize reimbursement fees for clinic treatment within geographic areas, as approved by the Division of Budget, and allow for movement toward establishing a more uniform reimbursement system by raising the reimbursement amounts for the lowest paid providers and lowering the reimbursement amounts for providers with the highest rates.

Job Impact Statement

A Job Impact Statement is not submitted with this notice because the rulemaking adjusts the Medicaid reimbursement associated with certain outpatient treatment programs regulated by the Office of Mental Health. These changes are consistent with the 2008-09 enacted State budget. There will be no adverse impact on jobs and employment opportunities.

EMERGENCY RULE MAKING

Medical Assistance Payment for Outpatient Programs

I.D. No. OMH-28-09-00008-E

Filing No. 748

Filing Date: 2009-06-29

Effective Date: 2009-06-29

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

Action taken: Amendment of Part 588 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 31.04, 43.02; and Social Services Law, sections 364 and 364-a

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

Specific reasons underlying the finding of necessity: The restoration of funds for continuing day treatment programs licensed solely under Article 31 of the Mental Hygiene Law are a result of the enacted 2009-2010 State budget. The reimbursement methodology restructuring was effective April 1, 2009.

Subject: Medical Assistance Payment for Outpatient Programs.

Purpose: To modify current reimbursement methodology for continuing day treatment programs and restore funding for certain programs.

Substance of emergency rule: This rule will amend the provisions of 14 NYCRR Part 588, Medical Assistance Payment for Outpatient Programs that pertain to the reimbursement of continuing day treatment (CDT) programs. This rulemaking implements a change in the reimbursement methodology for services provided on or after April 1, 2009, and restores funding, effective April 1, 2009, for CDT programs licensed solely under Article 31 of the Mental Hygiene Law to the level which existed on December 31, 2008.

Overview

This rulemaking adjusts the current methodology for reimbursing CDT programs for persons with serious mental illness from one based upon hours of attendance in program to one utilizing a modified threshold approach for services provided on or after April 1, 2009. In addition, a reduction in fees paid to CDT programs for services provided on or after January 1, 2009, and prior to April 1, 2009, had been implemented. This rulemaking restores the funding, effective April 1, 2009, for CDT programs licensed solely under Article 31 to the December 31, 2008 level.

Requirements

Under current regulations, reimbursement methodology is based upon the number of hours of an individual's attendance. The rulemaking utilizes a modified threshold fee for reimbursement. Under a threshold fee, a provider receives a fee when an individual receives a reimbursable service, regardless of the duration of the visit. The regulation establishes a methodology in which there are two threshold fees-a half-day fee and a full-day fee. A half-day fee will be paid when an individual attends the program for at least 2 hours and receives at least one reimbursable service. A full-day fee will be paid when an individual attends the program for at least 4 hours and receives at least three reimbursable services. This modified threshold fee approach was delayed until April 1, 2009, to allow providers sufficient time to implement the system changes necessary to operate under the new reimbursement methodology.

Current regulations call for a different fee to be paid to providers based upon the number of hours of attendance, up to five hours, so long as at least one reimbursable service is provided during the visit. On average, individuals receive between two and three services during a five-hour visit. This regulation ensures that individuals will receive at least this level of service across all providers.

The rulemaking also continues the current pass-through methodology for reimbursing the capital costs of continuing day treatment programs operated by general hospitals, which allows for an add-on to the individual provider's fee based upon the capital costs incurred by the provider. The regulation also specifies that outpatient mental health services provided by general hospitals are not considered specialty services within the meaning of the Public Health Law.

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 September 26, 2009.

Text of rule and any required statements and analyses may be obtained from: Joyce Donohue, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: cocbjdd@omh.state.ny.us

Regulatory Impact Statement

1. Statutory authority: Subdivision (b) of Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

Subdivision (a) of Section 31.04 of the Mental Hygiene Law empowers the Commissioner to issue regulations setting standards for licensed programs for the provision of services for persons with mental illness.

Subdivision (a) of Section 43.02 of the Mental Hygiene Law grants the Commissioner the power to set rates for facilities licensed under Article 31 of the Mental Hygiene Law.

Sections 364 and 364-a of the Social Services Law give the Office of Mental Health responsibility for establishing and maintaining standards for care and services eligible for Medicaid reimbursement in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of Health.

2. Legislative objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding

mental health programs. The amendments to Part 588 are consistent with the goals and objectives of the Medicaid program to ensure that individuals with serious mental illness receive effective services to address their illness and that providers receive adequate reimbursement to pay for such care.

3. Needs and benefits: This rulemaking modifies the current methodology for reimbursing continuing day treatment programs for persons with serious mental illness from one based upon hours of attendance in program to one utilizing a modified threshold approach. The reimbursement methodology existing under current regulation continued until April 1, 2009, in order to allow providers sufficient time to implement the systems changes necessary to operate under the new reimbursement methodology. For services provided on or after April 1, 2009, providers will be reimbursed using a modified threshold fee.

Under a threshold fee, a provider receives a fee when an individual receives a reimbursable service, regardless of the duration of the visit. This rulemaking establishes a methodology in which there are two threshold fees-a half-day fee and a full-day fee. A half-day fee will be paid when an individual attends the program for at least 2 hours, and receives at least one reimbursable service. A full-day fee will be paid when an individual attends the program for at least 4 hours, and receives at least three reimbursable services.

Current regulations call for a different fee to be paid to providers based upon the number of hours of attendance, up to five hours, so long as at least one reimbursable service is provided during the visit. On average, individuals receive between two and three services during a five-hour visit. This rulemaking ensures that individuals will receive at least this level of service across all providers.

The rulemaking also continues the current methodology for reimbursing the capital costs of continuing day treatment programs operated by general hospitals, and specifies that outpatient mental health services provided by general hospitals are not considered specialty services within the meaning of the Public Health Law.

Under a previous rulemaking, a modest rate cut had been effectuated to continuing day treatment programs licensed under Article 31 for services provided on or after January 1, 2009, and prior to April 1, 2009. This rulemaking restores the funding for continuing day treatment programs licensed solely under Article 31 to the December 31, 2008 level, effective April 1, 2009.

4. Costs:

a) Costs to regulated parties: There are no costs to regulated parties as a result of this rulemaking.

b) Costs to State and Local government and the agency: There is an estimated $4 million Medicaid cost ($2 million of which is the State share) to restore the reductions to continuing day treatment programs licensed solely under Article 31 for the period April 1, 2009 through June 30, 2010. The funds necessary for this restoration were included in the enacted 2009-2010 State budget.

5. Local government mandates: These regulatory amendments will not involve or result in any additional imposition of duties or responsibilities upon county, city, town, village, school, or fire districts.

6. Paperwork: This rule should not substantially increase the paperwork requirements of affected providers.

7. Duplication: These regulatory amendments do not duplicate existing State or federal requirements.

8. Alternatives: The Office of Mental Health has proposed changes to the reimbursement methodology from hourly fees to half day/full day reimbursement, with a minimum number of services required for each reimbursement category. This simplifies the billing structure, while ensuring that individuals receive at least a standard level of services across providers. Consideration was given to not changing to a half day/full day reimbursement methodology, but the proposed methodology was determined to be preferable to the existing methodology due to the fact that it is less confusing, and more amenable to the establishment of a uniform standard for services. In addition, the rulemaking restores funding for continuing day treatment programs licensed solely under Article 31 to the level which existed on December 31, 2008. The only alternative would have been to not restore that funding, but to do so would be contrary to the enacted 2009-2010 State Budget.

9. Federal standards: The regulatory amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: This rulemaking is effective upon adoption.

Regulatory Flexibility Analysis

The rulemaking adjusts the methodology for reimbursement of continuing day treatment programs from one based upon hours of attendance in program to one utilizing a modified threshold approach for services provided on or after April 1, 2009. This modified threshold fee approach was delayed until April 1, 2009, to allow providers sufficient time to implement the system changes necessary to operate under the new reimbursement methodology. The rulemaking also restores the funding for continuing day treatment programs licensed solely under Article 31 to the level which existed on December 31, 2008, effective April 1, 2009, as per the enacted 2009-2010 State Budget. For these reasons, a regulatory flexibility analysis is not necessary and is, therefore, not being submitted with this rulemaking.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this notice because the rulemaking will not impose any adverse economic impact on rural areas. The rulemaking merely adjusts the methodology for reimbursement of continuing day treatment programs from one based upon hours of attendance in program to one utilizing a modified threshold approach for services provided on or after April 1, 2009. This modified threshold fee approach was delayed until April 1, 2009, to allow providers sufficient time to implement the system changes necessary to operate under the new reimbursement methodology. The rulemaking also restores the funding for continuing day treatment programs licensed solely under Article 31 to the level which existed on December 31, 2008, effective April 1, 2009. This restoration is consistent with the enacted 2009-2010 State Budget.

Job Impact Statement

A Job Impact Statement is not submitted with this notice because the rulemaking merely adjusts the methodology for reimbursement of continuing day treatment programs from one based upon hours of attendance in program to one utilizing a modified threshold approach for services provided on or after April 1, 2009. This modified threshold fee approach was delayed until April 1, 2009, to allow providers sufficient time to implement the system changes necessary to operate under the new reimbursement methodology. The rulemaking also restores the funding effective April 1, 2009, for continuing day treatment programs licensed solely under Article 31 to the level which existed on December 31, 2008, as per the enacted 2009-2010 State Budget. There will be no adverse impact on jobs and employment opportunities as a result of this rulemaking.

Office of Mental Retardation and Developmental Disabilities

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Appeals Process Pursuant to Chapter 508, Laws of 2008

I.D. No. MRD-28-09-00014-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 630 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.09(b) and 13.37

Subject: Appeals process pursuant to Chapter 508, Laws of 2008.

Purpose: To establish an appeals process to use when a person is determined not to to be in need of OMRDD adult services.

Text of proposed rule: Add a new Part 630 to 14 NYCRR as follows:

PART 630

ELIGIBILITY DETERMINATIONS FOR CHILDREN WHO ARE AGING OUT

Section 630.1 Applicability.

This Part applies to the New York State Office of Mental Retardation and Developmental Disabilities (OMRDD) and its local administrative offices, the Developmental Disabilities Services Offices (DDSOs). It does not apply to voluntary agencies or private providers of services.

Section 630.2 Background.

(a) Subparagraph 4402(1)(b)(5) of the New York State Education Law and subdivision 398(13) of the New York State Social Services Law require that the committee on special education, multidisciplinary team or social services official send a report to OMRDD (if certain conditions are met) about a child who will be aging out and who may need adult services in the OMRDD system. A person ages out when he or she is no longer able to receive services in the educational system, foster care system or other system for children because of his or her age (usually related to the person attaining 21 years of age).

(b) Section 13.37 of the New York State Mental Hygiene Law sets forth the responsibilities of OMRDD related to the planning and referral process for children who are aging out.

(1) Once a report about the child has been received by OMRDD, OMRDD is charged with reviewing the report to determine whether the child will likely need adult services, including evaluating the child if necessary.

(2) If OMRDD determines that the child will not require adult services, OMRDD is required to notify the child's parent or guardian and referring entity. Chapter 508 of the Laws of 2008 amended Section 13.37 MHL to establish that if this determination is not acceptable to the child's parent or guardian, he or she may appeal the determination.

(c) Subdivisions 1.03(21) and (22) of the Mental Hygiene Law define ''mental retardation'' and ''developmental disability.''

Section 630.3. Determination of eligibility for services in the OMRDD system.

OMRDD shall determine whether individuals meet the criteria established in subdivision 1.03(22) of the Mental Hygiene Law and are therefore eligible to receive services in the OMRDD system. OMRDD determinations shall be in accordance with the eligibility determination process described in ''Eligibility for OMRDD Services'' which is inserted into this Part in section 630.5.

Section 630.4. Procedures for children aging out.

(a) For the purposes of meeting the requirements of Section 13.37 MHL, a child is determined to ''likely need adult services'' if the child is eligible for services in the OMRDD system.

(b) Upon receiving a report submitted pursuant to subparagraph 4402(1)(b)(5) of the Education Law or subdivision 398(13) of the Social Services Law, OMRDD shall determine whether the child is eligible for services utilizing the eligibility determination process described in ''Eligibility for OMRDD Services'' (section 630.5).

(c) If OMRDD determines that the child is not eligible for services, it shall notify the child's parent or guardian and the committee on special education, multidisciplinary team or social services official which submitted the report.

(1) Such notice shall state the reasons for the determination and may recommend a state agency which may be responsible for determining and recommending adult services.

(2) If the determination is not acceptable to the child's parent or guardian, he or she may appeal the determination in accordance with the eligibility determination process described in ''Eligibility for OMRDD Services.'' The notice to the parent or guardian shall also describe the procedures for appealing the determination.

Section 630.5. ''Eligibility for OMRDD Services.''

The following policy of OMRDD entitled ''Eligibility for OMRDD Services'' is hereby inserted into this Part.

New York State Office of Mental Retardation
and Developmental Disabilities

ELIGIBILITY FOR OMRDD SERVICES

Important Facts

Revised December, 2008

OMRDD, through its local Developmental Disabilities Services Offices (DDSO), determines whether a person has a developmental disability and is eligible for OMRDD funded services. This fact sheet describes the Three-Step process used by OMRDD to make an eligibility determination of developmental disability.

NOTE: A determination of developmental disability does not mean the person is eligible for all OMRDD funded services. Some OMRDD funded services have additional eligibility criteria. For example, Intermediate Care Facilities, and Home and Community Based (HCBS) waiver programs include an additional level of care determination, and individuals are eligible for HCBS services only when they reside in appropriate living arrangements. These and other additional criteria for eligibility of specific OMRDD services are not reviewed through this process.

ELIGIBILITY DETERMINATION PROCESS

Eligibility Request

An OMRDD Transmittal Form must accompany all requests submitted to the DDSO for eligibility determinations. The Transmittal Form includes the name of the person, the name of the person's representative, and relevant contact information. Documentation of the person's developmental disability must also be included as part of the eligibility request.

1st Step Review

DDSO staff review the eligibility request for completeness and share the information with other staff designated by the Director, as necessary. After this review, the DDSO notifies the person in writing that:

(a) Eligibility or provisional eligibility has been determined; or

(b) The request is incomplete and requires additional documentation; or

(c) The request has been forwarded for a 2nd Step Review.

2nd Step Review

DDSO clinicians designated by the DDSO Director conduct a 2nd Step Review of the eligibility request forwarded by the 1st Step Review, along with any additional documentation provided by the person. If these clinicians require additional medical information, psychological test results, or historical documentation, the person is notified in writing of the type of information needed and the date by which it must be submitted to the DDSO.

Following the 2nd Step Review, the DDSO provides the person with written notification of its determination. If the person is found ineligible for OMRDD services because he or she does not have a developmental disability, the letter shall offer the person and his or her representative the opportunity to:

(a) Meet with DDSO staff to discuss the determination and documentation reviewed; and

(b) Request a 3rd Step Review; and

(c) Request a Medicaid Fair Hearing in cases where Medicaid funded services are sought.

Note that a Notice of Decision informing the person of his or her right to request a Medicaid fair hearing is sent only when the Transmittal Form indicates that the person is interested in receiving Medicaid funded OMRDD services if determined eligible. If the person has not indicated Medicaid funded services, no fair hearing is offered and the decision of the DDSO is final.

The person may choose one, two or all three of the above options. If a fair hearing is requested, a 3rd Step Review will automatically be conducted.

3rd Step Review

3rd Step Eligibility Determination Committees established by OMRDD in NYC and Albany conduct the 3rd Step Reviews. Committee members include licensed practitioners who are not directly involved in the determinations made at the 1st and 2nd Step Reviews. The Committee reviews the submitted eligibility request and any additional documentation provided by or on behalf of the person. The Committee forwards its recommendations to the DDSO Eligibility Coordinator. The DDSO Director or designated staff person considers the 3rd Step recommendations and informs the person of any change in the DDSO's determination. 3rd Step Reviews will be made prior to any fair hearing date.

Text of proposed rule and any required statements and analyses may be obtained from: Barbara Brundage, Director of Regulatory Affairs, OMRDD, 44 Holland Avenue, Albany, New York 12229, (518) 474-1830, email: barbara.brundage@omr.state.ny.us

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

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

Additional matter required by statute: Pursuant to the requirements of SEQRA and 14 NYCRR Part 602, OMRDD has on file a Negative Declaration with respect to this Action. OMRDD has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

Regulatory Impact Statement

1. Statutory Authority:

a. The OMRDD's authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

b. Section 13.37 of the New York State Mental Hygiene Law establishes OMRDD's responsibilities in relation to the planning and referral of children with developmental disabilities for adult services. The statute requires OMRDD to determine whether a child referred to OMRDD through the planning and referral processes will likely need adult services.

2. Legislative Objectives: The amendments further the legislative objectives embodied in Mental Hygiene Law Section 13.37. Chapter 508 of the Laws of 2008 amended Section 13.37 to establish that if OMRDD determines that a child will not require adult services, and that if the determination is not acceptable to the child's parent or guardian, the parent or guardian ''may appeal the determination pursuant to regulations adopted by the commissioner.''

3. Needs and Benefits: Section 13.37 of the Mental Hygiene Law (MHL) sets forth OMRDD's responsibility to review referrals from school and social services districts to determine whether a child aging out of those systems is likely to need adult services. These responsibilities date back to 1983 with several subsequent amendments including those added by Chapter 600, Laws of 1994.

Section 13.37 MHL requires that OMRDD provide written notification to the child's parents or guardian, and referring entity, of the reasons for

its determination that the child does not need adult services in the OMRDD system. Chapter 508 of the Laws of 2008 adds a requirement to Section 13.37 MHL that the parent or guardian may appeal the determination if it is not acceptable to him or her pursuant to regulations adopted by OMRDD. The addition of new Part 630 of Title 14 NYCRR by this proposed regulation assists in the implementation of the new statutory requirement.

OMRDD has longstanding policy documents which establish a process for determining whether an individual has a developmental disability as defined by the Mental Hygiene Law and is therefore eligible for services in the OMRDD system. The pre-existing OMRDD process already includes procedures that can be utilized to appeal a determination that an individual does not have a developmental disability. A determination by OMRDD that a person does not have a developmental disability according to the legal definition is tantamount to a determination that the child does not require (or need) adult services, which is the standard established by Section 13.37 MHL.

In order to implement the new statute, OMRDD will continue to adhere to the procedures outlined in its longstanding policy documents regarding eligibility for services, which include appeals procedures. The new regulations therefore merely require adherence to these policies.

4. Costs:

a. Costs to the Agency and the State and its local governments: There will be no new costs to OMRDD or the State. OMRDD already has appeals processes pursuant to longstanding agency procedures regarding eligibility for services, which include appeals processes.

There will be no new costs to local governments as a result of the proposed amendments.

b. Costs to private regulated parties: There will be no new costs to private regulated parties.

5. Local Government Mandates: There are no new mandates on local governmental units or any other special districts.

6. Paperwork: There will no new paperwork for private regulated parties or local government. There will be no new paperwork for OMRDD as it will merely continue to adhere to its longstanding procedures regarding eligibility for services.

7. Duplication: None.

8. Alternatives: OMRDD considered using general references in the regulations in lieu of including the actual text of its procedures for determining eligibility. However, OMRDD decided that it would be more valuable and clearer to regulated parties to include the existing eligibility determination process in the actual regulatory text.

9. Federal Standards: The proposed amendments do not exceed any minimum standards of the Federal government.

10. Compliance Schedule: OMRDD will continue to adhere to its longstanding policies regarding eligibility. Further, compliance was required by emergency regulations effective January 14, 2009 and April 15, 2009. No new compliance activities are necessary.

Regulatory Flexibility Analysis

1. Effect on small businesses: These amendments apply only to OMRDD and do not apply to small businesses that operate under the auspices of OMRDD.

The amendments result in no new costs for local government.

2. Compliance requirements: OMRDD will continue to adhere to its longstanding policies regarding eligibility, which include procedures to appeal a determination that a person is not eligible for services in the OMRDD system. The amendments contain no compliance requirements for small businesses or local governments.

3. Professional services: No additional professional services are required as a result of these amendments. The amendments will have no impact on the professional service needs of small businesses or local governments.

4. Compliance costs: There are no costs to local governments or to small businesses.

5. Economic and technological feasibility: The amendments do not impose on regulated parties the use of any technological processes.

6. Minimizing adverse impact: These amendments impose no adverse economic impact on local governments or small businesses.

7. Small business and local government participation: Providers, individuals receiving services and family members were involved in the original development of OMRDD's longstanding policies and procedures regarding eligibility for services and have been familiar with the processes for years, including the appeals procedures. OMRDD also notified all providers about the promulgation of emergency regulations which contain the same provisions.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for the proposed amendments has not been submitted. OMRDD has determined that the amendments will not impose any adverse impact, reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The amendments concern procedures for appealing a determination that a person aging out does not need services in the OMRDD system. No compliance activities are imposed on providers.

Job Impact Statement

A Job Impact Statement is not submitted because the amendment will not present an adverse impact on existing jobs or employment opportunities. The amendments concern procedures for appealing a determination that a person aging out does not need services in the OMRDD system. No compliance activities are imposed on providers and no new procedures will be utilized by OMRDD. OMRDD will continue to adhere to its longstanding policies and procedures related to determining eligibility for services in the OMRDD system.

Division of Parole

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

The Placement of Level 2 and Level 3 Sex Offenders in the Community Upon Their Release from State Prison

I.D. No. PAR-28-09-00005-P

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

Proposed Action: Addition of section 8002.7 to Title 9 NYCRR.

Statutory authority: Executive Law, section 259(2); and L. 2008, ch. 568, section 2

Subject: The placement of Level 2 and Level 3 sex offenders in the community upon their release from State prison.

Purpose: To provide guidance to Division of Parole staff for the placement of Level 2 and Level 3 sex offenders in the community.

Text of proposed rule: A new section 8002.7 is added to Title 9 New York Codes, Rules & Regulations

Section 8002.7. Guidelines and Procedures for the Placement of Certain Sex Offenders in the Community

(a) Chapter 568 of the laws of 2008 requires the Division of Parole (DOP), the Division of Probation and Correctional Alternatives (DPCA), and the Office of Temporary and Disability Assistance (OTDA) to promulgate regulations to provide guidance concerning the placement and/or approval of housing for certain sex offenders.

(b) The State has previously enacted laws concerning sex offenders, including the Sex Offender Registration Act, the Sex Offender Management and Treatment Act, the Electronic Security and Targeting of On-Line Predators Act (e-STOP) and laws restricting certain sex offenders who are under probation or parole supervision from entering school grounds. Chapter 568 of the laws of 2008 continues the State's efforts in the area of sex offender management and specifically in the area of the placement and housing of sex offenders. Sex offender management, and the placement and housing of sex offenders, are areas that have been, and will continue to be, matters addressed by the State. These regulations further the State's coordinated and comprehensive policies in these areas, and are intended to provide further guidance to relevant state and local agencies in applying the State's approach.

(c) Public safety is a primary concern and these regulations are intended to better protect children, vulnerable populations and the general public from sex offenders. The State's coordinated and comprehensive approach also recognizes the necessity to provide emergency shelter to individuals in need, including those who are sex offenders, and the importance of stable housing and support in allowing offenders to live in and re-enter the community and become law-abiding and productive citizens. These regulations are based upon, and are intended to further best practices and effective strategies to achieve these goals.

(d) In implementing this statute and the State's comprehensive approach, DOP, DPCA, OTDA and the Division of Criminal Justice Services' Office of Sex Offender Management (DCJS/OSOM) recognize that:

(i) Not all sex offenders are equally dangerous. Some sex offenders may pose a high risk of committing a new sexual crime; others may pose only a low risk.

(ii) All reasonable efforts should be made in to avoid an ill-advised concentration of sex offenders in certain neighborhoods and localities. What constitutes such a concentration will depend on many factors, and

may vary depending on housing availability and the locality and community. In addition, it is sometimes safer to house sex offenders together. Law enforcement, probation, and parole officers may more effectively monitor offenders, and service providers may more easily offer transitional services to offenders in these congregate settings. Further, some social service officials and departments rely on congregate housing for sex offenders who seek emergency shelter because of the limited, or lack of other housing options available for this population. All public officials who are responsible for finding or approving housing for sex offenders should recognize that an over-concentration of sex offenders may create risks and burdens on the surrounding community, and that their responsibility is to make judgments that are reasonable under the circumstances.

(iii) All social service districts are required by statute, regulation and directive to arrange temporary housing assistance for eligible homeless individuals, including those who are sex offenders.

(iv) To reduce recidivism it is important that offenders be able to re-enter society and become productive and law-abiding citizens whenever possible. A stable living situation and access to employment and support services are important factors that can help offenders to successfully re-enter society.

(v) Maintaining and/or finding suitable housing for sex offenders is an enormous challenge that impacts all areas of the State. Offenders reside in all regions of the state and may have long-established residences in their respective communities. Even offenders who do not have such long-established relationships are often discharged from prison to the community where they previously lived. As a result, it is not appropriate for any one community or county to bear an inappropriate burden in housing sex offenders because another community has attempted to shift its responsibility for those offenders onto other areas of the State. The proliferation of local ordinances imposing residency restrictions upon sex offenders, while well-intentioned, have made it more challenging for the State and local authorities to address the difficulties in finding secure and appropriate housing for sex offenders.

(vi) Decisions as to the housing and supervision of sex offenders should take into account all relevant factors and no one factor will necessarily be dispositive. These factors should include, but not be limited to, the factors enumerated in the statute, the risk posed by the offender, the nature of the underlying offense, whether housing offenders together or apart is safer and more feasible, the most effective method to supervise and provide services to offenders, and the availability of appropriate housing, employment, treatment and support.

(e) Division of Parole staff shall apply the following guidelines to the placement of a sex offender in the community upon their release from a New York State correctional facility when such offender has been designated as a Level 2 or Level 3 offender pursuant to the New York State Sex Offender Registration Act, i.e., Correction Law article 6-C. These guidelines recognize that the placement of a sex offender within a community is a considerable undertaking given the shortage of affordable housing in many communities, State law restricting the location of certain sex offenders in the community and the movement of individuals subject to registration as a sex offender. Under these guidelines, the Division of Parole, through a community preparation process of investigation, seeks to enhance public safety and facilitate the successful re-entry of offenders into their communities and effect the successful placement of eligible offenders into residential services that can address identified needs.

(f) Persons to be released on presumptive release, parole, conditional release or post-release supervision.

(1) Division of Parole staff will investigate the proposed release program of all Level 2 and Level 3 sex offenders being released to the Division's jurisdiction from any New York State correctional facility with the objective of attaining the optimum residential placement that is available within the community proposed by the offender. As appropriate, such investigation shall include but not be limited to, consideration being given to the following factors:

(i) the sex offender's level of risk;

(ii) the applicability of Executive Law section 259-c(14);

(iii) the proximity of entities with vulnerable populations;

(iv) the location of other sex offenders required to register under the sex offender registration act, specifically whether there is a concentration of registered sex offenders in a certain residential area or municipality;

(v) the number, if any, of registered sex offenders at a particular property;

(vi) accessibility to family members, friends or other supportive services, including, but not limited to, locally available sex offender treatment programs with preference for placement of such individuals into programs that have demonstrated effectiveness in reducing sex offender recidivism and increasing public safety; and

(vii) the availability of permanent, stable housing in order to reduce the likelihood that such offenders will be transient.

(2) The approval of a residential placement by Division of Parole staff will take into consideration:

(i) all relevant case information, including but not limited to the offender's criminal history and present crime of conviction;

(ii) the investigation factors set forth in subparagraphs (i) through (vi) of paragraph (1) of subdivision (f) of this section, and

(iii) if applicable, the structure of the supervision plan and the services to be afforded through either the Division of Parole or some other entity within the offender's community.

(iv) no one factor shall be considered dispositive.

(g) Persons released on presumptive release, parole, conditional release, post-release supervision or by maximum expiration of sentence where notice was provided to a local social services district pursuant to Executive Law section 259-c(17).

(1) When the Division of Parole is notified by a local social services district of its determination that a Level 2 or Level 3 sex offender for whom a notice pursuant to Executive Law section 259-c(17) was received by such district is in immediate need of shelter, and an investigation and approval of the potential residential placement by the Division of Parole is required, the Division shall investigate the district's proposed placement in accord with the factors set forth in subdivision (f) of this section. Following such investigation, the Division of Parole shall provide the local social services district with the results of its investigation and its approval or disapproval of the proposed placement.

(2) When an investigation by the Division of Parole is impracticable within the timeframe necessary for the local social services district to meet the immediate housing need of the offender, such investigation shall be completed within 48 hours of the Division's receipt of the local social services district's notice that such residential placement was necessary.

(i) The Division of Parole's investigation of a local social services district's immediate residential placement determination will take into consideration the factors set forth in subdivision (f) of this section. Following such investigation, the Division of Parole shall provide the local social services district with the results of its investigation and its approval or disapproval of the proposed placement.

Text of proposed rule and any required statements and analyses may be obtained from: Terrence X. Tracy, Counsel, New York State Division of Parole, 97 Central Avenue, Albany, New York, 12206, (518) 473-5671, email: tracy@parole.state.ny.us

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

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

Regulatory Impact Statement

1. Statutory Authority: Section 259(2) of the New York Executive Law authorizes the Chairman of the New York State Board of Parole to promulgate regulations as are necessary and proper for the efficient operation of the Division of Parole. In addition, pursuant to section 2 of Chapter 568 of the Laws of 2008, the Chairman of the Board of Parole shall promulgate rules and regulations which shall include guidelines and procedures on the placement of sex offenders designated as Level 2 or Level 3 offenders pursuant to Article 6-C of the Correction Law.

2. Legislative Objectives: Chapter 568 of the Laws of 2008 requires the Division of Parole to promulgate regulations that provide guidance concerning the placement and/or approval of housing for certain sex offenders who are to be released from State prison. The proposed regulations provide Division of Parole staff with guidance in the process associated with the placement of Level 2 and Level 3 sex offenders within the community that is consistent with Chapter 568 of the Laws of 2008.

3. Needs and Benefits: The State has previously enacted laws concerning sex offenders, including the Sex Offender Registration Act, the Sex Offender Management and Treatment Act, the Electronic Security and Targeting of On-Line Predators Act (e-STOP) and laws restricting certain sex offenders who are under probation or parole supervision from entering school grounds. Chapter 568 of the Laws of 2008 continues the State's efforts in the area of sex offender management and specifically in the areas of the placement and housing of sex offenders. Accordingly, these regulations further the State's coordinated and comprehensive policies in these areas, and are intended to provide further guidance to relevant State and local agencies in applying the State's plan. Public safety is a primary concern and these regulations are intended to better protect children, other vulnerable populations and the general public from sex offenders. However, the State's coordinated and comprehensive approach also recognizes the necessity and obligation to provide emergency shelter to individuals in need, including those who are sex offenders, and the importance of stable housing and support in allowing offenders to re-enter the community and become law-abiding and productive citizens. Decisions as to the housing and supervision of sex offenders should take into account all relevant factors with no one factor being dispositive. These factors should include, but not be limited to, the factors enumerated in

Chapter 568 of the Laws of 2008, the risk posed by the offender, the nature of the underlying offense, whether housing offenders together or apart is safer and more feasible, the most effective method to supervise and provide services to offenders, and the availability of appropriate housing, employment and support. Therefore, these regulations are based upon and are intended to further best practices and effective strategies to achieve these goals. These practices and goals are in accord with the Division of Parole's established protocols for reintegrating this type of offender into the community following their release from State prison in a manner that is consistent with public safety.

4. Costs: The proposed rule will not impose any costs.

5. Local Government Mandates: The proposed rule does not impose any new mandates or legal obligation on local governments.

6. Paperwork: The proposed rule will require only minimal paperwork between the local social services districts and the Division of Parole regarding their request for and the Division's conducting of an investigation into a shelter placement proposed by the local social services district for a level two or level three sex offender. Pursuant to existing law, Executive Law § 259-c(17), the Division of Parole has utilized for a number of years a one page document in order to notify a local social services district of a sex offender's release from State prison where it appears such offender is likely to access local social services for homeless persons. The Division will continue to use this form and will utilize a new form to be utilized when an offender is being released after serving their entire sentence. Finally, a one page document has been developed by the Division of Parole in concert with the Office of Temporary and Disability Assistance to be utilized by local social services districts for the purpose of requesting the Division of Parole to investigate a proposed emergency shelter placement and approve the same following its investigation.

7. Duplication: The proposed rule will not duplicate any existing State or federal rule.

8. Alternatives: The alternative presented by the proposed rule was regarded as the most efficient method for implementing Chapter 568 of the Laws of 2008. In addition, the language of the proposed alternative parallels the language of the enabling legislation so as to minimize confusion and foster uniformity between the legislation and this proposed rule.

9. Federal Standards: There are no federal standards governing the subject matter of the proposed rule.

10. Compliance Schedule: The proposed rule will be published through a notice of proposed rule making to be followed by a 45 day comment period. The proposed rule shall be effective upon the filing of a notice of adoption.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Business and Local Government is not being submitted with this notice, for the 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. Currently, local social service districts are responsible for providing emergency housing to individuals who are released from State prison and are undomiciled. In addition, the Division of Parole and the Department of Correctional Services provide notification to local social service districts when it appears that an individual who is to be released to the county services by that district will be in need of emergency housing services. The proposed rule change will not impose upon local social service districts any obligation that did not previously exist for providing residents with emergency housing services. In addition, the modified paperwork associated with the notifications about offenders who are to be release that will exchanged between the Division of Parole and local social service districts will have no adverse impact upon small businesses or local governments, nor do the rule changes impose any reporting, record keeping or other compliance requirements upon local businesses or local governments.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this notice, for the proposed rule will have no adverse impact upon rural areas, nor does the proposed rule impose any reporting, record keeping or other compliance requirements upon rural areas.

Job Impact Statement

A Job Impact Statement is not being submitted with this notice, for the proposed rule will have no adverse impact upon jobs or employment opportunities, nor does the proposed rule impose any reporting, record keeping or other compliance requirements upon employers.

Public Service Commission

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Commission Adopted an Order to Grant in Whole or in Part on an Emergency Basis, the Transfer of Property Petition

I.D. No. PSC-28-09-00003-EP

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

Proposed Action: The Public Service Commission adopted an order approving, on an emergency basis, the petition on behalf of Central Hudson Gas & Electric Corporation seeking Commission approval pursuant to Public Service Law Section 70 to transfer certain property and property rights valued at approximately $26,000 and located in the City of Poughkeepsie and Town of Lloyd to Poughkeepsie-Highland Railroad Bridge Co. Inc./DBA Walkway Over The Hudson and Town of Lloyd, which is required to receive federal funding to complete the Walkway Over the Hudson project and contribute to the economic development and general welfare of Central Hudson's service territory.

Statutory authority: Public Service Law, section 70

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

Specific reasons underlying the finding of necessity: The Public Service Commission approved the petition on behalf of Central Hudson Gas & Electric Corporation seeking Commission approval pursuant to Public Service Law Section 70 to transfer certain property and property rights valued at approximately $26,000 and located in the City of Poughkeepsie and Town of Lloyd to Poughkeepsie-Highland Railroad Bridge Co. Inc./DBA Walkway Over The Hudson and Town of Lloyd because such approval is required for federal funding under the deadlines proscribed under the American Recovery and Reinvestment Act (ARRA) and completion and success of the Walkway Over the Hudson project which will contribute to the economic development and general welfare of Central Hudson's service territory. Additionally, assuring that the Town of Lloyd will meet the ARRA deadline improves the likelihood that New York State will fully allocate its $392 million in funding by that date, and therefore, will be eligible to receive some of the funding that will be redistributed from States that do not meet the deadline.

Subject: The Commission adopted an order to grant in whole or in part on an emergency basis, the transfer of property petition.

Purpose: The Commission adopted an order to grant in whole or in part on an emergency basis, the transfer of property petition.

Substance of emergency/proposed rule (Full text is posted at the following State website: www.dps.state.ny.us): The Public Service Commission approved, on an emergency basis, the petition on behalf of Central Hudson Gas & Electric Corporation seeking Commission approval pursuant to Public Service Law Section 70 to transfer certain property and property rights valued at approximately $26,000 and located in the City of Poughkeepsie and Town of Lloyd to Poughkeepsie-Highland Railroad Bridge Co. Inc./DBA Walkway Over The Hudson and Town of Lloyd, which is required to receive federal funding, complete the Walkway Over the Hudson project and contribute to the economic development and general welfare of Central Hudson's service territory.

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 September 22, 2009.

Text of rule may be obtained from: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann__ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn__brilling@dps.state.ny.us

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

Regulatory Impact Statement

A regulatory impact statement is 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.

Regulatory Flexibility Analysis
A regulatory flexibility analysis is 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.

Rural Area Flexibility Analysis
A rural area flexibility analysis is 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.

Job Impact Statement
A job impact statement is not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(09-M-0485SA1)

NOTICE OF ADOPTION

Approval of an Amendment to an Electric Service Agreement

I.D. No. PSC-29-08-00007-A
Filing Date: 2009-06-25
Effective Date: 2009-06-25

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

Action taken: On 6/18/09, the PSC adopted an order approving the joint petition of New York State Electric & Gas Corporation and Nucor Steel Auburn, Inc. for modifications to an electric service agreement.

Statutory authority: Public Service Law, sections 5(1)(b), 64, 65(1), 66(1), (5), (9), (10), (12) and (12-b)

Subject: Approval of an amendment to an electric service agreement.

Purpose: To approve an amendment to an electric service agreement.

Substance of final rule: The Commission, on June 18, 2009, adopted an order approving the joint petition of New York State Electric & Gas Corporation (NYSEG) and Nucor Steel Auburn, Inc. for a second amendment to the flexible rate contract, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann__ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment
An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(08-E-0713SA1)

NOTICE OF ADOPTION

To Establish a Bankruptcy Preferred Share in Compliance with the Abbreviated Order

I.D. No. PSC-47-08-00005-A
Filing Date: 2009-06-24
Effective Date: 2009-06-24

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

Action taken: On 6/18/09, the PSC approved, with modifications, the joint petition of Iberdrola, S.A., Energy East Corporation, et. al., for issuance of the bankruptcy preferred share, and the selection of its holder, in compliance with the Abbreviated Order of 9/9/08.

Statutory authority: Public Service Law, section 69

Subject: To establish a Bankruptcy Preferred Share in compliance with the Abbreviated Order.

Purpose: To approve with modifications the Issuance of Bankruptcy Preferred Share in compliance with the Abbreviated Order.

Substance of final rule: The Commission, on June 18, 2009, adopted an order, approving with modifications, the joint petition of New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation for issuance of the bankruptcy preferred share, and the selection of its holder, in compliance with the Abbreviated Order of September 9, 2008, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann__ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment
An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(07-M-0906SA2)

NOTICE OF ADOPTION

Mini Rate Filing

I.D. No. PSC-01-09-00016-A
Filing Date: 2009-06-24
Effective Date: 2009-06-24

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

Action taken: On June 18, 2009, the PSC adopted an order approving, with modifications Fishers Island Electric Corporation's amendments to PSC 1—Electricity, to increase its annual electric revenues of $174,755, or 10.1%, effective July 1, 2009.

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

Subject: Mini rate filing.

Purpose: To approve an increase in annual electric revenues of $174,755, or 10.1%.

Substance of final rule: The Commission, on June 18, 2009, adopted an order approving, with modifications Fishers Island Electric Corporation's amendments to PSC 1—Electricity, to increase its annual electric revenues of $174,755, or 10.1%, effective July 1, 2009.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann__ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment
An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(08-E-1458SA1)

NOTICE OF ADOPTION

Iberdrola's Code of Conduct for All Outstanding Issues, Affiliate Transactions and Cost Allocations

I.D. No. PSC-06-09-00006-A
Filing Date: 2009-06-24
Effective Date: 2009-06-24

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

Action taken: On 6/18/09, the PSC approved the joint proposal of Iberdrola, S.A., Energy East Corporation, et. al., for a Code of Conduct for all outstanding issues, including, but not limited to affiliate transactions and cost allocation.

Statutory authority: Public Service Law, sections 2, 5, 70 and 110

Subject: Iberdrola's Code of Conduct for all outstanding issues, affiliate transactions and cost allocations.

Purpose: To approve a Code of Conduct for all outstanding issues, affiliate transactions and cost allocations.

Substance of final rule: The Commission, on June 18, 2009, adopted an order, approving the Joint Proposal of Iberdrola, S.A., Energy East Corporation, RGS Energy Group, Inc., Greene Acquisition Capital, Inc., New York State Electric & Gas Corporation and Rochester Gas and

Electric Corporation for a Code of Conduct for all outstanding issues, including, but not limited to affiliate transactions and cost allocation, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann__ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(07-M-0906SA3)

NOTICE OF ADOPTION

Waiver of 16 NYCRR 86.3(a)(1) and (2), 86.3(b)(2), 86.6(b) and (c), and 88.4(a)

I.D. No. PSC-09-09-00020-A

Filing Date: 2009-06-26

Effective Date: 2009-06-26

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

Action taken: On 6/18/09 the PSC adopted an order granting in part and denying in part, Upstate NY Power Corp.'s request for waivers of several application filing requirements.

Statutory authority: Public Service Law, art. VII, and related provisions of 16 NYCRR

Subject: Waiver of 16 NYCRR 86.3(a)(1) and (2), 86.3(b)(2), 86.6(b) and (c), and 88.4(a).

Purpose: To approve in part and deny in part, the request to waive a number of PSL Article VII filing provisions.

Substance of final rule: Commission, on June 18, 2009, adopted an order granting in part and deny in part the request of Upstate NY Power Corp. for waivers of several application filing requirements, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann__ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(09-T-0049SA1)

NOTICE OF ADOPTION

Rate Design and Collection, Temporary Rates

I.D. No. PSC-12-09-00013-A

Filing Date: 2009-06-25

Effective Date: 2009-06-25

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

Action taken: On 6/18/09, the PSC adopted an order approving the Joint Proposal of Consolidated Edison Company of New York, Inc. and Staff of the Dept. of Public Service establishing adjustment clause mechanisms to recover gas and steam rates.

Statutory authority: Public Service Law, sections 2, 5, 65, 79, 107, 113 and 114

Subject: Rate design and collection, temporary rates.

Purpose: To approve the joint proposal establishing rate adjustment clause mechanisms.

Substance of final rule: The Commission, on June 18, 2009, adopted an order approving the Joint Proposal of Consolidated Edison Company of New York, Inc. and staff of the Department of Public Service establishing rate adjustment clause mechanisms for steam and gas service to enable later reconciliation if amounts are found to be imprudent, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann__ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(09-M-0114SA1)

NOTICE OF ADOPTION

To Permit the Use of TransData SSR-6000 Data Recorder to Collect Electric Meter Data in Revenue Meter Accounts

I.D. No. PSC-13-09-00010-A

Filing Date: 2009-06-26

Effective Date: 2009-06-26

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

Action taken: On June 18, 2009, the PSC adopted an order approving the petition of TransData and allowing the TransData Model SSR-6000 to be used as an ancillary meter recording device for use in New York State.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1) and 67(1)

Subject: To permit the Use of TransData SSR-6000 data recorder to collect electric meter data in revenue meter accounts.

Purpose: To grant petition of TransData, allowing the TransData Model SSR-6000 to be used as a meter recording device in NYS.

Sustance of final rule: The Commission, on June 18, 2009, adopted an order approving the petition of TransData and allowing the TransData Model SSR-6000 to be used as an ancillary meter recording device for use in New York State.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann__ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(09-E-0212SA1)

NOTICE OF ADOPTION

Multifamily and Multifamily Low-Income Residential Electric Energy Efficiency Programs

I.D. No. PSC-14-09-00011-A

Filing Date: 2009-06-24

Effective Date: 2009-06-24

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

Action taken: On 6/18/09, the PSC adopted an order approving, with modifications, two electric energy efficiency programs designed to serve the multifamily building customer market segment to be administered by New York State Energy Research and Development Authority.

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

Subject: Multifamily and multifamily low-income residential electric energy efficiency programs.

Purpose: To approve electric energy efficiency programs designed to serve the multifamily building customer market segment.

Substance of final rule: The Commission, on June 18, 2009, adopted an order approving, with modifications, two electric energy efficiency programs designed to serve the multifamily building customer market segment to be administered by New York State Energy Research and Development Authority (NYSERDA), subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann__ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(08-E-1127SA1)

NOTICE OF ADOPTION

Authorization of the Use of Interest Earned on System-Wide Program Funds to Pay Its Share of the Cost Recovery

I.D. No. PSC-14-09-00012-A

Filing Date: 2009-06-24

Effective Date: 2009-06-24

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

Action taken: On 6/18/09, the PSC adopted an order authorizing NYSERDA to use interest earnings on funds System-Wide Program funds to pay its share of the New York State Cost Recovery Fee.

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

Subject: Authorization of the use of interest earned on system-wide program funds to pay its share of the cost recovery.

Purpose: To authorize the use of interest earned on system-wide program funds to pay its share of the cost recovery.

Substance of final rule: The Commission, on June 18, 2000, adopted an order authorizing New York State Energy Research and Development Authority (NYSERDA) to pay a *pro rata* share of the New York Cost Recovery Fee allocable to the System-Wide Program in relation to the budgets of all NYSERDA's programs, from excess and unallocated interest earnings accrued from funds held by NYSERDA for the System-Wide Program for the benefit of electric customers of Consolidated Edison Company of New York Inc., subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann__ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(04-E-0572SA15)

NOTICE OF ADOPTION

To Pay for a Consultant on Evaluation Methods Out of General SBC Funds

I.D. No. PSC-14-09-00013-A

Filing Date: 2009-06-24

Effective Date: 2009-06-24

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

Action taken: On 6/18/09, the PSC adopted an order approving modifications to the Energy Efficiency Portfolio Standard and System Benefits Charge (SBC) programs by authorizing NYSERDA to use SBC interest earnings to pay the costs of an Evaluation Consultant.

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

Subject: To pay for a consultant on evaluation methods out of general SBC funds.

Purpose: To authorize NYSERDA to use SBC interest earnings to pay the costs of an Evaluation Consultant.

Substance of final rule: The Commission, on June 18, 2009, adopted an order approving the modifications to the Energy Efficiency Portfolio Standard and System Benefits Charge (SBC) programs by authorizing the New York State Energy Research and Development Authority (NYSERDA) to use SBC interest earnings to pay the costs of an Evaluation Consultant, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann__ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(07-M-0548SA16)

NOTICE OF ADOPTION

Petition for the Submetering of Electricity at a Commercial Property

I.D. No. PSC-16-09-00011-A

Filing Date: 2009-06-26

Effective Date: 2009-06-26

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

Action taken: On June 18, 2009, the PSC adopted an order approving the petition of Corning Property Management Corporation to submeter electricity at One Museum Way, Corning, New York.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1) and 67(1)

Subject: Petition for the submetering of electricity at a commercial property.

Purpose: To grant the petition of Corning Property Management Corporation to submeter electricity at One Museum Way, Corning, New York.

Substance of final rule: The Commission, on June 18, 2009, adopted an order approving the petition of Corning Property Management Corporation, a subsidiary of Corning Inc., to submeter electricity at One Museum Way, Corning, New York, located in the territory of New York State Electric & Gas Corporation.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann__ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(09-E-0103SA1)

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Water Rates and Charges

I.D. No. PSC-28-09-00010-P

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

Proposed Action: The Public Service Commission is considering a request filed by New York Water Service Corporation to make various changes in the rates, charges, rules and regulations contained in its tariff schedule P.S.C. No. 12—Water.

Statutory authority: Public Service Law, section 89-c(10)

Subject: Water rates and charges.

Purpose: To increase NYWS' base rates by $6 million, including the roll-in of approximately $3 million now paid through surcharges.

Public hearing(s) will be held at: 2:00 p.m., Sept. 1, 2009* at Merrick Library, 2779 Merrick Ave., Merrick, NY.

*There could be requests to reschedule the hearings. Notification of any subsequent scheduling changes will be available at the DPS Website (www.dps.state.ny.us) under Case No. 09-W-0237SP1.

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

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

Substance of proposed rule: On March 9, 2009, New York Water Service Corporation (NYWS or the company) filed a request to increase its annual base rate revenues by approximately $6 million or 27%. The effect on customers' bills is approximately one-half of 27%. The company also proposes to implement a surcharge mechanism to recover the cost of a new storage facility; this would increase revenues by approximately $262,000 (.93%). In addition, NYWS proposes to switch its customers from bi-monthly to monthly billing. The company states that the principal reasons for the rate request are increased costs of operation, including property taxes and payroll and benefits; capital costs associated with additions to its water plant; and, increased depreciation expense. On April 7, 2009, the Commission initially suspended the effective date of the filing to August 5, 2009. NYWS serves approximately 45,000 customers in the communities of Merrick, North Merrick, Bellmore, North Bellmore, Wantagh, Seaford and portions of Levittown within the Town of Hempstead and Massapequa in the Town of Oyster Bay, in Nassau County. The Commission may approve or reject the company's proposals in whole or in part.

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.state.ny.us/f96dir.htm. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 486-2655, email: leann__ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530, email: jaclyn__brilling@dps.state.ny.us

Public comment will be received until: October 9, 2009.

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(09-W-0237SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Discontinuance of Water Service

I.D. No. PSC-28-09-00012-P

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

Proposed Action: The Public Service Commission is considering whether to approve or reject, in whole or in part or modify a petition filed by Dwight Arthur & Betty Lemonik Water System requesting approval to abandon its water system.

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

Subject: Discontinuance of water service.

Purpose: To allow the Company to abandon its water system.

Text of proposed rule: On June 22, 2009, Dwight Arthur & Betty Lemonik Water System or (The Company) filed a petition requesting Commission approval to abandon its water system. The company provided water service to 2 customers including the owner of the system in the Town of Carmel, Putnam County New York. The Company is also requesting to cancel its Tariff Schedule. The Commission may approve or reject, in whole or in part, or modify the company's request.

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.state.ny.us/f96dir.htm. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 486-2655, email: leann__ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530, email: jaclyn__brilling@dps.state.ny.us

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(09-W-0518SP1)

Office of Temporary and Disability Assistance

NOTICE OF ADOPTION

Educational Activities

I.D. No. TDA-04-09-00011-A

Filing No. 721

Filing Date: 2009-06-25

Effective Date: 2009-10-01

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

Action taken: Amendment of sections 385.6(a) and (b), 385.7(a) and (b) and 385.9(c) of Title 18 NYCRR.

Statutory authority: 42 USC, sections 601(a) and 607; and Social Services Law, art. 5, title 9-B

Subject: Educational Activities.

Purpose: To increase the skills of individuals receiving public assistance through the provision of additional opportunities to participate in education and other skill development activities.

Text or summary was published in the January 28, 2009 issue of the Register, I.D. No. TDA-04-09-00011-P.

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

Text of rule and any required statements and analyses may be obtained from: Jeanine Stander Behuniak, New York State Office of Temporary and Disability Assistance, 40 North Pearl Street, 16C, Albany, New York 12243-0001, (518) 474-9779, email: Jeanine.Behuniak@OTDA.state.ny.us

Assessment of Public Comment

During the public comment period with respect to the proposed rule to help nonexempt public assistance recipients increase their literacy level through the provision of additional opportunities to participate in basic education and other skill development activities, the Office of Temporary and Disability Assistance (OTDA) received comments from ten organizations. The majority of comments were notably supportive of OTDA's efforts to expand access to education and training for nonexempt public assistance recipients. Nine organizations offered comments on certain aspects of the proposed rule which are described in greater detail below, of which only one strongly opposed the proposed rule, and one additional organization provided a letter stating no comments.

Comment: Seven commenting organizations expressed support of OTDA's intent to clarify the basic literacy standard, such as specifying that a ninth grade reading level will be the defining measure of basic literacy. One commenter voiced concern that using the standard of the ninth grade has the potential for delaying employment and self-sufficiency observing that many individuals who test at only a sixth grade level are able to work. This commenter further noted that some employers do not require either a high school diploma or the equivalent, instead looking for industry credentials as the primary criteria necessary to place an individual in a position or a work activity.

Response: While OTDA acknowledges that individuals with a basic literacy level equal to the sixth grade may be able to successfully engage in

certain types of employment, the research reviewed demonstrates that individuals who do not have a high school diploma are, on average, expected to have lower earnings, higher rates of unemployment and reduced job training opportunities as compared to those with a high school diploma. OTDA is committed to helping public assistance recipients improve their literacy level so that they may have increased opportunities for employment and wage gains over time. Taking this into account, OTDA's regulatory impact statement and the proposed regulations provide that assigned work activities including participation in educational activities must still be based on the individual's employment assessment and identified in the employment plan. Furthermore, districts are encouraged to combine such educational activities with at least 20 hours weekly of work-based activities, such as employment, work experience and internships both for purposes of meeting federal and State work participation rates and to improve employment outcomes.

Comment: Two commenting organizations advised that the completion of an Individual Education Plan (IEP) is different from a high school diploma in that an individual can complete an IEP, but still not complete high school and receive a high school diploma. These commenters recommended that the OTDA clarify in the regulations that completion of an IEP will not be treated as the equivalent of attaining a high school diploma or the equivalent for purposes of work assignments and access to educational activities.

Response: OTDA will clarify in Office policy that individuals who have completed an IEP, but have not attained a high school diploma or the equivalent, should be treated consistent with all individuals who do not have a high school diploma or the equivalent for purposes of work assignments and access to educational activities.

Comment: Five commenting organizations suggested that OTDA add language to clarify that individuals who have attained a high school diploma or its equivalent, but nonetheless have a basic literacy level below the 9th grade be considered to be individuals with low basic literacy and accordingly be encouraged to participate in educational activities.

Response: OTDA will clarify in Office policy that nonexempt public assistance recipients who have attained a high school diploma or its equivalent, but are nevertheless determined to have low basic literacy are to be encouraged to participate in appropriate educational activities designed to enhance their level of literacy as part of the individual's public assistance work requirement, consistent with the individual's employment assessment and plan.

Comment: Three commenting organizations recommended that OTDA include accompanying language to the regulations or otherwise require that individuals are adequately informed of their option to participate in educational activities and are actively encouraged/offered the opportunity to participate in such activities. One of these organizations suggested that individuals should be advised by a qualified counselor of the benefits of obtaining a higher education.

Response: Social services districts are already required to encourage, and may, in fact, require nonexempt public assistance recipients who have not achieved basic literacy to participate in appropriate educational activities as part of their public assistance work requirement. These regulatory changes will further require districts to offer the option to participate in certain educational activities and may require a nonexempt public assistance recipient who has achieved a basic literacy level, but has not attained a high school diploma or the equivalent to participate in educational activities designed to prepare the individual for attaining a high school diploma. OTDA will provide technical assistance in connection with the Administrative Directive that will be issued prior to the effective date of the regulation, and will add language to the next update of the LDSS-4148A, "WHAT YOU SHOULD KNOW ABOUT YOUR RIGHTS AND RESPONSIBILITIES" to inform individuals of the opportunity to participate in educational activities as part of the individual's public assistance work requirement. OTDA does not believe that the imposition of an unfunded mandate upon districts to provide information via a "qualified counselor" is warranted.

Comment: Two commenters suggested that the regulations require social services districts to provide written notice of opportunities to participate in educational activities.

Response: OTDA believes that the social services districts are in the best position to determine appropriate work and educational activities based on the individual's circumstances, and OTDA does not intend to require districts to provide such opportunities to participate in educational activities in writing.

Comment: One organization which supported the proposed regulations voiced some concern that the proposed regulations might somehow be applied so as to unreasonably deny or discourage individuals from participating in educational activities.

Response: While OTDA would dispute that the regulations might be applied to unreasonably deny a public assistance recipient of appropriate and available educational activities, OTDA will issue an Administrative Directive reminding social services districts of the requirement to encourage nonexempt public assistance recipients who have not achieved basic literacy or to offer nonexempt public assistance recipients who have achieved basic literacy, but have not attained a high school diploma or the equivalent to participate in appropriate educational activities, consistent with the individual's employment assessment and plan as part of the individual's public assistance work requirement.

Comment: Two commenters recommended that social services districts be required to provide assistance to enable public assistance recipients to locate and enroll in educational activities, (such as basic education, English as a second language and preparation for the General Educational Development [GED] exam).

Response: Social services districts already describe the availability of work activities, including educational programs as part of the orientation provided to public assistance recipients conducted in accordance with 18 NYCRR § 385.5. While OTDA encourages districts to provide information on available work activities, OTDA firmly believes that the discussion about the availability and appropriateness of specific educational activities and programs should be completed on an individual basis, consistent with the individual's assessment and employment plan. OTDA further believes that districts generally do provide information to public assistance recipients to locate available and appropriate educational programs which may then be assigned as a work activity.

Comment: One commenter felt that an individual with limited education should have the right to pursue additional education as part of their employment plan and recommended that this be clearly set forth to social services districts.

Response: OTDA agrees that nonexempt public assistance recipients who have not achieved a high school diploma or its equivalent should be afforded the opportunity to include appropriate educational activities as a component of their employment plan. The proposed regulations provide for such opportunities.

Comment: Five commenting organizations noted that the proposed rule does not specify when and to whom the literacy test should be given. Several organizations offered the opinion that testing for basic literacy level should not rely upon an individual expressing an interest in pursuing educational activities. Some of these commenters advised that the law requires that individuals lacking basic literacy be encouraged and may be required to participate in education. One other commenter recommended that basic literacy testing be offered to all public assistance applicants and recipients. By contrast, one commenting organization expressed their belief that requiring districts to test all nonexempt public assistance recipients who do not have a high school diploma or the equivalent for basic literacy levels may be redundant in some instances and counterproductive in others.

Response: The proposed regulations will require districts to offer nonexempt public assistance recipients without a high school diploma or the equivalent the ability to improve their basic literacy and/or obtain a High School Equivalency Diploma. At that point, if the recipient does not want to participate in an educational program, mandatory testing for literacy levels would not be necessary. Given that literacy testing may be inconsistent with the recipient's interest or goals and that district resources are limited, OTDA does not believe that a State mandate of literacy testing for all public assistance recipients is warranted.

Comment: Six of the organizations offering comments supported the ability to count home work/study time which is completed as part of an assigned educational activity towards the individual's required hours of work participation, but felt that the regulation did not go far enough in such regard. Instead they desired that the regulations/State policy require districts to count all hours of homework/study time towards work participation.

Response: OTDA anticipates that districts will generally support counting of home work/study time completed as part of an approved educational activity towards the individual's public assistance work requirement, but maintains that social services districts are in the best position to determine when and to what extent homework/study time should be counted towards the individual's work requirement. In many instances counting all hours of homework/study time would effectively preclude social services districts from being able to meet federal and State work participation rates or otherwise engage individuals in at least 20 hours of a work-based activity, such as employment, work experience or internship. OTDA believes that part-time enrollment in a work-based activity is often the appropriate method to help individuals achieve and reinforce positive work and educational outcomes. Therefore, OTDA believes that the questions of when and to what extent homework/study time should be approved as a work activity is best left to the determination made by the social services district.

Comment: Seven commenters expressed concerns relative to the addition of "prior participation in education and training" as a factor that districts may consider when evaluating whether an individual should be

assigned to an educational activity as part of such individual's public assistance work requirement. These commenters noted that current statute and regulations already allow the employment assessment to take prior activities into account and voiced concern that by affirmatively adding "prior participation" to the list may result in districts denying an individual's participation in educational activities solely because the individual may have previously been referred to an educational activity without regard for whether he/she successfully completed same. The concern is that OTDA ensure that "prior participation" in an educational activity is not used to "unreasonably deny" appropriate participation in available educational activities.

Response: OTDA acknowledges that there may be any number of reasons why an individual might not have been successful in a prior educational assignment. The purpose of this provision is not to imply that districts should deny an individual's participation in educational activities which are otherwise consistent with the individual's assessment and employment plan, but rather to clarify that prior participation in educational activities may be taken into consideration when evaluating whether or not participation in an educational activity is an appropriate work activity. OTDA agrees that individuals should not be categorically denied participation in available educational activities which are consistent with the individual's employment assessment solely based on the fact that the individual participated in the same or similar activities in the past and perhaps was found to not make progress or to fully participate. While OTDA strongly believes that social services districts are in the best position to determine the appropriateness of work and educational activities based on the individual's unique circumstance, out of deference to the concern raised, OTDA will provide additional guidance pertaining to "prior participation" in educational activities via an Administrative Directive that will be released prior to the effective date of the proposed regulations.

Comment: Four commenters expressed support for the provision to offer nonexempt public assistance recipients who have attained basic literacy, but still have not attained a high school diploma or the equivalent, the ability to participate in educational activities designed to prepare him/her for attaining a high school diploma or its equivalent. One organization recommended that the language of the regulation be revised to require that nonexempt public assistance recipients who have attained basic literacy, but have not attained a high school diploma or its equivalent be encouraged (not offered) to participate in educational activities, and that an accompanying provision be included to define the term "encourage."

Response: OTDA appreciates the support voiced for the proposed regulation and believes that these services, provided with other work activity participation as deemed appropriate by the district, are important in enhancing employment opportunities to help public assistance recipients achieve economic independence.

Comment: One commenter raised concern that by requiring districts to offer recipients preparatory courses towards a high school diploma or the equivalent (which may be offered at times that frequently would require coordination in scheduling concurrent work activities) regardless of such individual's employment plan will make it more difficult to meet the federal participation rates inasmuch as literacy programs alone are not a countable activity for federal participation purposes.

Response: Districts are currently required by statute to encourage public assistance recipients who have not achieved a basic literacy level to participate in educational activities designed to improve basic literacy as part of the individual's employment plan. As stated in the Regulatory Impact Statement, the proposed rule retains the district's authority governing individual enrollments in work activities, including, but not limited to, assigning individuals to a work activity or a combination of work activities which the district has determined as appropriate to enhance the individual's work skills and that are consistent with the individual's assessment and employment plan. OTDA recognizes that coordination of work activities will be necessary to concurrently enroll individuals in work activities and educational activities, based on the individual's assessment and employment plan, but doing so would enable districts to continue to emphasize the importance of work and meet work participation rates. OTDA considers improving literacy and/or attaining a high school diploma or its equivalent to be consistent with the Office's overall employment goals.

Comment: Two comments offered agreement with OTDA's determination that the proposed regulations should not result in significant costs. One commenter, however, did state that the proposed changes would have a dramatic impact on programs, require system changes and necessitate staff training with respect to the changes in order to effectively implement the proposed regulations.

Response: OTDA acknowledges that system changes, staff training and other adjustments may need to be completed in order to effectively implement these regulatory changes. The effective date of the regulations will be October 1, 2009, to permit social services districts time to implement the necessary changes.

Comment: One commenting organization suggested that the regulations as written will require social services districts to stop ongoing employment activities to test all current recipients already successfully engaged in work activities for basic literacy levels. This commenter consequently recommended that additional time be given to implement any changes required by the regulations and that it be made explicit that the proposed changes only apply to new public assistance applicants after the effective date.

Response: OTDA does not intend for social services districts to interrupt or discontinue an individual's participation in current assigned work activities. Districts will be expected to reevaluate an individual's work assignment at the next update to the employment assessment or recertification for public assistance benefits, at which time discussions would take place as appropriate with nonexempt individuals without a high school diploma regarding the interest in participating in educational activities. OTDA will clarify the required timeframes in Office policy.

Comment: Three responding organizations suggested that the regulations prioritize work assignments as follows: class time, homework time and then additional hours of participation, as needed. One organization noted that stand-alone educational activities do not generally count towards the federal or State participation rates and in some instances are not held at times that would easily permit engaging individuals in concurrent work activities.

Response: As stated in the Regulatory Impact Statement, OTDA seeks to increase the skills of nonexempt individuals receiving public assistance through the provision of additional opportunities to participate in education and other work activities. OTDA acknowledges that this goal must be accomplished consistent with federal participation rate requirements, which (generally) count hours of participation in educational activities only after the individual has participated in defined core work activities, such as paid employment, work experience and community service, for a minimum of twenty hours on average per week during the month. Districts are expected to achieve both required participation standards and to offer enrollments in educational services as defined in these regulations. Generally, these requirements can both be met through a combination of twenty hours of a work-based activity combined with other skill development activities such as education or training.

Comment: One commenting organization voiced concern that the proposed regulations ignore both the economic climate and the need to continue the successful employment-focused approach. This commenter suggested that it may be more prudent, given the current economy to ensure that individuals receiving public assistance work toward a job placement whenever possible.

Response: OTDA agrees that social services districts should maintain an employment-focused approach with respect to the provision of public assistance benefits. However, OTDA also recognizes employment-related and other benefits of helping public assistance recipients increase their skills through participation in education and other skill development activities as part of the individual's public assistance work requirement. Improved basic skills and other jobs skills training can expand the number of jobs individuals are qualified to perform, enhance the ability of individuals to learn on the job, and increase the number of higher level training opportunities the individual will be qualified to enter. For these reasons, among others, OTDA considers efforts to improve basic skills and obtain a High School Equivalency Diploma as consistent with an employment-focused program. OTDA would expect that basic educational services be combined with a work-based activity in most instances and that progress be expected and monitored to retain program accountability.

NOTICE OF ADOPTION

Utility Service

I.D. No. TDA-07-09-00014-A

Filing No. 720

Filing Date: 2009-06-24

Effective Date: 2009-07-15

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

Action taken: Amendment of section 352.5(e) of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f), 131(1) and 131-s

Subject: Utility Service.

Purpose: To suspend the enforcement of utility repayment agreements during periods of cold weather in order to provide districts with the flexibility to assist households during the current period of historically high energy costs.

Text of final rule: Subdivision (e) of section 352.5 is amended to read as follows:

(e) Payment essential to continue or restore utility service for an applicant for family assistance, safety net assistance, veteran assistance or emergency public assistance. A payment must be made for utilities previously provided to an applicant for family assistance, safety net assistance, veteran assistance or emergency public assistance if such payment is essential to continue or restore utility service. Payment essential to continue or restore utility service may be provided to an applicant whose utility bill includes costs for service for the applicant's own residential unit and for space outside that unit. Payment may only be made when it is documented that the applicant is the tenant of record and the customer of record, as defined in subdivision (a) of this section, and alternative payment or housing accommodations cannot be made and the applicant is without liquid resources to continue or restore utility service. Payment must not exceed the cost of utilities provided to the applicant during the four most recently completed monthly billing periods or two most recently completed bimonthly billing periods for which a bill has been issued immediately preceding the date of application for such assistance. Payment is limited to the applicant's proportionate share of the cost of service for the most recently completed four monthly or two most recently completed bimonthly billing periods for which a bill has been issued immediately preceding the date of application for such assistance when the applicant's utility bill includes costs for service for the applicant's own residential unit and for space outside that unit. Payment must not exceed the balance due on the account. In a shared meter situation subject to the provisions of section 52 of the Public Service Law, the proportionate share is to be determined by the utility company's apportionment of retroactive charges upon completion of a shared meter investigation and determination. As a condition of receiving such assistance, an applicant not in receipt of recurring public assistance or supplemental security income whose gross monthly household income on the date of application exceeds the public assistance standard of need for the same size household must sign an agreement to repay the assistance within one year of the date of the payment. A household consists of all persons who occupy a housing unit. A house, an apartment or other group of rooms, or a single room is regarded as a housing unit when it is occupied or intended for occupancy as separate living quarters. A household includes related family members and all unrelated persons, if any, such as lodgers, foster children, wards, or employees who share the housing unit. A person living alone, or a group of unrelated persons sharing a housing unit as partners, also constitutes a household. The public assistance standard of need is determined by applying the following statewide standards of need in accordance with office regulations: the pre-add allowance as set forth in Schedule SA-2a of section 352.3 of this Part; the shelter allowance as paid, but not to exceed the maximum allowance set forth in section 352.3 of this Part; the fuel allowance set forth in Schedule SA-6a, SA-6b or SA-6c of section 352.5 of this Part, if the applicant is the tenant of record and customer of record for the residential heating bill; the home energy and supplemental home energy payments (HEA and SHEA) as set forth in schedule SA-2b or SA-2c of section 352.1 of this Part; and, if applicable, the additional cost of meals for persons unable to prepare meals at home as set forth in schedule SA-5 of section 352.7 of this Part. The repayment agreement must set forth a schedule of payments that will assure repayment within one year of the date of payment. Subsequent assistance to continue or restore utility service must not be provided unless any prior utility arrearage payments have been repaid or are being repaid in accordance with the schedule of payments contained in each prior repayment agreement as of the date of application for such subsequent assistance*, or unless the enforcement of such prior repayment agreement(s) is suspended by the local social services district during a period of cold weather, defined, for these purposes, as the time period from November 1st of each year and ending April 15th of the following year*. Repayment agreements under this subdivision may be enforced in any manner available to a creditor, in addition to any other remedy the district may have pursuant to the Social Services Law.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 352.5(e).

Text of rule and any required statements and analyses may be obtained from: Jeanine Stander Behuniak, New York State Office of Temporary and Disability Assistance, 40 North Pearl Street 16C, Albany, New York 12243-0001, (518) 474-9779, email: Jeanine.Behuniak@OTDA.state.ny.us

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

The nonsubstantive revision made to section 352.5(e) is merely a technical change. The words "for these purposes" have been added to the regulatory text in order to clarify that "a period of cold weather" is defined only for the purposes of this regulatory subdivision. Since this change is only a clarification, it does not necessitate revisions to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

Assessment of Public Comment

The Office of Temporary and Disability Assistance received one comment in response to its Notice of Emergency Rule Making (I.D. No. TDA-48-08-00001-E) published on November 26, 2008, in the *New York State Register*. An assessment of this comment appeared as part of the Notice of Emergency Rule Making (I.D. No. TDA-07-09-00014-E) published on April 22, 2009, in the *New York State Register*. No additional comments have been received.

NOTICE OF ADOPTION

Recovery of Overpayments

I.D. No. TDA-09-09-00007-A

Filing No. 727

Filing Date: 2009-06-26

Effective Date: 60 days after filing

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

Action taken: Amendment of section 352.31(d)(1) of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f) and 106-b

Subject: Recovery of overpayments.

Purpose: To delete the regulatory requirement to recoup/recover overpayments from all members of an assistance unit regardless of their ages at the time of overpayment.

Text or summary was published in the March 4, 2009 issue of the Register, I.D. No. TDA-09-09-00007-P.

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

Text of rule and any required statements and analyses may be obtained from: Jeanine Stander Behuniak, New York State Office of Temporary and Disability Assistance, 40 North Pearl Street, 16C, Albany, New York 12243-0001, (518) 474-9779, email: Jeanine.Behuniak@OTDA.state.ny.us

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Temporary Housing Assistance for Certain Sex Offenders

I.D. No. TDA-28-09-00006-P

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

Proposed Action: Addition of section 352.36 to Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), (8), 34(3)(f) and 131(1); and L. 2008, ch. 568

Subject: Temporary housing assistance for certain sex offenders.

Purpose: To implement chapter 568 of the Laws of 2008 concerning factors that social services districts must consider when making determinations about the location of temporary housing for level two and three sex offenders, when advance notice has been received.

Text of proposed rule: A new section 352.36 is added to Title 18 NYCRR to read as follows:

Section 352.36 Factors when providing temporary housing assistance to certain sex offenders

(a) Statement of purpose

(1) Chapter 568 of the laws of 2008 requires the Division of Parole (DOP), the Division of Probation and Correctional Alternatives (DPCA), and the Office of Temporary and Disability Assistance (OTDA) to promulgate regulations to provide guidance concerning the placement and/or approval of housing for certain sex offenders.

(2) The State has previously enacted laws concerning sex offenders, including the Sex Offender Registration Act, the Sex Offender Management and Treatment Act, the Electronic Security and Targeting of On-Line Predators Act (e-STOP) and laws restricting certain sex offenders who are under probation or parole supervision from entering school grounds. Chapter 568 of the laws of 2008 continues the State's efforts in the area of

sex offender management and specifically in the area of the placement and housing of sex offenders. Sex offender management, and the placement and housing of sex offenders, are areas that have been, and will continue to be, matters addressed by the State. These regulations further the State's coordinated and comprehensive policies in these areas, and are intended to provide further guidance to relevant state and local agencies in applying the State's approach.

(3) Public safety is a primary concern, and these regulations are intended to better protect children, vulnerable populations and the general public from sex offenders. The State's coordinated and comprehensive approach also recognizes the necessity to provide emergency shelter to individuals in need, including those who are sex offenders, and the importance of stable housing and support in allowing offenders to live in and re-enter the community and become law-abiding and productive citizens. These regulations are based upon, and are intended to further, best practices and effective strategies to achieve these goals.

(4) In implementing this statute and the State's comprehensive approach, DOP, DPCA, OTDA and the Division of Criminal Justice Services' Office of Sex Offender Management (DCJS/OSOM) recognize that:

(i) Not all sex offenders are equally dangerous. Some sex offenders may pose a high risk of committing a new sexual crime; others may pose only a low risk.

(ii) All reasonable efforts should be made to avoid an ill-advised concentration of sex offenders in certain neighborhoods and localities. What constitutes such a concentration will depend on many factors, and may vary depending on housing availability and the locality and community. In addition, it is sometimes safer to house sex offenders together. Law enforcement, probation, and parole officers may more effectively monitor offenders, and service providers may more easily offer transitional services to offenders in these congregate settings. Further, some social service officials and departments rely on congregate housing for sex offenders who seek emergency shelter because of the limited, or lack of other housing options available for this population. All public officials who are responsible for finding or approving housing for sex offenders should recognize that an over-concentration of sex offenders may create risks and burdens on the surrounding community, and that their responsibility is to make judgments that are reasonable under the circumstances.

(iii) All social service districts are required by statute, regulation and directive to arrange temporary housing assistance for eligible homeless individuals, including those who are sex offenders.

(iv) To reduce recidivism it is important that offenders be able to re-enter society and become productive and law-abiding citizens whenever possible. A stable living situation and access to employment and support services are important factors that can help offenders to successfully re-enter society.

(v) Maintaining and/or finding suitable housing for sex offenders is an enormous challenge that impacts all areas of the State. Offenders reside in all regions of the state and may have long-established residences in their respective communities. Even offenders who do not have such long-established relationships are often discharged from prison to the community where they previously lived. As a result, it is not appropriate for any one community or county to bear an inappropriate burden in housing sex offenders because another community has attempted to shift its responsibility for those offenders onto other areas of the State. The proliferation of local ordinances imposing residency restrictions upon sex offenders, while well-intentioned, have made it more challenging for the State and local authorities to address the difficulties in finding secure and appropriate housing for sex offenders.

(vi) Decisions as to the housing and supervision of sex offenders should take into account all relevant factors and no one factor will necessarily be dispositive. These factors should include, but not be limited to, the factors enumerated in the statute, the risk posed by the offender, the nature of the underlying offense, whether housing offenders together or apart is safer and more feasible, the most effective method to supervise and provide services to offenders, and the availability of appropriate housing, employment, treatment and support.

(b) Applicability and factors

(1) When a social services district has received advance written notice, pursuant to section 259-c (17) of the Executive Law, that an inmate who is designated a level two or level three sex offender pursuant to the sex offender registration act is likely to seek to access local social services for homeless persons, and such individual is determined by the social services district to be in immediate need of shelter, the local social services officials shall consider the following factors when making a determination in regard to the placement of such individual in shelter, provided that the individual is otherwise eligible for temporary housing assistance:

(i) the location of other sex offenders required to register pursuant to the sex offender registration act, specifically whether there is a concentration of registered sex offenders in a certain residential area or municipality;

(ii) the number of registered sex offenders residing at a particular property;

(iii) proximity of the entities with vulnerable populations;

(iv) accessibility to family members, friends or other supportive services, including but not limited to locally available sex offender treatment programs with preference for placement of such individuals into programs that have demonstrated effectiveness in reducing sex offender recidivism and increasing public safety; and

(v) investigation and approval of such placement by the state Division of Parole.

(2) When one or more of the factors set forth in paragraph 1 of this subdivision are not relevant or not practicable in determining a placement for such individual, within the timeframe necessary to meet the immediate need for shelter, the local social services officials shall place the individual in the most appropriate available shelter.

Text of proposed rule and any required statements and analyses may be obtained from: Jeanine Stander Behuniak, New York State Office of Temporary and Disability Assistance, 40 North Pearl Street 16C, Albany, New York 12243-0001, (518) 474-9779, email: Jeanine.Behuniak@OTDA.state.ny.us

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

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

Regulatory Impact Statement

1. Statutory authority:

Social Services Law (SSL) § 20(3)(d) authorizes the Office of Temporary and Disability Assistance (OTDA) to promulgate regulations and policies to carry out its powers and duties.

SSL § 34(3)(f) requires the Commissioner of OTDA to establish regulations for the administration of public assistance and care within the State.

Chapter 568 of the Laws of 2008, effective January 23, 2009, requires the Division of Parole (DOP), the Division of Probation and Correctional Alternatives (DPCA) and OTDA to promulgate rules and regulations regarding housing for certain sex offenders who are under parole or probation supervision or who are being released from State prison after completing their maximum sentences.

SSL § 20(8), effective January 23, 2009, requires OTDA to promulgate regulations concerning Chapter 568 of the Laws of 2008. This section also sets forth factors which social services districts are to consider when making determinations in regard to the placement of certain sex offenders.

SSL § 131(1) requires social services districts, insofar as funds are available for that purpose, to provide adequately for those unable to maintain themselves, in accordance with the provisions of the SSL.

2. Legislative objectives:

It is the intent of the Legislature in enacting the above statutes that OTDA establish rules, regulations and policies so that adequate provision is made for those persons unable to provide for themselves so that, whenever possible, such persons can be restored to a condition of self-support and self-care.

This regulatory amendment supports the Legislature's intent to address the challenge to social services districts of considering the needs and concerns of the community while locating an appropriate temporary housing placement when certain sex offenders are released from prison without a place to live. These are individuals for whom a social services district will receive advance written notice pursuant to Executive Law § 259-c(17).

3. Needs and benefits:

At the present time, Article 6-C of the Correction Law, known as the Sex Offender Registration Act (SORA), requires anyone on parole or probation or imprisoned for a sex offense on or after January 21, 1996, to register and provide certain information including their residency location to the state Division of Criminal Justice Services.

Executive Law § 259-c(17) requires that prior to release, parole or release to post-release supervision of an inmate designated a level two or level three sex offender pursuant to SORA, the social services district in the county in which the inmate expects to reside be notified when information is available that indicates that the inmate is likely to seek homeless services upon release from State prison. Pursuant to this requirement, the appropriate social services districts are provided information when certain level two or level three sex offenders are likely to seek homeless services upon release from State prison.

Chapter 568 of the Laws of 2008, in part, amends the SSL to set forth factors that social services districts must consider when making determinations about the appropriate location of temporary housing for those level two and level three sex offenders, when written notice has been received pursuant to Executive Law § 259-c(17). The factors to be considered by the social services districts are the following:

(1) the location of other sex offenders required to register pursuant to the sex offender registration act, specifically whether there is a concentra-

tion of registered sex offenders in a certain residential area or municipality;

(2) the number of registered sex offenders residing at a particular property;

(3) the proximity of the entities with vulnerable populations;

(4) accessibility to family members, friends or other supportive services, including but not limited to locally available sex offender treatment programs with preference for placement of such individuals into programs that have demonstrated effectiveness in reducing sex offender recidivism and increasing public safety; and

(5) the investigation and approval of such placement by DOP.

As a result of the new statute, OTDA is required to promulgate regulations setting forth these new factors, and the social services districts are required to consider them when assessing placements for certain level two and level three sex offenders. The fifth factor, which is the investigation and approval of placements by DOP, necessitates a coordination of services between the social services districts and DOP. In order to facilitate this process, the districts need to locate appropriate temporary housing taking the first four factors into consideration and then provide information to DOP regarding the placement in order to allow for DOP's investigation and approval.

The general well-being of the public is best safeguarded if sex offenders are placed in appropriate available housing. Chapter 568 of the Laws of 2008 provides that social services districts need to consider concentrations of registered sex offenders and the proximity of available housing to entities with vulnerable populations when assessing housing placements for certain sex offenders. Consideration of the individual's immediate housing needs and these factors are intended to protect the public. Meanwhile, consideration of factors such as the accessibility to family members, friends or other supportive services, including available sex offender treatment programs, is intended to prevent recidivism by providing sex offenders with suitable housing and support. Chapter 568 of the Laws of 2008 was designed to balance the safety interests of the public, the statutory obligations of social services districts in meeting the immediate needs of individuals, and the unique housing needs of sex offenders. It was intended to lead to a comprehensive approach that will protect the public and provide appropriate housing for sex offenders.

4. Costs:

There may be a minimal fiscal impact as a result of the proposed rule. Pursuant to existing OTDA policies, social services districts must meet emergency needs of eligible persons and determine, based upon the particular circumstances, the most appropriate temporary housing assistance for such persons. Since current provisions require that districts receive notification of the release of certain sex offenders that may seek homeless and emergency housing services, districts must already place such individuals in appropriate settings using available information.

Pursuant to Chapter 568 of the Laws of 2008, social services districts will now need to complete certain administrative steps that were not required in the past. For instance, districts will be required to notify DOP of the placements of certain sex offenders so that DOP can conduct an investigation and approve or disapprove such placements, and districts will later review DOP's approval or disapproval of the placements. This will necessitate a coordinated effort between the districts and DOP, which may result in some administrative costs to the districts due to additional processing requirements. The extent of this economic impact is dependent upon the prior practices of each district. The districts, to varying degrees, already coordinate their placement efforts with DOP for certain sex offenders.

It is noted that any increase in administrative costs to the districts is a result of Chapter 568 of the Laws of 2008, and not this proposed regulatory amendment. This proposed rule merely complies with the statutory requirements and makes the required regulatory changes.

5. Local government mandates:

Social services districts already are under a mandate to provide temporary housing assistance and other emergency and ongoing assistance to eligible individuals, including eligible individuals who are sex offenders. Additionally, social services districts already are notified of the sex offender status of certain individuals pursuant to Executive Law § 259-c(17) when making a temporary housing placement. This amendment codifies the specific factors that must be considered by the social services districts when notified under Executive Law § 259-c(17) and in that sense adds an additional mandate as is required by law.

6. Paperwork:

Pursuant to the new statutory requirements, social services districts will need to provide information to DOP regarding the placement of certain sex offenders for DOP's investigation and approval. To facilitate this process, DOP has developed a one page form titled ''DSS Request for Investigation/Approval by DOP.'' To advise DOP of a placement and to request DOP's investigation and approval, the social services districts simply need to fill in two-thirds of this one page form and forward it to DOP. The form will later be returned to the social services districts by DOP with the remaining one third of the form completed indicating DOP's approval or disapproval of the placement.

7. Duplication:

The proposed amendment does not duplicate, overlap, or conflict with any existing State or federal requirement.

8. Alternatives:

No significant alternatives were considered. Chapter 568 of the Laws of 2008 required that OTDA promulgate regulations setting forth the factors which social services districts are to consider when making determinations in regard to the placement of certain sex offenders.

9. Federal standards:

The proposed amendment does not conflict with any federal standards for temporary housing.

10. Compliance schedule:

The social services districts will be able to comply with the proposed amendment on its effective date, or soon thereafter. OTDA will be issuing an Administrative Directive to the social services districts explaining the statutory and regulatory changes. The Administrative Directive will include the ''DSS Request for Investigation/Approval by DOP'' as an attachment and provide the name, the telephone number and the e-mail address of a contact person in case the social services districts have questions or concerns. In addition, OTDA plans to make follow up calls to the social services districts to address any issues that may arise during implementation or thereafter.

Regulatory Flexibility Analysis

1. Effect of rule:

The proposed amendment will have no effect on small businesses. The proposed amendment will have an effect on local governments since social services districts will be required to consider certain factors when deciding on temporary housing placements for certain sex offenders. However, consideration of the factors is required under Chapter 568 of the Laws of 2008.

2. Compliance requirements:

The proposed amendment will not have any additional compliance requirements for small businesses. As noted above, to comply with Chapter 568 of the Laws of 2008 and the proposed amendment, the social services districts will be required to consider certain factors when deciding on temporary housing placements for certain sex offenders. The local districts also will need to provide information to DOP regarding the placement of certain sex offenders to facilitate DOP's investigation and approval. To facilitate this process, DOP has developed a one page form titled ''DSS Request for Investigation/Approval by DOP.'' To advise DOP of a placement and to request DOP's investigation and approval, the social services districts will need to fill in two-thirds of this one page form and forward it to DOP. The form will later be returned to the social services districts by DOP with the remaining one third of the form completed indicating DOP's approval or disapproval of the placement.

3. Professional services:

The proposed amendment will not require small businesses or local governments to hire additional professional services.

4. Compliance costs:

There may be a minimal fiscal impact on the social services districts as a result of the proposed rule. Pursuant to existing OTDA policies, social services districts must meet emergency needs of eligible persons and determine, based upon the particular circumstances, the most appropriate temporary housing assistance for such persons. Since current provisions require that districts receive notification of the release of certain sex offenders that may seek homeless and emergency housing services, districts must already place such individuals in appropriate settings using available information.

Pursuant to Chapter 568 of the Laws of 2008, social services districts will now need to complete certain administrative steps that were not required in the past. For instance, districts will be required to notify DOP of the placements of certain sex offenders so that DOP can conduct an investigation and approve or disapprove such placements, and districts will later review DOP's approval or disapproval of the placements. This will necessitate a coordinated effort between the districts and DOP, which may result in some administrative costs to the districts due to additional processing requirements. The extent of this economic impact is dependent upon the prior practices of each district. The districts, to varying degrees, already coordinate their placement efforts with DOP for certain sex offenders.

It is noted that any increase in administrative costs to the districts is a result of Chapter 568 of the Laws of 2008, and not this proposed regulatory amendment. This proposed rule merely complies with the statutory requirements and makes the required regulatory changes.

5. Economic and technological feasibility:

All small businesses and local governments have the economic and technological ability to comply with these regulations.

6. Minimizing adverse impact:
There will be no adverse economic impact on small businesses, and there may be a minimal economic impact on the administrative costs of local governments.
7. Small business and local government participation:
On December 30, 2008, OTDA had a conference call which included participation from the New York State Public Welfare Association (NYPWA), the New York City Human Resources Administration (HRA), the New York City Department of Homeless Services (DHS), and eleven social services districts to discuss the proposal. On January 15, 2009, OTDA had a second conference call which included participation from the New York State Division of Criminal Justice Services (DCJS), DHS, DOP, DPCA and eleven social services districts to discuss the proposal. During the conference calls, these organizations made suggestions regarding implementation of the new law and any policy directives.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:
The proposed amendment will apply to the 44 rural social services districts in New York State.
2. Reporting, recordkeeping and other compliance requirements; and professional services:
To comply with Chapter 568 of the Laws of 2008 and the proposed amendment, the rural districts will be required to consider certain factors when deciding on temporary housing placements for certain sex offenders. These districts also will need to provide information to DOP regarding the placement of certain sex offenders to facilitate DOP's investigation and approval. DOP has developed a one page form to facilitate this process. The proposed amendment will not require rural districts to hire additional professional services.
3. Costs:
There may be a minimal fiscal impact on the social services districts, including those in rural areas, as a result of the proposed rule. Pursuant to existing OTDA policies, social services districts must meet emergency needs of eligible persons and determine, based upon the particular circumstances, the most appropriate temporary housing assistance for such persons. Since current provisions require that districts receive notification of the release of certain sex offenders that may seek homeless and emergency housing services, districts must already place such individuals in appropriate settings using available information.
Pursuant to Chapter 568 of the Laws of 2008, social services districts, including those in rural areas, will now need to complete certain administrative steps that were not required in the past. For instance, districts will be required to notify DOP of the placements of certain sex offenders so that DOP can conduct an investigation and approve or disapprove such placements, and districts will later review DOP's approval or disapproval of the placements. This will necessitate a coordinated effort between the districts and DOP, which may result in some administrative costs to the districts due to additional processing requirements. The extent of this economic impact is dependent upon the prior practices of each district. The districts, to varying degrees, already coordinate their placement efforts with DOP for certain sex offenders.
It is noted that any increase in administrative costs to the districts is a result of Chapter 568 of the Laws of 2008, and not this proposed regulatory amendment. This proposed rule merely complies with the statutory requirements and makes the required regulatory changes.
4. Minimizing adverse impact:
To facilitate this process, DOP has developed a one page form titled ''DSS Request for Investigation/Approval by DOP.'' To advise DOP of a placement and to request DOP's investigation and approval, the rural districts will need to fill in two-thirds of this one page form and forward it to DOP. The form will later be returned to the social services districts by DOP with the remaining one third of the form completed indicating DOP's approval or disapproval of the placement.
5. Rural area participation:
On December 30, 2008, OTDA had a conference call which included participation from NYPWA, HRA, DHS and eleven social services districts, including some rural districts, to discuss the proposal. On January 15, 2009, OTDA had a second conference call which included participation from DCJS, DHS, DOP, DPCA and eleven social services districts, including some rural districts, to discuss the proposal. During the conference calls, these organizations made suggestions regarding implementation of the new law and any policy directives.

Job Impact Statement

A Job Impact Statement has not been prepared for the proposed rule. It is evident from the subject matter of the amendment that the jobs of the workers making decisions pursuant to the proposed rule will not be affected in any real way. The proposed amendment formalizes the placement factors which many social services districts already consider and the consultation process with DOP. Thus, the changes will not have any impact on jobs and employment opportunities in the State.

Workers' Compensation Board

EMERGENCY RULE MAKING

Pharmacy and Durable Medical Equipment Fee Schedules and Requirements for Designated Pharmacies

I.D. No. WCB-28-09-00007-E
Filing No. 730
Filing Date: 2009-06-29
Effective Date: 2009-06-29

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

Action taken: Addition of Parts 440 and 442 to Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117, 13 and 13-o

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

Specific reasons underlying the finding of necessity: This rule provides pharmacy and durable medical equipment fee schedules, the process for payment of pharmacy bills, and rules for the use of a designated pharmacy or pharmacies. Many times claimants must pay for prescription drugs and medicines themselves. It is unduly burdensome for claimants to pay out-of-pocket for prescription medications as it reduces the amount of benefits available to them to pay for necessities such as food and shelter. Claimants also have to pay out-of-pocket many times for durable medical equipment. Adoption of this rule on an emergency basis, thereby setting pharmacy and durable medical equipment fee schedules will help to alleviate this burden to claimants, effectively maximizing the benefits available to them. Benefits will be maximized as the claimant will only have to pay the fee schedule amount and there reimbursement from the carrier will not be delayed. Further, by setting these fee schedules, pharmacies and other suppliers of durable medical equipment will be more inclined to dispense the prescription drugs or equipment without requiring claimants to pay up front, rather they will bill the carrier. Adoption of this rule further advances pharmacies directly billing by setting forth the requirements for the carrier to designate a pharmacy or network of pharmacies. Once a carrier makes such a designation, when a claimant uses a designated pharmacy he cannot be asked to pay out-of-pocket for causally related prescription medicines. This rule sets forth the payment process for pharmacy bills which along with the set price should eliminate disputes over payment and provide for faster payment to pharmacies. Finally, this rule allows claimants to fill prescriptions by the internet or mail order thus aiding claimants with mobility problems and reducing transportation costs necessary to drive to a pharmacy to fill prescriptions. Accordingly, emergency adoption of this rule is necessary.

Subject: Pharmacy and durable medical equipment fee schedules and requirements for designated pharmacies.

Purpose: To adopt pharmacy and durable medical equipment fee schedules, payment process and requirements for use of designated pharmacies.

Substance of emergency rule: Chapter 6 of the Laws of 2007 added Section 13-o to the Workers' Compensation Law ("WCL") mandating the Chair to adopt a pharmaceutical fee schedule. WCL Section 13(a) mandates that the Chair shall establish a schedule for charges and fees for medical care and treatment. Part of the treatment listed under Section 13(a) includes medical supplies and devices that are classified as durable medical equipment. The proposed rule adopts a pharmaceutical fee schedule and durable medical equipment fee schedule to comply with the mandates. This rule adds a new Part 440 which sets forth the pharmacy fee schedule and procedures and rules for utilization of the pharmacy fee schedule and a new Part 442 which sets forth the durable medical equipment fee schedule.

Section 440.1 sets forth that the pharmacy fee schedule is applicable to prescription drugs or medicines dispensed on or after the most recent effective date of § 440.5 and the reimbursement for drugs dispensed before that is the fee schedule in place on the date dispensed.

Section 440.2 provides the definitions for average wholesale price, brand name drugs, controlled substances, generic drugs, independent pharmacy, pharmacy chain, remote pharmacy, rural area and third party payor.

Section 440.3 provides that a carrier or self-insured employer may designate a pharmacy or pharmacy network which an injured worker must

use to fill prescriptions for work related injuries. This section sets forth the requirements applicable to pharmacies that are designated as part of a pharmacy network at which an injured worker must fill prescriptions. This section also sets forth the procedures applicable in circumstances under which an injured worker is not required to use a designated pharmacy or pharmacy network.

Section 440.4 sets forth the requirements for notification to the injured worker that the carrier or self-insured employer has designated a pharmacy or pharmacy network that the injured worker must use to fill prescriptions. This section provides the information that must be provided in the notice to the injured worker including time frames for notice and method of delivery as well as notifications of changes in a pharmacy network.

Section 440.5 sets forth the fee schedule for prescription drugs. The fee schedule in uncontroverted cases is average wholesale price minus twelve percent for brand name drugs and average wholesale price minus twenty percent for generic drugs plus a dispensing fee of five dollars for generic drugs and four dollars for brand name drugs, and in controverted cases is twenty-five percent above the fee schedule for uncontroverted claims plus a dispensing fee of seven dollars and fifty cents for generic drugs and six dollars for brand-name drugs. This section also addresses the fee when a drug is repackaged.

Section 440.6 provides that generic drugs shall be prescribed except as otherwise permitted by law.

Section 440.7 sets forth a transition period for injured workers to transfer prescriptions to a designated pharmacy or pharmacy network. Prescriptions for controlled substances must be transferred when all refills for the prescription are exhausted or after ninety days following notification of a designated pharmacy. Non-controlled substances must be transferred to a designated pharmacy when all refills are exhausted or after 60 days following notification.

Section 440.8 sets forth the procedure for payment of prescription bills or reimbursement. A carrier or self-insured employer is required to pay any undisputed bill or portion of a bill and notify the injured worker by certified mail within 45 days of receipt of the bill of the reasons why the bill or portion of the bill is not being paid, or request documentation to determine the self-insured employer's or carrier's liability for the bill. If objection to a bill or portion of a bill is not received within 45 days, then the self-insured employer or carrier is deemed to have waived any objection to payment of the bill and must pay the bill. This section also provides that a pharmacy shall not charge an injured worker or third party more than the pharmacy fee schedule when the injured worker pays for prescriptions out-of-pocket, and the worker or third party shall be reimbursed at that rate.

Section 440.9 provides that if an injured worker's primary language is other than English, that notices required under this part must be in the injured worker's primary language.

Section 440.10 provides penalties for failing to comply with this Part and that the Chair will enforce the rule by exercising his authority pursuant to Workers' Compensation Law § 111 to request documents.

Part 442 sets forth the fee schedule for durable medical equipment.

Section 442.1 sets for that the fee schedule is applicable to durable medical goods and medical and surgical supplies dispensed on or after July 11, 2007.

Section 442.2 sets forth the fee schedule for durable medical equipment as indexed to the New York State Medicaid fee schedule, except the payment for bone growth stimulators shall be made in one payment. This section also provides for the rate of reimbursement when Medicaid has not established a fee payable for a specific item and for orthopedic footwear. This section also provides for adjustments to the fee schedule by the Chair as deemed appropriate in circumstances where the reimbursement amount is grossly inadequate to meet a pharmacies or providers costs and clarifies that hearing aids are not durable medical equipment for purposes of this rule.

Appendix A provides the form for notifying injured workers that the claim has been contested and that the carrier is not required to reimburse for medications while the claim is being contested.

Appendix B provides the form for notification of injured workers that the self-insured employer or carrier has designated a pharmacy that must be used to fill prescriptions.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires September 26, 2009.

Text of rule and any required statements and analyses may be obtained from: Cheryl M. Wood, Special Counsel to the Chair, New York State Workers' Compensation Board, 20 Park Street, Room 400, Albany, New York 12207, (518) 408-0469, email: regulations@wcb.state.ny.us

Summary of Regulatory Impact Statement

Section 1 provides the statutory authority for the Chair to adopt a pharmacy fee schedule pursuant to Workers' Compensation Law Section (WCL) 13-o as added to the WCL by Chapter 6 of the Laws of 2007 which requires the Chair to adopt a pharmaceutical fee schedule. Chapter 6 also amended WCL Section 13(a) to mandate that the Chair establish a schedule for charges and fees for medical care and treatment. Such medical care and treatment includes supplies and devices that are classified as durable medical equipment (hereinafter referred to as DME).

Section 2 sets forth the legislative objectives of the proposed regulations which provide the fee schedules to govern the cost of prescription medicines and DME. This section provides a summary of the overall purpose of the proposed regulation to reduce costs of workers' compensation and the scope of the regulation with regard to process and guidance to implement the rule.

Section 3 explains the needs and benefits of the proposed regulation. This section provides the explanation of the requirement of the Chair to adopt a pharmacy fee schedule as mandated by Chapter 6 of the Laws of 2007. The legislation authorizes carriers and self-insured employers to designate a pharmacy or pharmacy network which requires claimants to obtain their prescription medicines from the designated pharmacy or network. This section explains how prescriptions were filled prior to the enactment of the legislation and the mechanisms by which prescriptions were reimbursed by carriers and self-insured employers. This section also provides the basis for savings under the proposed regulation. The cost savings realized by using the pharmacy fee schedule will be approximately 12 percent for brand name drugs and 20 percent for generic drugs from the average wholesale price. This section explains the issues with using the Medicaid fee schedule. The substantive requirements are set forth that carriers must follow to notify a claimant of a designated pharmacy or network. This includes the information that must be included in the notification as well as the time frames within which notice must be provided. This section also describes how carriers and self-insured employers will benefit from a set reimbursement fee as provided by the proposed regulation. This section provides a description of the benefits to the Board by explaining how the proposed regulation will reduce the number of hearings previously necessary to determine proper reimbursement of prescription medications by using a set fee schedule.

Section 4 provides an explanation of the costs associated with the proposed regulation. It describes how carriers are liable for the cost of medication if they do not respond to a bill within 45 days. This section describes how carriers will incur costs for sending the required notices, but also describes how the costs can be offset to a certain degree by sending the notices listed in the Appendices to the regulation concurrently. Pharmacies will have costs associated with the proposed regulation due to a lower reimbursement amount, but the costs are offset by the reduction of administrative costs associated with seeking reimbursement from carriers and self-insured employers. Pharmacies will be required to post notice that they are included in a designated network and a listing of carriers that utilize the pharmacy in the network. This section describes how the rule benefits carriers and self-insured employers by allowing them to contract with a pharmacy or network to provide drugs thus allowing them to negotiate for the lowest cost of drugs and DME.

Section 5 describes how the rule will affect local governments. Since a municipality of governmental agency is required to comply with the rules for prescription drug reimbursement and pharmacy or network notification, the savings afforded to carriers and self-insured employers will be substantially the same for local governments.

Section 6 describes the paperwork requirements that must be met by carriers, employers and pharmacies. Carriers will be required to provide notice to employers of a designated pharmacy or network, and employers in turn will provide such notice to employees so that employees will know to use a designated pharmacy or network for prescription drugs. Pharmacies will be required to post notice that they are part of a designated network and a listing of carriers that utilize the pharmacy within the network. This section also specifies the requirement of a carrier or self-insured employer to respond to a bill within 45 days of receipt. If a response is not given within the time frame, the carrier or self-insured employer is deemed to have waived any objection and must pay the bill. This section sets forth the requirement of carriers to certify to the Board that designated pharmacies within a network meet compliance requirements for inclusion in the network. This section sets forth that employers must post notification of a designated pharmacy or network in the workplace and the procedures for utilizing the designated pharmacy or network. This section also sets forth how the Chair will enforce compliance with the rule by seeking documents pursuant to his authority under WCL § 111 and impose penalties for non-compliance.

Section 7 states that there is no duplication of rules or regulations.

Section 8 describes the alternatives explored by the Board in creating the proposed regulation. This section lists the entities contacted in regard to soliciting comments on the regulation and the entities that were included in the development process. The Board studied fee schedules from other states and the applicability of reimbursement rates to New York State. Alternatives included the Medicaid fee schedule, average wholesale price

minus 15% for brand and generic drugs, the Medicare fee schedule and straight average wholesale price.

Section 9 states that there are no applicable Federal Standards to the proposed regulation.

Section 10 provides the compliance schedule for the proposed regulation. It states that compliance is mandatory and that the proposed regulation takes effect upon adoption.

Regulatory Flexibility Analysis

1. Effect of rule:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. As part of the overall rule, these self-insured local governments will be required to file objections to prescription drug bills or durable medical equipment (hereinafter DME) bills if they object to any such bills. This process is required by statute. This rule affects members of self-insured trusts, some of which are small businesses. Typically a self-insured trust utilizes a third party administrator or group administrator to process workers' compensation claims. A third party administrator or group administrator is an entity which must comply with the new rule. These entities will be subject to the new rule in the same manner as any other carrier or employer subject to the rule. Under the rule, objections to a prescription bill must be filed within 45 days of the date of receipt of the bill or the objection is deemed waived and the carrier, third party administrator, or self-insured employer is responsible for payment of the bill. Additionally, affected entities must provide notification to the claimant if they choose to designate a pharmacy network, as well as the procedures necessary to fill prescriptions at the network pharmacy. If a network pharmacy is designated, a certification must be filed with the Board on an annual basis to certify that the all pharmacies in a network comply with the new rule. The new rule will provide savings to small business and local government by reducing the cost of prescription drugs by utilization of a pharmacy fee schedule instead of retail pricing. Litigation costs associated with reimbursement rates for prescription drugs will be substantially reduced or eliminated because the rule sets the price for reimbursement. Additional savings will be realized by utilization of a network pharmacy and a negotiated fee schedule for network prices for prescription drugs.

2. Compliance requirements:

Self-insured municipal employers, self-insured non-municipal employers are required by statute to file objections to prescription drug bills within a forty five day time period if they object to the bill, otherwise they will be liable to pay for the bill if the objection is not timely filed. Notice to the injured worker must be provided outlining that a network pharmacy has been designated and the procedures necessary to fill prescriptions at the network pharmacy. Certification by carriers and self-insured employers must be filed on an annual basis with the Board that all the pharmacies in a network are in compliance with the new rule. Failure to comply with the provisions of the rule will result in requests for information pursuant to the Chair's existing statutory authority and the imposition of penalties.

3. Professional services:

It is believed that no professional services will be needed to comply with this rule.

4. Compliance costs:

This proposal will impose minimal compliance costs on small business or local governments which will be more than offset by the savings afforded by the fee schedule. There are filing and notification requirements that must be met by small business and local governments as well as any other entity that utilizes a pharmacy network. Notices are required to be posted in the workplace informing workers of a designated network pharmacy. Additionally, a certification must be filed with the Board on an annual basis certifying that all pharmacies within a network are in compliance with the rule.

5. Economic and technological feasibility:

There are no additional implementation or technology costs to comply with this rule. The small businesses and local governments are already familiar with average wholesale price and regularly used that information prior to the adoption of the Medicaid fee schedule. Further, some of the reimbursement levels on the Medicaid fee schedule were determined by using the Medicaid discounts off of the average wholesale price. The Red Book is one source for average whole sale prices and it can be obtained for less than $100.00. Since the Board stores its claim files electronically, it has provided access to case files through its eCase program to parties of interest in workers' compensation claims. Most insurance carriers, self-insured employers and third party administrators have computers and internet access in order to take advantage of the ability to review claim files from their offices.

6. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts to all insurance carriers, employers, self-insured employers and claimants. The rule provides a process for reimbursement of prescription drugs as mandated by WCL section 13(i). Further, the notice requirements are to ensure a claimant uses a network pharmacy to maximize savings for the employer as any savings for the carrier can be passed on to the employer. The costs for compliance are minimal and are offset by the savings from the fee schedule. The rule sets the fee schedule as average wholesale price (AWP) minus twelve percent for brand name drugs and AWP minus twenty percent for generic drugs. As of July 1, 2008, the reimbursement for brand name drugs on the Medicaid Fee Schedule was reduced from AWP minus fourteen percent to AWP minus sixteen and a quarter percent. Even before the reduction in reimbursement some pharmacies, especially small ones, were refusing to fill brand name prescriptions because the reimbursement did not cover the cost to the pharmacy to purchase the medication. In addition the Medicaid fee schedule did not cover all drugs, include a number that are commonly prescribed for workers' compensation claims. This presented a problem because WCL § 13-o provides that only drugs on the fee schedule can be reimbursed unless approved by the Chair. The fee schedule adopted by this regulation eliminates this problem. Finally, some pharmacy benefit managers were no longer doing business in New York because the reimbursement level was so low they could not cover costs. Pharmacy benefit managers help to create networks, assist claimants in obtaining first fills without out of pocket costs and provide utilization review. Amending the fee schedule will ensure pharmacy benefit managers can stay in New York and help to ensure access for claimants without out of pocket cost.

7. Small business and local government participation:

The Assembly and Senate as well as the Business Council of New York State and the AFL-CIO provided input on the proposed rule.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies to all carriers, employers, self-insured employers, third party administrators and pharmacies in rural areas. This includes all municipalities in rural areas.

2. Reporting, recordkeeping and other compliance requirements:

Regulated parties in all areas of the state, including rural areas, will be required to file objections to prescription drug bills within a forty five day time period or will be liable for payment of a bill. If regulated parties fail to comply with the provisions of Part 440 penalties will be imposed and the Chair will request documentation from them to enforce the provision regarding the pharmacy fee schedule. The new requirement is solely to expedite processing of prescription drug bills or durable medical bills under the existing obligation under Section 13 of the WCL. Notice to the injured worker must be provided outlining that a network pharmacy has been designated and the procedures necessary to fill prescriptions at the network pharmacy. Carriers and self-insured employers must file a certification on an annual basis with the Board that all the pharmacies in a network are in compliance with the new rule.

3. Costs:

This proposal will impose minimal compliance costs on carriers and employers across the State, including rural areas, which will be more than offset by the savings afforded by the fee schedule. There are filing and notification requirements that must be met by all entities subject to this rule. Notices are required to be posted and distributed in the workplace informing workers of a designated network pharmacy and objections to prescription drug bills must be filed within 45 days or the objection to the bill is deemed waived and must be paid without regard to liability for the bill. Additionally, a certification must be filed with the Board on an annual basis certifying that all pharmacies within a network are in compliance with the rule. The rule provides a reimbursement standard for an existing administrative process.

4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government from imposition of new fee schedules and payment procedures. This rule provides a benefit to small businesses and local governments by providing a uniform pricing standard, thereby providing cost savings reducing disputes involving the proper amount of reimbursement or payment for prescription drugs or durable medical equipment. The rule mitigates the negative impact from the reduction in the Medicaid fee schedule effective July 1, 2008, by setting the fee schedule at Average Wholesale Price (AWP) minus twelve percent for brand name prescription drugs and AWP minus twenty percent for generic prescription drugs. In addition, the Medicaid fee schedule did not cover many drugs that are commonly prescribed for workers' compensation claimants. This fee schedule covers all drugs and addresses the potential issue of repackagers who might try to increase reimbursements.

5. Rural area participation:

Comments were received from the Assembly and the Senate, as well as the Business Council of New York State and the AFL-CIO regarding the impact on rural areas.

Job Impact Statement

The proposed amendment will not have an adverse impact on jobs. This amendment is intended to provide a standard for reimbursement of pharmacy and durable medical equipment bills.