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; or C for first Continuation.)

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

Department of Correctional Services

NOTICE OF ADOPTION

Approval of Time Allowance and Temporary Release Committees

I.D. No. COR-07-04-00002-A
Filing No. 450
Filing date: April 16, 2004
Effective date: May 5, 2004

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

Action taken: Amendment of sections 261.1(b) and 1900.2(b) of Title 7 NYCRR.

Statutory authority: Correction Law, section 112

Subject: Approval of time allowance and temporary release committees.

Purpose: To delegate approval functions.

Text or summary was published in the notice of proposed rule making, I.D. No. COR-07-04-00002-P, Issue of February 18, 2004.

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

Text of rule and any required statements and analyses may be obtained from: Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, Bldg. 2, State Campus, Albany, NY 12226-2050, (518) 457-4951

Assessment of Public Comment
The agency received no public comment.

Education Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Qualified Public Educational Facilities Bond Program

I.D. No. EDU-18-04-00014-P

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

Proposed action: Addition of section 155.26 to Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1) and (2) and 3713(1) and (2); and 26 USC section 142(a) and (k)

Subject: Qualified Public Educational Facilities Bond Program.

Purpose: To establish procedures, consistent with State and Federal law, for the allocation of the State's qualified public educational facility bond limitation pursuant to 26 USC section 142(k).

Text of proposed rule: Section 155.26 of the Regulations of the Commissioner of Education is added, effective August 12, 2004, as follows:

155.26 Qualified Public Educational Facility Bonds.

(a) Purpose. The purpose of this section is to establish procedures, consistent with State and federal law, for the allocation of the State's qualified public educational facility bond limitation pursuant to 26 USC section 142(k) (Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law section 107-16, section 422, 115 STAT. 65-66; Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402-0001; 2001 - available at the Office of Facilities Planning, State Education Building Annex, Room 1060, Albany, New York 12234).

(b) Definitions. As used in this section:

(1) Qualified Public Educational Facility bond (or "QPEF bond") means a bond issued pursuant to the requirements of 26 USC section 142, the proceeds of which are to be used to provide qualified public educational facilities.

(2) Qualified public educational facility means a school facility as defined in 26 USC section 142(k).

(3) Eligible local educational agency means a local educational agency, as defined in 20 USC section 7801(26), which meets the requirements of subdivision (d) of this section (Public Law section 107-110, section 9101[26], 115 STAT 1961-1962, U.S. Government Printing Office, Washington, D.C. 20402-9328; 2002- available at the Office of Facilities Planning, State Education Building Annex, Room 1060, Albany, New York 12234).

(4) Annual aggregate face amount of tax-exempt financing means the amount of the QPEF bond limitation allocated to the State pursuant to 26 USC section 142(k)(5).

(c) Allocation. The Commissioner shall determine annually the respective amounts of the annual aggregate face amount of tax- exempt financing to be allocated to eligible local educational agencies for approved qualified public educational facilities pursuant to 26 USC section 142(k).

(1) Allocation percentages. Except as provided in subparagraph (iii) of paragraph (2) of this subdivision:

(i) Eighty percent (80%) of the annual aggregate face amount of tax exempt financing shall be allocated to the following eligible local

educational agencies: The City School District of the City of New York, the Buffalo City School District, the Syracuse City School District, the Rochester City School District and the Yonkers City School District, in accordance with the procedures specified in paragraph (2) of this subdivision; provided that no more than ten percent (10%) of any amount so allocated to an eligible local educational agency shall be used to finance the equipping of qualified public educational facilities.

(ii) Fifteen percent (15%) of the annual aggregate face amount of tax exempt financing shall be allocated to the remaining eligible local educational agencies in the State, other than charter schools, in accordance with the procedures specified in paragraph (2) of this subdivision; provided that no more than ten percent (10%) of any amount so allocated to an eligible local educational agency shall be used to finance the equipping of qualified public educational facilities.

(iii) The remaining five percent (5%) of the annual aggregate face amount of tax exempt financing shall be allocated to eligible local educational agencies which are charter schools, in accordance with the procedures specified in paragraph (2) of this subdivision; provided that no more than ten percent (10%) of any amount so allocated to an eligible local educational agency shall be used to finance the equipping of qualified public educational facilities.

(2) Allocation procedures.

(i) All applications received from eligible local educational agencies by the date prescribed pursuant to subdivision (d) of this section shall be ranked in order of highest to lowest number of students enrolled in each such local educational agencies.

(ii) Subject to the allocation percentages set forth in paragraph (1) of this subdivision, the annual aggregate face amount of tax-exempt financing shall be allocated to eligible local educational agencies in the order of their ranking, from highest to lowest, as established in subparagraph (i) of this paragraph, until such allocation is exhausted.

(iii) Notwithstanding any other provision of this subdivision to the contrary, in the event the Commissioner determines that the annual aggregate face amount of tax-exempt financing for any year will not be exhausted because of the failure of an eligible local educational agency receiving an allocation to use all or a part of its allocation, the Commissioner may:

(a) reallocate such unused allocation, adjusting the percentages specified in paragraph (1) of this subdivision as necessary, to assure that such annual aggregate face amount of tax-exempt financing is exhausted, provided that eligible local educational agencies whose allocation for the prior year was reallocated pursuant to this clause shall be given priority in the order in which they are ranked pursuant to subparagraph (i) of this paragraph in the allocation of any allocated but unused limitation; or

(b) elect to carry forward such unused allocation for any calendar year for three calendar years following the calendar year in which the unused allocation arose, pursuant to 26 USC section 142(k)(5)B)(i).

(d) Local educational agency responsibilities.

(1) A local educational agency may apply, in a form prescribed by and a date established by the Commissioner, for approval to receive an allocation for QPEF bonds from the annual aggregate face amount of tax-exempt financing. Such application shall include, but is not limited to:

(i) a description of the project(s) and the amount(s) to be financed through the issuance of QPEF bonds;

(ii) a certification by the local educational agency that a public-private partnership agreement has been executed pursuant to 26 USC section 142(k)(2);

(iii) a certification by the local educational agency within which the qualified public educational facility or facilities are located, that each such facility meets the requirements for a qualified public educational facility pursuant to 26 USC section 142(k)(3) and (4);

(iv) the written approval of the superintendent of schools and the Board of Education, or in the case of a charter school - the chief executive officer and the board of trustees of the charter school, for such bond issuance; and

(v) an assurance that each such qualified public educational facility will be in compliance with the Education Law and this section.

(2) In cities with a population of less than 1,000,000, any capital construction project to be financed through the issuance of QPEF bonds shall be submitted to the Office of Facilities Planning in the State Education Department. In cities with a population of 1,000,000 or more, any capital construction project to be financed through the issuance of QPEF bonds shall be submitted to the appropriate authority having jurisdiction for review and issuance of a building permit.

(3) Nothing in this section shall prevent the use of QPEF bonds for projects that are not capital construction projects, provided that such projects meet all the other requirements of this section.

Text of proposed rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov.

Data, views or arguments may be submitted to: James A. Kadamus, Deputy Commissioner, Education Department, Rm. 875, Education Bldg. Annex, Albany, NY 12234, (518) 474-5915, e-mail: jkadamus@mail.nysed.gov

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:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents as its head, and authorizes the Board of Regents to appoint the Commissioner of Education as the chief administrative officer of the Department, which is charged with the general management and supervision of public schools and the educational work of the State.

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

Education Law section 305(1) provides that the Commissioner of Education is the chief executive officer of the State system of education and of the Board of Regents, and charged with the enforcement of all general and special laws relating to the educational system of the State and the execution of all educational policies determined by the Board of Regents. Section 305(2) provides that the Commissioner shall have general supervision over all schools and institutions subject to the Education Law or any statute relating to education.

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

26 USC section 142 establishes a new type of federal tax- exempt financing for public elementary and secondary school construction called a Qualified Public Educational Facility Bond; allows for a public-private partnership agreement between a for- profit corporation and public school agency to construct, rehabilitate, refurbish, or equip a school facility and transfer the school facility to the agency for no additional consideration at the end of the agreement; establishes an annual national private activity bond volume limitation; and provides for the allocation of such limitation amount to State educational agencies for allocation to eligible local educational agencies within each respective State.

LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the above statutory authority and is necessary to implement the provisions of 26 USC section 142 by establishing the process for the allocation of the State's Qualified Public Educational Facilities (QPEF) bond limitation amount to local educational agencies within the State.

NEEDS AND BENEFITS:

The proposed rule will establish the process by which eligible local educational agencies gain access to federal tax- exempt financing entitled Qualified Public Educational Facility Bonds for the construction, rehabilitation, refurbishment or equipping of qualified public educational facilities. A qualified public educational facility means any school facility which is: (a) part of a public elementary school or a public secondary school, and (b) owned by a private, for-profit corporation pursuant to a public-private partnership agreement with a State or local educational agency.

Under the QPEF program, a local educational agency and private for-profit corporation enter into a public-private partnership agreement under which the corporation agrees to construct, rehabilitate, refurbish, or equip a school facility and, at the end of the term of the agreement, to transfer the school facility to the local educational agency for no additional consideration. The construction is financed through tax-exempt private activity bonds.

COSTS:

(a) Costs to State government: None. The proposed rule does not impose any additional costs on the State beyond those inherent in the authorizing statute, 26 USC section 142.

(b) Costs to local government: The proposed rule does not directly impose any costs on local government. Participation in the QPEF program is voluntary. Eligible local educational agencies that choose to participate must submit an application to the Commissioner for approval to receive a QPEF allocation from the State volume limitation amount. The costs of submitting a one-page, two-sided application are minimal and are anticipated to be absorbed within existing school district financial and staff resources. Local educational agencies will benefit from the public-private partnership agreement because the cost of a lease is less than the cost of construction and private developers may be able to build higher quality schools at a lower cost and on a faster time frame than presently exists.

(c) Cost to private regulated parties: None. The proposed rule establishes procedures for the allocation of the State QPEF bond limitation among eligible local educational agencies and does not impose any costs or compliance requirements on private regulated parties.

(d) Cost to regulating agency for implementation and continued administration of this rule: None. The proposed rule does not impose any additional costs on the State Education Department beyond those imposed by the authorizing statute, 26 USC sections 142 and 146.

LOCAL GOVERNMENT MANDATES:

The proposed rule will not impose any program, service, duty or responsibility on local governments. The rule will provide access to a new type of tax-exempt bond funding called Qualified Public Educational Facility Bonds, which will reduce costs to the borrower. Participation in the QPEF program is voluntary.

PAPERWORK:

Eligible local educational agencies that wish to finance projects through the issuance of Qualified Public Educational Facility Bonds must submit a one-page, two-sided application to the Commissioner for approval to receive an allocation from theState QPEF bond limitation amount. Such application shall be submitted in a form prescribed by and a date established by the Commissioner. Such application shall include, but is not limited to:

(1) A description of the project(s) and the amount(s) to be financed through the issuance of QPEF bonds;

(2) A certification by the local educational agency that a public-private partnership agreement has been executed pursuant to 25 USC section 142(k)(2).

(3) A certification by the local educational agency within which the qualified public educational facility or facilities are located, that each such facility meets the requirements for a qualified public educational facility pursuant to 26 USC section 142(k)(3) and (4).

(4) The written approval of the superintendent of schools and the board of education, or in the case of a charter school - the chief executive officer and the board of trustees of the charter school, for such bond issuance.

(5) An assurance that each such qualified public educational facility will be in compliance with the Education Law and this section.

Any capital construction project to be financed through the issuance of qualified public educational facility bonds shall be submitted for review to the Office of Facilities Planning in the State Education Department or, where applicable, to the appropriate authority having jurisdiction for review and issuance of a building permit.

DUPLICATION:

The proposed rule does not duplicate existing State or Federal regulations, but is necessary to implement the provisions of 26 USC section 142 by establishing the process for the allocation of the State's Qualified Public Educational Facilities (QPEF) bond limitation amount to local educational agencies within the State.

ALTERNATIVES:

There are no significant alternatives and none were considered.

FEDERAL STANDARDS:

The proposed rule is necessary to implement the provisions of 26 USC section 142 by establishing the process for the allocation of the State's Qualified Public Educational Facilities (QPEF) bond limitation amount to local educational agencies within the State.

COMPLIANCE SCHEDULE:

Participation in the QPEF program is voluntary. It is anticipated that eligible local educational agencies that wish to participate in such program will be able to comply with the proposed regulation by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed rule will establish the process by which local educational agencies gain access to federal tax-exempt financing entitled Qualified Public Educational Facility Bonds ("QPEFs") for the construction, rehabilitation, refurbishment or equipping of qualified public educational facilities. A qualified public educational facility means any school facility which is: (a) part of a public elementary school or a public secondary school, and (b) owned by a private, for-profit corporation pursuant to a public-private partnership agreement with a State or local educational agency. Under the QPEF program, a local educational agency and private for-profit corporation enter into a public-private partnership agreement under which the corporation agrees to construct, rehabilitate, refurbish, or equip a school facility, and at the end of the term of the agreement, to transfer the school facility to the local educational agency for no additional consideration. The corporation receives tax-exempt private activity bonds for the construction.

The proposed rule establishes the process for the allocation of the State's Qualified Public Educational Facilities (QPEF) bond limitation amount to local educational agencies within the State, and does not impose any economic impact, reporting, recordkeeping 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 Governments:

EFFECT OF RULE:

The proposed rule applies to all public school districts, charter schools and boards of cooperative educational services in the State, to the extent they choose to participate in the QPEF bond program.

COMPLIANCE REQUIREMENTS:

There are no compliance requirements associated with the proposed rule. Participation in the Qualified Public Educational Facility bond program is voluntary for those districts meeting federal eligibility requirements established under 26 USC section 142. Eligible local educational agencies that choose to participate must submit an application to the Commissioner for approval to receive a QPEF allocation from the State volume limitation amount. Such application shall be submitted in a form prescribed by and a date established by the Commissioner. Such application shall include, but is not limited to:

(1) A description of the project(s) and the amount(s) to be financed through the issuance of QPEF bonds.

(2) A certification by the local educational agency that a public-private partnership agreement has been executed pursuant to 25 USC section 142(k)(2).

(3) A certification by the local educational agency within which the qualified public educational facility or facilities are located, that each such facility meets the requirements for a qualified public educational facility pursuant to 26 USC section 142(k)(3) and (4).

(4) The written approval of the superintendent of schools and the board of education, or in the case of a charter school - the chief executive officer and the board of trustees of the charter school, for such bond issuance.

(5) An assurance that each such qualified public educational facility will be in compliance with the Education Law and this section.

Any capital construction project to be financed through the issuance of qualified public educational facility bonds shall be submitted for review to the Office of Facilities Planning in the State Education Department or, where applicable, to the appropriate authority having jurisdiction for review and issuance of a building permit.

PROFESSIONAL SERVICES:

There are no additional professional services required as a result of the implementation of the proposed rule.

COMPLIANCE COSTS:

The proposed rule does not directly impose any costs on local government. Participation in the QPEF program is voluntary. Eligible local educational agencies that choose to participate must submit an application to the Commissioner for approval to receive a QPEF allocation from the State volume limitation amount. The costs of submitting a one-page, two- sided application are minimal and are anticipated to be absorbed within existing school district financial and staff resources. Local educational agencies will benefit from the public-private partnership agreement because the cost of a lease is less than the cost of construction and private developers may be able to build higher quality schools at a lower cost and on a faster time frame than presently exists.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule will not impose any new economic or technological requirements on local governments. Economic feasibility is addressed under the Compliance Costs section above.

MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement a process by which eligible local educational agencies within the State gain access to the State's qualified public educational facility bond limitation allocation. There is no adverse impact as a result of this regulation. Participation in the program is voluntary. Participants will receive a benefit in the form of tax-exempt borrowing. The local educational agency saves money because the cost of the lease is less than the cost of construction and the for-profit corporation can lease out the building during off-school hours.

LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed rule have been provided to District Superintendents with the request that they be shared with school districts within their supervisory regions for review and comment.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed rule applies to all local educational agencies in the State, including 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:

There are no compliance requirements associated with the proposed rule. Participation in the Qualified Public Educational Facility Bond program is voluntary for those districts meeting federal eligibility requirements established under 26 USC section 142(k). Eligible local educational agencies that wish to finance projects through the issuance of Qualified Public Educational Facility Bonds (QPEFs) must submit an application to the Commissioner for approval to receive an allocation from the State QPEF bond limitation amount. Such application shall be submitted in a form prescribed by and a date established by the Commissioner and shall include, but is not limited to:

(1) A description of the project(s) and the amount(s) to be financed through the issuance of QPEF bonds;

(2) A certification by the local educational agency that a public-private partnership agreement has been executed pursuant to 25 USC section 142(k)(2).

(3) A certification by the local educational agency within which the qualified public educational facility or facilities are located, that each such facility meets the requirements for a qualified public educational facility pursuant to 26 USC section 142(k)(3) and (4).

(4) The written approval of the superintendent of schools and the board of education, or in the case of a charter school - the chief executive officer and the board of trustees of the charter school, for such bond issuance.

(5) An assurance that each such qualified public educational facility will be in compliance with the Education Law and this section.

Any capital construction project to be financed through the issuance of qualified public educational facility bonds shall be submitted for review to the Office of Facilities Planning in the State Education Department or, where applicable, to the appropriate authority having jurisdiction for review and issuance of a building permit.

COMPLIANCE COSTS:

The proposed rule does not directly impose any costs on school districts. Participation in the QPEF program is voluntary. Eligible local educational facilities that choose to participate must submit a one-page, two-sided application to the Commissioner for approval to receive a QPEF allocation from the State limitation allocation. The costs of submitting an application are minimal and are anticipated to be absorbed within existing school district financial and staff resources. Local educational agencies will benefit from participation in the QPEF program because the cost of a lease is less than the cost of construction, and private developers may be able to build higher quality schools at a lower cost and on a faster time frame than presently exists. The private developer will benefit because it will be able to lease the facility during off-school hours.

MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement a process by which eligible local educational agencies within the State gain access to the State's qualified public educational facility bond limitation allocation. There is no adverse impact as a result of this regulation. Participation in the program is voluntary. Participants will receive a benefit in the form of tax-exempt borrowing. The local educational agency saves money because the cost of the lease is less than the cost of construction and the for-profit corporation can lease out the building during off-school hours.

RURAL AREA PARTICIPATION:

Copies of the proposed rule have been distributed to members of the Department's Rural Advisory Committee, which includes representatives of school districts in rural areas. Copies were also provided to each charter school in the State.

Job Impact Statement

The proposed rule relates to the process by which local educational agencies gain access to a program entitled Qualified Public Educational Facility (QPEF) bonds, established in 26 USC section 142, by which the applicant receives tax-exempt bonds. Under the QPEF program, a local educational agency and private for-profit corporation enter into a public-private partnership agreement under which the corporation agrees to construct, rehabilitate, refurbish, or equip a school facility, and at the end of the term of the agreement, to transfer the school facility to the local educational agency for no additional consideration.

The proposed amendment will not have an adverse impact on jobs or employment opportunities. The availability of financing through QPEF bonds for school construction projects will have a positive impact on jobs and 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.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Education for Gainful Employment (EDGE) Program

I.D. No. EDU-18-04-00015-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 164.1(g) of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided) and 3713(1) and (2); and L. 2003, ch. 1, section 1

Subject: Education for Gainful Employment (EDGE) Program.

Purpose: To update the commissioner's regulations by replacing references to the Job Opportunities and Basic Skills (JOBS) Program with references to the Education for Gainful Employment (EDGE) Program.

Text of proposed rule: Subdivision (g) of section 164.1 of the Regulations of the Commissioner of Education is amended, effective September 30, 2004, as follows:

(g) [Job opportunities and basic skills training (JOBS) program] *Education for Gainful Employment (EDGE) program.* Application for grants for adult basic education and literacy programs which are designated by the commissioner to support activities under the [State job opportunities and basic skills training] *Education for Gainful Employment* program for [aid to families with dependent children] *temporary assistance to needy families* shall meet all the requirements of this section except:

(1) degree-granting institutions and public and private not-for-profit agencies which include but are not limited to school districts, boards of cooperative educational services (BOCES), community based organizations, literacy volunteer organizations, and libraries shall be eligible to receive awards;

(2) the commissioner shall approve programs designed to assist [recipients of public assistance to attain gainful employment] *those eligible for temporary assistance to needy families services*, including, but not limited to, child care, case management, assessment, counseling, transportation, occupational education and training, work experience and training for employment readiness;

(3) the building, rooms or space in which staff and students are housed for any purpose while attending school, and all facilities and equipment therein, shall meet the standards for school purposes of local fire, health and building authorities;

(4) the date for submission of applications for awards to offer [JOBS-related] *EDGE-related* education programs for pubic assistance shall be no later than October 1st of the year in which application is made [provided that for program year October 1, 1990 through September 30, 1991 such applications shall be made no later than June 30, 1991].

Text of proposed rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov.

Data, views or arguments may be submitted to: James A. Kadamus, Deputy Commissioner, Education Department, Rm. 875, Education Bldg. Annex, Albany, NY 12234, (518) 474-5915, e-mail: jkadamus@mail.nysed.gov

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

1. STATUTORY AUTHORITY:

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

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

Section 1 of Chapter 53 of the Laws of 2003 provides an appropriation for programs involving literacy and basic education for public assistance recipients.

The federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. Law 104-193) repealed the Jobs Opportunities and Basic Skills Training (JOBS) program and the Aid to Families with Dependent Children (AFDC) program, and created the Temporary Assistance for Needy Families (TANF) program.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the aforementioned authority to establish criteria relating to the Education for Gainful Employment (EDGE) program.

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to replace references to the Jobs Opportunities and Basic Skills Training (JOBS) program and the Aid to Families with Dependent Children (AFDC) program with, respectively, the Education for Gainful Employment (EDGE) program and Temporary Assistance for Needy Families (TANF) program. The federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. Law 104-193) repealed the JOBS and AFDC programs, and created the TANF program. The proposed amendment will set forth the description, eligibility criteria and allowable activities for programs funded under the Welfare Education Program (WEP). A portion of WEP is sub-allocated for a match for TANF funds to create the EDGE program, which is administered in partnership with the State Department of Labor.

4. COSTS:

(a) Costs to State government: none.

(b) Costs to local government: none.

(c) Costs to private regulated parties: none.

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

The proposed amendment does not impose any costs on the State, local government, private regulated parties or the State Education Department. It merely amends section 164.1(g), relating to applications for grants for adult basic education to support activities under the job opportunities and basic skills (JOBS) program, to replace references to the JOBS program and Aid to Families with Dependent Children program with references, respectively, to the Education for Gainful employment (EDGE) program and Temporary Assistance for Needy Families (TANF) program.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any program, service, duty or responsibility on local governments. The proposed amendment merely amends section 164.1(g), relating to applications for grants for adult basic education to support activities under the job opportunities and basic skills (JOBS) program, to replace references to the JOBS program and Aid to Families with Dependent Children program with references, respectively, to the Education for Gainful employment (EDGE) program and Temporary Assistance for Needy Families (TANF) program.

6. PAPERWORK:

The proposed amendment does not impose any additional paperwork. The proposed amendment merely amends section 164.1(g), relating to applications for grants for adult basic education to support activities under the job opportunities and basic skills (JOBS) program, to replace references to the JOBS program and Aid to Families with Dependent Children program with references, respectively, to the Education for Gainful employment (EDGE) program and Temporary Assistance for Needy Families (TANF) program.

7. DUPLICATION:

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

8. ALTERNATIVES:

There are no significant alternatives and none were considered.

9. FEDERAL STANDARDS:

There are no related federal standards.

10. COMPLIANCE SCHEDULE:

It is anticipated that school districts and boards of cooperative educational services will be able to achieve compliance with the proposed amendment by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment amends section 164.1(g), relating to applications for grants for adult basic education to support activities under the job opportunities and basic skills (JOBS) program, to replace references to the JOBS program and the Aid to Families with Dependent Children (AFDC) program with references, respectively, to the Education for Gainful employment (EDGE) program and Temporary Assistance for Needy Families (TANF) program. The federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. Law 104-193) repealed the JOBS and AFDC programs, and created the Temporary Assistance for Needy Families (TANF) program.

The proposed amendment 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 amendments that they do 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 Governments:

EFFECT OF RULE:

The proposed amendment applies to all public school districts and boards of cooperative educational services in the State.

COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on local governments.

The proposed amendment amends section 164.1(g), relating to applications for grants for adult basic education to support activities under the job opportunities and basic skills (JOBS) program, to replace references to the JOBS and Aid to Families with Dependent Children (AFDC) programs with references, respectively, to the Education for Gainful employment (EDGE) program and Temporary Assistance for Needy Families (TANF) program. The federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. Law 104-193) repealed the JOBS and AFDC programs, and created the Temporary Assistance for Needy Families (TANF) program.

PROFESSIONAL SERVICES:

The proposed amendment will not impose any additional professional services requirements.

COMPLIANCE COSTS:

The proposed amendment will not impose any costs on local governments. It merely amends section 164.1(g), relating to applications for grants for adult basic education to support activities under the job opportunities and basic skills (JOBS) program, to replace references to the JOBS program and Aid to Families with Dependent Children (AFDC) program with references, respectively, to the Education for Gainful employment (EDGE) program and Temporary Assistance for Needy Families (TANF) program.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional costs or new technological requirements.

MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any compliance requirements or costs on local governments. It merely amends section 164.1(g), relating to applications for grants for adult basic education to support activities under the job opportunities and basic skills (JOBS) program, to replace references to the JOBS program and the Aid to Families with Dependent Children (AFDC) program with references, respectively, to the Education for Gainful employment (EDGE) program and Temporary Assistance for Needy Families (TANF) program. The federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. Law 104-193) repealed the JOBS and AFDC programs, and created the Temporary Assistance for Needy Families (TANF) program.

LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all school districts and boards of cooperative educational services in the State, including 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 SEVICES:

The proposed amendment does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on local governments.

The proposed amendment amends section 164.1(g), relating to applications for grants for adult basic education to support activities under the job opportunities and basic skills (JOBS) program, to replace references to the JOBS and Aid to Families with Dependent Children (AFDC) programs with references, respectively, to the Education for Gainful employment (EDGE) program and Temporary Assistance for Needy Families (TANF) program. The federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. Law 104-193) repealed the JOBS and AFDC programs, and created the Temporary Assistance for Needy Families (TANF) program. The proposed amendment will not impose any additional professional services requirements.

COMPLIANCE COSTS:

The proposed amendment will not impose any costs on local governments. It merely amends section 164.1(g), relating to applications for grants for adult basic education to support activities under the job opportunities and basic skills (JOBS) program, to replace references to the JOBS program and Aid to Families with Dependent Children (AFDC) program with references, respectively, to the Education for Gainful employment (EDGE) program and Temporary Assistance for Needy Families (TANF) program.

MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any compliance requirements or costs on rural areas. It merely amends section 164.1(g), relating to applications for grants for adult basic education to support activities under the job opportunities and basic skills (JOBS) program, to replace references to the JOBS program and the Aid to Families with Dependent Children (AFDC) program with references, respectively, to the Education for Gainful employment (EDGE) program and Temporary Assistance for Needy Families (TANF) program. The federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. Law 104-193) repealed the JOBS and AFDC programs, and created the Temporary Assistance for Needy Families (TANF) program.

RURAL AREA PARTICIPATION:

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

Job Impact Statement

The proposed amendment amends section 164.1(g), relating to applications for grants for adult basic education to support activities under the job opportunities and basic skills (JOBS) program, to replace references to the JOBS program and the Aid to Families with Dependent Children (AFDC) program with references, respectively, to the Education for Gainful employment (EDGE) program and Temporary Assistance for Needy Families (TANF) program. The federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. Law 104-193) repealed the JOBS and AFDC programs, and created the Temporary Assistance for Needy Families (TANF) program.

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

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Teacher Aide and Teaching Assistant as School Support Personnel

I.D. No. EDU-18-04-00016-P

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

Proposed action: Amendment of sections 200.1, 200.2, 200.4, 200.6, 200.9 and 200.16 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 4403(3) and 4410(13)

Subject: Teacher aide and teaching assistant as school support personnel.

Purpose: To replace the term "paraprofessional" with the term "supplementary school personnel."

Text of proposed rule: 1. Subdivision (i) of section 200.1 of the Regulations of the Commissioner of Education is amended, effective August 12, 2004, as follows:

(i) Class size means the maximum number of students who can receive instruction together in a special class or resource room program and the number of teachers and [paraprofessionals] *supplementary school personnel* assigned to the class.

2. Subdivision (hh) of section 200.1 of the Regulations of the Commissioner of Education is amended, effective August 12, 2004, as follows:

(hh) [Paraprofessional] *Supplementary school personnel* means a teacher aide or a [teacher] *teaching* assistant as described in section [80.33] *80-5.6(a) through (d)* of this Title.

3. Subparagraph (iii) of paragraph (11) of subdivision (b) of section 200.2 of the Regulations of the Commissioner of Education is amended, effective August 12, 2004, as follows:

(iii) the chairperson of the committee on special education designates for each student one, or as appropriate, more than one professional employee of the school district with knowledge of the student's disability and education program to, prior to the implementation of the IEP, inform each regular education teacher, special education teacher, related service provider, other service provider, [paraprofessional] *supplementary school personnel*, as defined in section 200.1(hh) of this Part, and other provider and support staff person of his or her responsibility to implement the recommendations on a student's IEP, including the responsibility to provide specific accommodations, program modifications, supports and/or services for the student in accordance with the IEP.

4. Subdivision (h) of section 200.2 of the Regulations of the Commissioner of Education is amended, effective August 12, 2004, as follows:

(h) Local comprehensive system of personnel development (CSPD) plan. The board of education or trustees of each school district and each board of cooperative educational services shall submit to the State Education Department annually, by a date prescribed by the commissioner, a local CSPD plan containing the information demonstrating that all personnel providing services to students with disabilities are adequate as prescribed by the commissioner. The CSPD plan shall include, but not be limited to, a description of the professional development activities provided to all professional [and paraprofessional] staff *and supplementary school personnel* who work with students with disabilities to assure that they have the skills and knowledge necessary to meet the needs of students with disabilities. A school district or BOCES may include the local CSPD plan as part of the professional development plan pursuant to section 100.2(dd) of the commissioner's regulations.

5. Subparagraphs (ii) and (iii) of paragraph (3) of subdivision (e) of section 200.4 of the Regulations of the Commissioner of Education are amended, effective August 12, 2004, as follows:

(ii) ensuring that [a paraprofessional] *supplementary school personnel*, as defined in section 200.1(hh) of this Part, and each other provider responsible for assisting in the implementation of a student's IEP, has the opportunity to review a copy of the student's IEP, prior to the implementation of such program, and has ongoing access to a copy of the IEP, which may be the copy provided to the student's special education teacher or the teacher or related service provider under whose direction such [paraprofessional] *supplementary school personnel* or other provider works;

(iii) ensuring that each regular education teacher, special education teacher, related service provider, other service provider, [paraprofessional] *supplementary school personnel* as defined in section 200.1(hh) of this Part, and other provider and support staff person has been informed, prior to the implementation of the IEP, of his or her responsibility to implement the recommendations on the student's IEP, including the responsibility to provide specific accommodations, program modifications, supports and/or services for the student in accordance with the IEP; and

6. Subparagraphs (i), (ii) and (iii) of paragraph (4) of subdivision (g) of section 200.6 of the Regulations of the Commissioner of Education are amended, effective August 12, 2004, as follows:

(i) The maximum class size for special classes containing students whose management needs interfere with the instructional process, to the

extent that an additional adult is needed within the classroom to assist in the instruction of such students, shall not exceed 12 students, with [at least] one *or more* [paraprofessional] *supplementary school personnel* assigned to each class during periods of instruction.

(ii) (a) The maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, shall not exceed six students, with [at least] one *or more* [paraprofessional] *supplementary school personnel* assigned to each class during periods of instruction.

(b) The maximum class size for special classes containing students whose management needs are determined to be intensive, and requiring a significant degree of individualized attention and intervention, shall not exceed eight students, with [at least] one *or more* [paraprofessional] *supplementary school personnel* assigned to each class during periods of instruction.

(iii) The maximum class size for those students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, shall not exceed 12 students. In addition to the teacher, the staff/student ratio shall be one staff person to three students. The additional staff may be teachers, [paraprofessionals] *supplementary school personnel* and/or related service providers.

7. Subparagraph (x) of paragraph (2) of subdivision (f) of section 200.9 of the Regulations of the Commissioner of Education is amended, effective August 12, 2004, as follows:

(x) For the purpose of this subparagraph, integrated special class programs are defined as those programs employing a special education teacher and [at least] one *or more* [paraprofessional] *supplementary school personnel* in a classroom made up of no more than twelve preschool students with and without disabilities, or a classroom that is made up of no more than twelve preschool students with disabilities staffed by a special education teacher and [at least] one *or more* [paraprofessional] *supplementary school personnel* that is housed in the same physical space as a preschool class of students without disabilities taught by a non-special education teacher. The tuition rate for preschool programs operating a special class as defined in section 200.16 of this Part in an integrated setting serving students with and without disabilities shall be established in accordance with the provisions set forth in paragraph (1) of this subdivision and subparagraphs (i) through (viii) of this paragraph, with the following additional provisions:

8. Clause (b) of subparagraph (iii) of paragraph (3) of subdivision (h) of 200.16 of the Regulations of the Commissioner of Education is amended, effective August 12, 2004, as follows:

(b) the maximum class size shall not exceed 12 preschool students with at least one teacher and one *or more* [paraprofessional] *supplementary school personnel* assigned to each class; and

Text of proposed rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov.

Data, views or arguments may be submitted to: Rebecca H. Cort, Deputy Commissioner, Education Department, Office of Vocational and Educational Services for Individuals with Disabilities, One Commerce Plaza, Rm. 1606, Albany, NY 12234, (518) 474-2714, e-mail: rcort@mail.nysed.gov

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:

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

Section 207 of the Education Law empowers the Board of Regents and the Commissioner of Education to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the State Education Department by law.

Section 4403 of the Education Law outlines the responsibilities of the Department and of the local school districts to provide special education programs and services to students with disabilities. Subdivision 3 of section 4403 authorizes the Department to formulate such rules and regulations pertaining to the physical and educational needs of such children as the Commissioner shall deem to be in their best interest.

Section 4410 of the Education Law outlines the special education services and programs for preschool children with disabilities. Subdivision 13 of section 4410 authorizes the Commissioner of Education to adopt regulations to implement the provisions of the statute.

LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the legislative objectives set forth in the aforementioned statutes by aligning the State's special education regulations (8 NYCRR Part 200) with the provisions of 8 NYCRR section 80-5.6, relating to supplementary school personnel, and with the provisions of the federal No Child Left Behind Act of 2001(Public Law 107-110), relating to qualified paraprofessionals.

NEEDS AND BENEFITS:

The proposed rulemaking is necessary to align Part 200 of the Commissioner's Regulations with the provisions of 8 NYCRR section 80-5.6, relating to supplementary school personnel, and with the provisions of the federal No Child Left Behind Act (Public Law 107-110), relating to qualified paraprofessionals.

Section 200.1(hh) presently defines the term "paraprofessional", as used in Part 200, to mean either a teacher aide or a teacher assistant, but pursuant to section 80-5.6 of the Commissioner's Regulations these positions are designated as "supplementary school personnel."

Furthermore, under section 1119 of the No Child Left Behind Act (NCLB), the term "paraprofessional" refers to individuals who provide instructional support. However, as noted above, section 200.1(hh) of the Commissioner's Regulations presently defines a paraprofessional to include both a teaching assistant, whose duties include instructional support (see 8 NYCRR section 80- 5.6[b]), as well as a teacher aide, whose duties do not include instructional support (see 8 NYCRR section 80-5.6[a]).

Therefore, in order to ensure consistency with the provisions of section 80-5.6 and the NCLB, it is necessary to amend section 200.1(hh) and other provisions of Part 200 of the Commissioner's Regulations to replace references to "paraprofessionals" with the term "supplementary school personnel."

COSTS:

a. Costs to State government: None

b. Costs to local government: None

c. Costs to regulated parties: None

d. Costs to the State Education Department for implementation and continuing compliance: None

The proposed amendment is necessary to ensure consistency with the provisions of section 80-5.6 and the federal No Child Left Behind Act of 2001 and does not impose any additional costs on the State, local governments, private regulated parties or the State Education Department.

LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility upon local governments. The proposed amendment replaces references to the term "paraprofessional" with the term "supplementary school personnel" in order to ensure consistency with the provisions of section 80-5.6(a-d) of the Commissioner's Regulations and the NCLB.

PAPERWORK:

The proposed amendment is necessary to ensure consistency with the provisions of section 80-5.6 and the federal No Child Left Behind Act of 2001 and does not impose any additional reporting or record keeping requirements.

DUPLICATION:

The proposed amendment will not duplicate, overlay or conflict with any other State or federal statute or regulation but instead will conform State regulation terminology to the provisions of section 80-5.6 of the Commissioner's Regulations and the federal No Child Left Behind Act of 2001.

ALTERNATIVES:

There are no significant alternatives to the proposed amendment and none were considered.

FEDERAL STANDARDS:

The proposed amendment does not exceed any minimum standards of the federal government.

COMPLIANCE SCHEDULE:

It is anticipated that the regulated parties will be able to achieve compliance with the proposed rulemaking by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment applies to schools in New York State that operate an education program for students with disabilities and is necessary to align the State's special education regulations with the provisions of section 80-5.6 of the Commissioner's Regulations and the federal No Child Left Behind Act of 2001 (Public Law 107-110). Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

1. EFFECT OF RULE:

The proposed amendment applies to each school in New York State that operates an education program for students with disabilities.

2. COMPLIANCE REQUIREMENTS:

The proposed amendment ensures consistency with the provisions of section 80-5.6 of the Commissioner's Regulations and the federal No Child Left Behind Act of 2001 (NCLB), by amending Part 200 of the Commissioner's Regulations to replace references to "paraprofessionals" with the term "supplementary school personnel." The proposed amendment will not impose any compliance requirements on local governments.

3. PROFESSIONAL SERVICES:

The proposed amendment will not impose any additional professional service requirements on school districts.

4. COMPLIANCE COSTS:

The proposed amendment is necessary to ensure consistency with the provisions of section 80-5.6 and the NCLB and does not impose any additional costs on local governments.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional technological requirements on school districts. Furthermore, since there are no additional costs, the proposed amendment is economically feasible.

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any additional compliance requirements or costs on local governments. The proposed amendment merely replaces references to the term "paraprofessional" with the term "supplementary school personnel" in order to ensure consistency with the provisions of section 80- 5.6(a-d) of the Commissioner's Regulations and the NCLB.

7. LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed amendment have been solicited from school districts, through the office of the district superintendents of each supervisory district in the State.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all schools in New York State that operate special education programs, including those located in the 44 rural counties with less that 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 persons per square mile or less.

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

The proposed amendment ensures consistency with the provisions of section 80-5.6 of the Commissioner's Regulations and the federal No Child Left Behind Act of 2001 (NCLB), by amending Part 200 of the Commissioner's Regulations to replace references to "paraprofessionals" with the term "supplementary school personnel." The proposed amendment does not impose any additional reporting, record keeping and other compliance requirements, or professional service requirements on local governments. The proposed amendment will not impose any additional professional service requirements on school districts.

COMPLIANCE COSTS:

The proposed amendment ensures consistency with the provisions of section 80-5.6 of the Commissioner's Regulations and the federal No Child Left Behind Act of 2001 (NCLB), by amending Part 200 of the Commissioner's Regulations to replace references to "paraprofessionals" with the term "supplementary school personnel." The proposed amendment will not impose any compliance costs on local governments.

MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any additional compliance requirements or costs on local governments. The proposed amendment merely replaces references to the term "paraprofessional" with the term "supplementary school personnel" in order to ensure consistency with the provisions of section 80- 5.6(a-d) of the Commissioner's Regulations and the NCLB. Because these statutory requirements apply to all school districts in the State, including those located in rural areas, it is not possible to establish different compliance and reporting requirements for school districts in rural areas, or to exempt them from the requirements of the proposed amendment.

RURAL AREA PARTICIPATION:

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

Job Impact Statement

The proposed amendment applies to all schools in New York State schools that operate an education program for students with disabilities and is necessary to align the State's special education regulations with the provisions of section 80-5.6 of the Commissioner's Regulations and the federal No Child Left Behind Act of 2001 (Public Law 107-110).

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

Department of Environmental Conservation

NOTICE OF ADOPTION

Recreational Harvest and Possession of Atlantic Cod and Haddock

I.D. No. ENV-01-04-00002-A
Filing No. 452
Filing date: April 20, 2004
Effective date: May 5, 2004

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

Action taken: Amendment of section 40.1(f) of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-1303 and 13-0339-a

Subject: Regulation of the recreational harvest and possession of Atlantic cod and haddock in New York waters.

Purpose: To amend regulations relating to the Atlantic cod and haddock recreational fisheries in New York waters, consistent with the Federal regulations for these resources adopted by the National Marine Fisheries Service, and consistent with the needs of the resource and resource users.

Text or summary was published in the notice of proposed rule making, I.D. No. ENV-01-04-00002-P, Issue of January 7, 2004.

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

Text of rule and any required statements and analyses may be obtained from: Alice Weber, Department of Environmental Conservation, 205-S N. Bellemeade Rd., East Setauket, NY 11733, (631) 444-0435, e-mail: amweber@gw.dec.state.ny.us

Assessment of Public Comment

The Department of Environmental Conservation (Department) received one comment during the forty five day public comment period. The comment, which was from a Montauk based partyboat owner who has participated in New York's recreational cod fishery for many years, supported the Department's proposal to eliminate the recreational possession limit for cod.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Sanitary Condition of Shellfish Lands

I.D. No. ENV-18-04-00003-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 41.3 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 13-0307 and 13-0319

Subject: Sanitary condition of shellfish lands.

Purpose: To reclassify underwater lands for shellfishing purposes in order to protect public health.

Text of proposed rule: 6 NYCRR Section 41.3, Shellfish Lands in Suffolk County, is amended to read as follows:

Subparagraph 41.3(b)(4)(xi) is repealed.

Subparagraphs 41.3(b)(4)(xii) through 41.3(b)(4)(xvii) are renumbered as subparagraphs 41.3(b)(4)(xi) through 41.3(b)(4)(xvi), respectively.

Paragraph 41.3(b)(5) remains unchanged.

Subparagraph 41.3(b)(6)(i) is amended to read as follows:

(i) Shelter Island Sound *and Dering Harbor. All that area of Shelter Island Sound and Dering Harbor south and east of a line extending southwesterly from the westernmost point of land at Dering Point, Shelter Island to the southernmost point of land at Fanning Point, Southold and continuing southeasterly to the westernmost corner of the ferry dock at Shelter Island; and all that area of Shelter Island Sound extending seaward 1000 feet from mean high water from the ferry dock to a line extending westerly from the yellow house at 34 Prospect Avenue, Shelter Island to the foot of Island View Lane, Southold (local names, local landmarks).*

Clause 41.3(b)(6)(i)('a') is repealed.

Subparagraph 41.3(b)(6)(ii) is repealed.

Subparagraphs 41.3(b)(6)(iii) and 41.3(b)(6)(iv) are renumbered 41.3(b)(6)(ii) and 41.3(b)(6)(iii),respectively.

Subparagraph 41.3(b)(7)(i) through subparagraph 41.3(b)(7)(iv) remains unchanged.

Clause 41.3(b)(7)(v)('a') is repealed.

New clause 41.3(b)(7)(v)('a') is adopted to read as follows:

('a') All that area of Shelter Island Sound and Dering Harbor south and east of a line extending southwesterly from the westernmost point of land at Dering Point, Shelter Island to the southernmost point of land at Fanning Point, Southold and continuing southeasterly to the westernmost corner of the ferry dock at Shelter Island; and all that area of Shelter Island Sound extending seaward 1000 feet from mean high water from the ferry dock to a line extending westerly from the yellow house at 34 Prospect Avenue, Shelter Island to the foot of Island View Lane, Southold (local names, local landmarks).

Clause 41.3(b)(7)(v)('b') through subparagraph 41.3(b)(7)(xv) remains unchanged.

New subparagraph 41.3(b)(7)(xvi) is adopted to read as follows:

(xvi) Pipes Cove. All that area of the unnamed creek northwest of Fanning Point and east of Silvermere Road, Southold, and all that area of Pipes Cove within 100 feet of the southernmost point of the eastern bulkhead within the mouth of the unnamed creek.

Subparagraphs 41.3(b)(8)(i) and 41.3(b)(8)(ii) remain unchanged.

Clause 41.3(b)(8)(iii)('a') is repealed.

New clause 41.3(b)(8)(iii)('a') is adopted to read as follows:

('a') East Creek. All that area of the East Creek boat basin and its tributaries.

Clause 41.3(b)(8)(iii)('b') is repealed.

Subparagraph 41.3(b)(8)(iv) remains unchanged.

Subparagraph 41.3(b)(8)(v) is amended to read as follows:

(v) Wading River *Creek.* All *that area* of Wading River *Creek* and its tributaries.

Subparagraph 41.3(b)(9)(i) is amended to read as follows:

(i) Port Jefferson Harbor *and Conscience Bay*

Clause 41.3(b)(9)(i)('a') remains unchanged.

Clause 41.3(b)(9)(i)('b') is repealed.

New clause 41.3(b)(9)(i)('b') is adopted to read as follows:

('b') During the period January 1st through December 31st, both dates inclusive, all that area of Conscience Bay, including tributaries, lying south of a line extending northeasterly from utility pole "NYT 183" (with transformer), located across Old Field Road from the residence located at #92 Old Field Road (local landmark), to the top of the white chimney of the residence located at 22 Conscience Circle, Strong's Neck (local landmark, said residence is a gray, two story house).

New clause 41.3(b)(9)(i)('c') is adopted to read as follows:

('c') During the period May 1st through November 30th, both dates inclusive, all that area of Port Jefferson Harbor, including tributaries, lying southerly and easterly of a line extending southwesterly from the light, Fl 4 sec, 35 feet 6M "3" (located on the eastern jetty at the entrance to Port Jefferson Harbor) to the light, Fl R 4 sec, 26 feet 5M "2A"(located on the western jetty at the entrance to Port Jefferson Harbor); and thence continuing southeasterly to the southeasternmost point of land on the western side of the entrance to Port Jefferson Harbor; and thence continuing southwesterly to the southern end of the rock jetty (located on the western shoreline of Port Jefferson Harbor approximately 250 yards easterly of the eastern side of the entrance to Setauket Harbor).

New clause 41.3(b)(9)(i)('d') is adopted to read as follows:

('d') During the period May 1st through October 31st, both dates inclusive, all that area of Port Jefferson Harbor, the Narrows and Conscience Bay, including tributaries, lying westerly of a line extending due north from the northeasternmost corner of the gray slate chimney located on the residence at #11 Indian Field Rd, Strong's Neck (said residence is a red brick and gray slate structure located on property that is protected by a stone seawall) to a point on the harbor side of the Old Field Beach peninsula (local names, local landmarks).

Subparagraph 41.3(b)(9)(ii) remains unchanged.

Subparagraph 41.3(b)(9)(iii) is repealed.

New subparagraph 41.3(b)(9)(iii) is adopted to read as follows:

(iii) Flax Pond. During the period January 1st through December 31st, both dates inclusive, all that area east of a line extending southerly from the southeasternmost point of the easternmost rock jetty protecting the entrance to Flax Pond to the northwesternmost point of the red brick chimney located on the residence at #9 Shore Drive, Village of Old Field (said house is a multi-story structure painted gray with white trim)(local landmarks).

Clause 41.3(b)(9)(iv)('a') is repealed.

New clause 41.3(b)(9)(iv)('a') is adopted to read as follows:

('a') During the period May 15th through October 31st, both dates inclusive, all that area of Mount Sinai Harbor, including tributaries, bounded by a line extending southerly from utility pole LIL 82 (located between the shoreline and Harbor Beach Road near the southeastern side of the entrance to the harbor, local landmark) to the westernmost Town of Brookhaven red nun channel marker in a line of red nun channel markers; and thence continuing easterly along the line of red nun channel markers to the easternmost Town of Brookhaven red nun channel marker; and thence continuing northerly to the wooden pole located at the southeastern end of the Town of Brookhaven boat launching ramp (local landmarks).

Clauses 41.3(b)(9)(iv)('b') and 41.3 (b)(9)(iv)('c') remain unchanged.

New clause 41.3(b)(9)(iv)('d') is adopted to read as follows:

('d') During the period May 15th through October 31st, both dates inclusive, all that area of Mount Sinai Harbor, including tributaries, lying both westerly of a line extending northerly from the Town of Brookhaven access point known locally as Satterly Landing (located on the northern side of Shore Road and immediately westerly of the residence at #182 Shore Road, local landmarks) to utility pole LIL 82 (located between the shoreline and Harbor Beach Road near the southeastern side of the entrance to the harbor (local landmark); and southerly of a line extending westerly from utility pole 27 BBL located near the shoreline at the intersection of Pipe Stave Hollow Road and Enchanted Woods Court, Miller Place, to the foot of Crystal Brook Hollow Road at the Village of Port Jefferson cul-de-sac parking area, Port Jefferson (local landmark).

Subparagraph 41.3(9)(v) remains unchanged.

Subparagraph 41.3(9)(vi) is amended to read as follows:

(vi) Wading River *Creek.* All *that area* of Wading River *Creek* and its tributaries.

Subparagraph 41.3(9)(vii) through the end of Section 41.3 remains unchanged.

Text of proposed rule and any required statements and analyses may be obtained from: Juliette Ventaloro, Department of Environmental Conservation, 205 N. Belle Mead Rd., Suite 1, East Setauket, NY 11733, (631) 444-0492, e-mail: jlvental@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.

Regulatory Impact Statement

Statutory authority:

The statutory authority for designating shellfish lands as certified or uncertified is Environmental Conservation Law (ECL) Section 13-0307. Subdivision 1 of Section 13-0307 of the ECL requires the Department to periodically conduct examinations of shellfish lands within the marine district to ascertain the sanitary condition of said lands. Subdivision 2 of this Section requires that the Department certify which shellfish lands are in such sanitary condition that shellfish may be taken for food. Such lands are designated as certified shellfish lands. All other shellfish lands are designated as uncertified.

The statutory authority for promulgating regulations with respect to the harvest of shellfish is Section 13-0319 of the ECL.

Legislative objectives:

There are two purposes of the legislation: to protect public health and to ensure that shellfish lands are appropriately classified as certified or uncertified for the harvest of shellfish. This legislation requires the Department to examine shellfish lands and determine which shellfish lands meet the sanitary criteria for a certified shellfish land, as set forth in regulation, Part 47 of Title 6NYCRR, promulgated pursuant to Section 13-0319 of the ECL. Shellfish lands which meet criteria must be designated as certified. Shellfish lands which do not meet criteria must be designated as uncertified to prevent the harvest of shellfish from those lands.

Needs and benefits:

To protect public health and to comply with ECL 13-0307, the Bureau of Marine Resources' shellfish sanitation program conducts and maintains sanitary surveys of shellfish growing areas (SGA) in the marine district of New York State. Maintenance of these surveys includes the regular collection and bacteriological examination of water samples to monitor the sanitary condition of shellfish growing areas. Additionally, shoreline pollution sources surveys are conducted every 10 years and updated annually. These reports list all actual and potential pollution sources in an SGA and may include hydrographic studies of wastewater treatment plant (WWTP) effluent. These studies describe the dilution and distribution of effluent and recommend appropriate uncertified areas adjacent to effluent outfalls.

Annually, water quality evaluation reports are prepared by the staff of the shellfish sanitation program for each SGA which contains certified shellfish lands. These reports present the results of statistical analyses of water quality data gathered by the program, and annual updates to the shoreline pollution source surveys. Each report includes a summary and recommendations for the appropriate classification of that particular shellfish growing area. The report summary may state that all or portions of an SGA should be designated as uncertified for the harvest of shellfish or that all, or portions of, an SGA should be designated as certified for the harvest of shellfish based on criteria in 6NYCRR Part 47. These reports are on file at the Bureau of Marine Resources office in East Setauket, NY.

The "Shoreline Pollution Source Survey, Shelter Island Sound (North)" dated October 23, 2003 contains the report "Coastal Hydrography of Shelter Island Heights, NY Wastewater Effluent" conducted in July of 2002. It recommends that the previous area designated as uncertified adjacent to the oufall of the WWTP at Shelter Island Heights be reshaped so as to provide improved protection to shellfish consumers. The reshaped uncertified area excludes a portion of Shelter Island Sound which was previously designated as uncertified. This portion is therefore designated as certified.

Regulations which designate shellfish lands as certified, as is proposed for a portion of Shelter Island Sound, benefit the general welfare by ensuring that shellfish resources on lands which meet the sanitary criteria are available for both commercial and recreational use. The classification of previously uncertified lands as certified may provide additional sources of income to shellfish diggers by increasing the amount of harvest area available.

In "Addendum to Mt. Sinai Harbor, Shellfish Growing Area #32, 2003 Triennial Report" dated October 2003, data analyses demonstrate that water quality in a portion of the growing area no longer meets bacteriological criteria for certified shellfish lands as specified in 6NYCRR Part 47, "Certification of Shellfish Lands." It recommends that this portion of Mt. Sinai Harbor be designated as uncertified during months when the shellfish lands fail to meet criteria.

In the "2003 Annual Shellfish Growing Area Water Quality Data Evaluation for Port Jefferson Harbor" report dated October 2003, data analyses demonstrate that water quality in a portion of the growing area no longer meets bacteriological criteria for certified shellfish lands as specified in 6NYCRR Part 47. It recommends that this portion of Port Jefferson Harbor be designated as uncertified during the months when the shellfish lands fail to meet criteria.

In the "Flax Pond, part of Shellfish Growing Area #35, Triennial Water Quality Data Evaluation" report dated January 2003 and in "Addendum to Flax Pond SGA #35 2003 Triennial Report" dated October 2003, data analyses demonstrate that water quality in a portion of the growing area no longer meets bacteriological criteria for certified shellfish lands as specified in 6NYCRR Part 47. It recommends that this portion of Flax Pond be designated as uncertified throughout the year.

In the "Great Peconic Bay, Shellfish Growing Area #28 Triennial Water Quality Data Evaluation" report dated March 2003, data analyses demonstrate that water quality in a portion of the growing area that is seasonally uncertified May through November, no longer meets bacteriological criteria for certified shellfish lands as specified in 6NYCRR Part 47. It recommends that this portion of the growing area, specifically East Creek, be designated as uncertified throughout the year.

The "addendum to the Pipes Cove Shoreline Pollution Source Survey" dated October, 2003 describes a periodic discharge of untreated sewage. It recommends that a portion of Pipes Cove be designated as uncertified until such point as the discharge is remedied.

The "Shoreline Pollution Source Survey, Shelter Island Sound (North)" dated October 23, 2003 contains the report "Coastal Hydrography of Shelter Island Heights, NY Wastewater Effluent" conducted in July of 2002. It recommends that the previous area designated as uncertified adjacent to the oufall of the WWTP at Shelter Island Heights be reshaped so as to provide improved protection to shellfish consumers. The reshaped uncertified area includes several portions of Shelter Island Sound and Dering Harbor which were previously designated as certified and seasonally certified. These areas are therefore to be designated as uncertified.

Regulations which designate shellfish lands as uncertified, as proposed for Mt. Sinai Harbor, Port Jefferson Harbor, Flax Pond, East Creek (Great Peconic Bay), Pipes Cove, Shelter Island Sound and Dering Harbor are needed to prevent the harvest and subsequent sale for consumption of shellfish from lands which do not meet the criteria for certified shellfish lands. The direct harvest of shellfish for use as food is allowed from certified shellfish lands only. Shellfish harvested from uncertified shellfish lands have a greater potential to cause human illness due to the possible presence of pathogenic bacteria or viruses which may cause the transmission of infectious disease to the shellfish consumer.

The four technical amendments are included to improve the description of closure line landmarks for proper harvesting and enforcement purposes, and will not result in classification changes.

This rulemaking provides the benefit of protecting the public health, specifically the health of shellfish consumers, by designating areas as uncertified. The taking of shellfish from uncertified shellfish lands is prohibited by Section 13-0309 of the Environmental Conservation Law. These regulations also benefit the shellfish industry. Seafood wholesalers, retailers, and restaurants are adversely affected by public reaction to instances of shellfish related illness. By preventing the harvest of shellfish from lands which fail to meet the sanitary criteria, these regulations are intended to ensure that only wholesome shellfish are allowed to be harvested and sold to shellfish consumers.

Costs:

There will be no costs to State or local governments. No direct costs will be incurred by regulated commercial shellfish harvesters in the form of initial capital investment or initial non-capital expenses, in order to comply with these proposed regulations. The annual cost of continuing compliance may take the form of potential lost income if productive harvest areas are closed. Conversely, the reopening of uncertified shellfish lands is likely to provide economic benefit to commercial shellfish harvesters whose livelihoods depend on access to certified shellfish lands.

The Department cannot provide an estimate of potential lost income to shellfish harvesters when areas are designated as uncertified, due to a number of variables that are associated with commercial shellfish harvesting; nor can the potential benefits be estimated when areas are reopened. Those variables are listed in the following three paragraphs.

As of November 20, 2003, the Department had issued 1,813 New York State shellfish digger's permits. However, the actual number of those individuals who harvest shellfish commercially full time is not known. Recreational harvesters who wish to harvest more than the daily recreational limit of 100 hard clams, with no intent to sell their catch, can only do so by purchasing a New York State digger's permit. The number of individuals who hold shellfish diggers permits for that type of recreational harvest is unknown. The Department's records do not differentiate between full-time and part-time commercial or recreational shellfishing.

The number of harvesters working in a particular area cannot be estimated for the reason stated above. In addition, the number of harvesters in a particular area is dependent upon the season, the amount of shellfish resource in the area, the price of shellfish and other economic factors, unrelated to the Department's proposed regulatory action.

Estimates of the existing shellfish resource in a particular embayment are not known. Recent shellfish population assessments have not been conducted by the Department. Without this information, the Department cannot determine the effect a closure or reopening would have on the existing shellfish resource.

The Department's actions to designate areas as certified or uncertified are not dependent on the resources in a particular area. They are based solely on public health concerns and legal mandates.

There is no cost to the Department. Administration and enforcement of the proposed amendment are covered by existing programs.

Local government mandates:

The proposed rule does not impose any mandates on local government.

Paperwork:

No new paperwork is required.

Duplication:

The proposed amendment does not duplicate any state or federal requirement.

Alternatives:

There are no significant alternatives. By law (ECL, Section 13-0307), once the Department has determined that a shellfish land no longer meets the sanitary criteria for a certified shellfish land, the Department must designate that land as uncertified for the harvest of shellfish. This is necessary to protect public health. Conversely, once the Department has determined that an uncertified shellfish land meets the sanitary criteria, the Department must designate the land as certified and open the area to shellfish harvesting.

Federal standards:

There are no federal standards regarding the certification of shellfish lands. New York and other shellfish producing and shipping states participate in the National Shellfish Sanitation Program (NSSP) which provides guidelines intended to promote uniformity in shellfish sanitation standards among members. The NSSP is a cooperative program consisting of the federal government, states and the shellfish industry. Participation in the NSSP is voluntary - each state adopts its own standards. The U.S. Food and Drug Administration (FDA) evaluates state programs and standards relative to NSSP guidelines. Substantial non-conformity with NSSP guidelines can result in sanctions being taken by FDA and the NSSP, including removal of a state's shellfish shippers from the Interstate Certified Shellfish Shippers List. This would effectively bar a non-conforming state's product from interstate commerce.

Compliance schedule:

Immediate compliance with any regulation designating shellfish lands as uncertified is necessary to protect public health. Shellfish harvesters are notified of changes to SGA classification by mail either prior to, or concurrent with, the adoption of new regulations.

Compliance with new regulations designating areas as certified or uncertified does not require additional capital expense, paperwork, record keeping or any action by the regulated parties in order to comply, except that harvesters must observe the new closure lines. Therefore, immediate compliance can be readily achieved.

Consolidated Regulatory Flexibility Analysis

Effect on small business and local government:

As of February 20, 2004, there were 1,144 licensed shellfish diggers in New York State. The number of permits issued for areas in the state is as follows: New York City, 15; Town of Hempstead, 102; Town of Oyster Bay, 96; Town of North Hempstead, 2; Town of Babylon, 40; Town of Islip, 79; Town of Brookhaven, 184; Town of Southampton, 140; Town of East Hampton, 126; Town of Shelter Island, 26; Town of Southold, 146; Town of Riverhead, 30; Town of Smithtown, 15; Town of Huntington, 141; other, 2.

Any change in the designation of shellfish lands may have an effect on shellfish diggers. Each time shellfish lands or portions of shellfish lands are designated as uncertified, there may be some loss of income for a number of diggers who may be harvesting shellfish from the lands to be closed. This loss is determined by the acreage to be closed, the type of closure (whether year-round or seasonal), the species of shellfish present in the area, its productivity, and the market value of the shellfish resource in the particular area.

When uncertified shellfish lands are found to meet the sanitary criteria for a certified shellfish land, and are then re-designated as certified, there is also an effect on shellfish diggers. More shellfish lands are made available for the harvest of shellfish, and there is a potential for an increase in income. Again, the effect of the re-opening of a harvesting area is determined by the shellfish species present, the area's productivity, and the market value of the shellfish resource in the area.

Local governments on Long Island exercise management authority and share law enforcement responsibility for shellfish with the state and the counties of Nassau and Suffolk. These are the towns of Hempstead, North Hempstead and Oyster Bay in Nassau County and the towns of Babylon, Islip, Brookhaven, Southampton, East Hampton, Southold, Shelter Island, Riverhead, Smithtown and Huntington in Suffolk County. Changes in the classification of shellfish lands impose no additional requirements on local governments above what level of management and enforcement that they normally undertake; therefore, there should be no effect on local governments.

Compliance requirements:

There are no reporting or recordkeeping requirements for small businesses or local governments.

Professional services:

Small businesses and local governments will not require any professional services to comply with proposed rules.

Compliance costs:

There are no capital costs which will be incurred by small businesses or local governments.

Minimizing adverse impact:

The designation of shellfish lands as uncertified may have an adverse impact on commercial shellfish diggers. All diggers in the towns affected by proposed closures will be notified by mail of the designation of shellfish lands as uncertified, prior to the date the closures go into effect. Shellfish lands which fail to meet the sanitary criteria during specified times of the year will be designated as uncertified only during those times. At other times, shellfish may be harvested from those lands (seasonally certified). To further minimize any adverse effects of proposed closures, towns may request that uncertified shellfish lands be considered for conditionally certified designation or for a shellfish transplant project. Under appropriate conditions, shellfish may be harvested from uncertified lands and microbiologically cleansed in a shellfish depuration plant. Shellfish diggers will also be able to shift harvesting effort to nearby certified shellfish lands. There should be no significant adverse impact on local governments from most changes in the classification of shellfish lands. There exists the possibility that all shellfish lands in a town could be closed. In that case, the town would lose income from the sale of harvesters permits and possibly lose tax revenue. Such impacts would be unavoidable if changes in classification to protect public health were necessary.

Small business and local government participation:

Impending shellfish closures are discussed at regularly scheduled Shellfish Advisory Committee meetings. This committee, organized by the Department, is comprised of representatives of local baymen's associations and local town officials. Through their representatives, shellfish harvesters can express their opinions and give recommendations to the department concerning shellfish land classification. Local governments, state legislators, and baymen's organizations are notified by mail and given the opportunity to comment on any proposed rulemaking prior to filing with the Department of State.

Economic and technological feasibility:

As specified above, there are no reporting, recordkeeping or affirmative acts that small businesses or local governments must undertake to comply with the proposed rules which result in the reclassification of shellfish harvesting areas as certified or uncertified. Similarly, small businesses and local governments will not have to retain any professional services or incur any capital costs to comply with such rules. As a result, it should be economically and technically feasible for small businesses and local governments to comply with rules of this type.

Consolidated Rural Area Flexibility Analysis

Amendments to Part 41 will not impose an adverse impact on rural areas. Only the State's marine district will be directly affected by regulatory initiatives to open or close shellfish lands. The Department of Environmental Conservation has determined that there are no rural areas within the marine district, and no shellfish lands within the marine district are located adjacent to any rural areas of the state. The proposed regulations will not impose reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. Since no rural areas will be affected by amendments of Part 41 "Sanitary Condition of Shellfish Lands" of Title 6 NYCRR, a Rural Area Flexibility Analysis is not required.

Consolidated Job Impact Statement

Nature of impact:

Environmental Conservation Law section 13-0307 requires that the Department examine shellfish lands and certify which shellfish lands are in such sanitary condition that shellfish may be taken therefrom for use as food. Shellfish lands that do not meet the criteria for certified (open) shellfish lands must be designated as uncertified (closed) to protect public health.

Rulemakings to amend 6 NYCRR 41, Sanitary Condition of Shellfish Lands, can potentially have a positive or negative effect on jobs for shellfish harvesters. Amendments to reclassify areas as certified may increase job opportunities, while amendments to reclassify areas as uncertified may limit harvesting opportunities.

Amendments of 6 NYCRR Part 41 to designate areas as uncertified can have negative impacts on harvesting opportunities. The extent of the impact will be determined by the acreage closed, the type of closure (year-round or seasonal), the area's productivity, and the market value of the shellfish. In general, any negative impacts are small because the Department's actions to designate areas as uncertified typically only effect a small portion of the shellfish lands in the state. Negative impacts are also diminished in many instances by the fact that shellfish harvesters are able to redirect effort to adjacent certified areas.

The greatest potential impact on jobs would occur if an entire area within a local government's jurisdiction were closed. If such an amendment were necessary, shellfish diggers within a town might not be able to harvest shellfish in adjacent waters because of residency requirements imposed by local governments who exercise management authority over shellfish within their boundaries. This impact would be unavoidable because shellfish harvested from areas that do not meet the bacteriological water quality criteria for certified shellfish lands have the potential to cause human illness.

Categories and numbers affected:

Licensed commercial shellfish diggers can be affected by amendments to 6 NYCRR Part 41. Most harvesters are self-employed, but there are some who work for companies with privately controlled shellfish lands or who harvest surf clams or ocean quahogs in the Atlantic Ocean.

As of February 20, 2004, there were 1,144 licensed shellfish diggers in New York State. The number of permits issued for areas in the state is as follows: New York City, 15; Town of Hempstead, 102; Town of Oyster Bay, 96; Town of North Hempstead, 2; Town of Babylon, 40; Town of Islip, 79; Town of Brookhaven, 184; Town of Southampton, 140; Town of East Hampton, 126; Town of Shelter Island, 26; Town of Southold, 146; Town of Riverhead, 30; Town of Smithtown, 15; Town of Huntington, 141; other, 2. It is estimated that ten (10) to twenty-five (25) percent of the diggers are full-time harvesters. The remainder are seasonal or part-time harvesters.

Regions of adverse impact:

Certified shellfish lands that could potentially be affected by amendments to 6 NYCRR Part 41 are located in or adjacent to Nassau County, Suffolk County, and a portion of the Atlantic Ocean south and east of New York City. There is no potential adverse impact to jobs in any other areas of New York State.

Minimizing adverse impact:

Shellfish lands are designated as uncertified to protect public health as required by the Environmental Conservation Law. Some impact from rulemakings to close areas that do not meet the criteria for certified shellfish lands is unavoidable.

To minimize the impact of closures of shellfish lands, the Department evaluates areas to determine whether they can be opened seasonally during periods of improved water quality. The Department also operates Conditional Harvesting Programs at the request of, and in cooperation with, local governments. Conditional Harvesting Programs allow harvest in uncertified areas under prescribed conditions, determined by studies, when bacteriological water quality is acceptable. Additionally, the Department operates transplant harvesting programs which allow removal of shellfish from closed areas for cleansing in certified areas, thereby recovering a valuable resource. Conditional and transplant programs increase harvesting opportunities by making the resource in a closed area available under controlled conditions.

Self-employment opportunities:

A large majority of shellfish harvesters in New York State are self-employed. Rulemakings to change the classification of shellfish lands can have an impact on self-employment opportunities. The impact is dependent on the size and productivity of the affected area and the availability of adjacent lands for shellfish harvesting. The impact of a rulemaking will likely be small because most rulemakings will affect only a small portion of the state's shellfish harvesting areas.

Department of Health

EMERGENCY RULE MAKING

Payment for Psychiatric Social Work Services

I.D. No. HLT-18-04-00001-E
Filing No. 449
Filing date: April 14, 2004
Effective date: April 14, 2004

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

Action taken: Amendment of section 86-4.9 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 201.1(v)

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

Specific reasons underlying the finding of necessity: The amendment to 10 NYCRR 86-4.9 will permit Medicaid billing for individual psychotherapy services provided by certified social workers in Article 28 Federally Qualified Health Centers (FQHCs). In conjunction with this change, DOH is also amending regulations to prohibit Article 28 clinics from billing for group visits and to prohibit such services from being provided by part-time clinics.

Based upon the Department's interpretation of Part 86-4.9(c), social work services have not been considered billable threshold visits in Article 28 clinic settings despite the fact that certified social workers have been an integral part of the mental health delivery system in community health centers. New federal statute and regulation require States to provide and pay for each FQHC's baseline costs, which include costs which are reasonable and related to the cost of furnishing such services. Reimbursement for individual psychotherapy services provided by certified social workers in the FQHC setting is specifically mandated by federal law. Failure to comply with these mandates could lead to federal sanctions and the loss of federal dollars. Additionally, allowing Medicaid reimbursement for clinical social worker services is expected to increase access to needed mental health services.

Subject: Payment for psychiatric social work services in article 28 federally qualified health centers.

Purpose: To permit psychotherapy by certified social workers; a billable service under certain circumstances.

Text of emergency rule: Pursuant to the authority vested in the State Hospital Review and Planning Council, and subject to the approval of the Commissioner of Health by Section 2803(2)(a) of the Public Health Law, section 86-4.9 of Subpart 86-4 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended as follows to be effective upon filing a Notice of Emergency Adoption with the Secretary of State:

86-4.9 Units of service. (a) The unit of service used to establish rates of payment shall be the threshold visit, except for dialysis, abortion, sterilization services and free-standing ambulatory surgery, for which rates of payment shall be established for each procedure. For methadone maintenance treatment services, the rate of payment shall be established on a fixed weekly basis per recipient.

(b) A threshold visit, including all part-time clinic visits, shall occur each time a patient crosses the threshold of a facility to receive medical care without regard to the number of services provided during that visit. Only one threshold visit per patient per day shall be allowable for reimbursement purposes, except for transfusion services to hemophiliacs, in which case each transfusion visit shall constitute an allowable threshold visit.

(c) Offsite services, visits related to the provision of offsite services, visits for ordered ambulatory services, and patient visits solely for the purpose of the following services shall not constitute threshold visits: pharmacy, nutrition, medical social services *with the exception of clinical social services as defined in paragraph (g) of this section,* respiratory therapy, recreation therapy. Offsite services are medical services provided by a facility's clinic staff at locations other than those operated by and under the licensure of the facility.

(d) A procedure shall include the total service, including the initial visit, preparatory visits, the actual procedure and follow-up visits related to

the procedure. All visits related to a procedure, regardless of number, shall be part of one procedure and shall not be reported as a threshold visit.

(e) Rates for separate components of a procedure may be established when patients are unable to utilize all of the services covered by a procedure rate. No separate component rates shall be established unless the facility includes in its annual financial and statistical reports the statistical and cost apportionments necessary to determine the component rates.

(f) Ordered ambulatory services may be covered and reimbursed on a fee-for-service basis in accordance with the State medical fee schedule. Ordered ambulatory services are specific services provided to nonregistered clinic patients at the facility, upon the order and referral of a physician, physician's assistant, dentist or podiatrist who is not employed by or under contract with the clinic, to test, diagnose or treat the patient. Ordered ambulatory services include laboratory services, diagnostic radiology services, pharmacy services, ultrasound services, rehabilitation therapy, diagnostic services and psychological evaluation services.

(g)(1) For purposes of this section, clinical social services are defined as,

(i) individual psychotherapy services provided in a Federally Qualified Health Center by a licensed clinical social worker on or after September 1, 2004, or before September 1, 2004 by a certified social worker with psychotherapy privileges on their New York State Education Department certification; or

(ii) individual psychotherapy services provided in a Federally Qualified Health Center by a licensed clinical social worker on or after September 1, 2004, or before September 1, 2004 by a certified social worker who is working in a clinic under qualifying supervision in pursuit of a psychotherapy privileges certification by the New York State Education Department.

(2) Clinical social services provided in a part time clinic shall be ineligible for reimbursement under this paragraph. Clinical social services shall not include group psychotherapy services or case management services.

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 July 12, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

The authority for the promulgation of these regulations is contained in sections 2803(2)(a) of the Public Health Law which authorize the State Hospital Review and Planning Council to adopt and amend rules and regulations, subject to the approval of the Commissioner.

Legislative Objective:

The legislative objective of this authority is to allow, in limited instances, social work visits to be a billable threshold service in Article 28 clinics. This amendment will allow psychotherapy by certified social workers (CSWs) as a billable visit under the following circumstances:

- Services are provided by a certified social worker with psychotherapy privileges (on their SED certification), or a CSW who is working in a clinic under qualifying supervision in pursuit of such certification.
- Payment will only be made for services that occur in Article 28 clinic base and extension clinics only. Billings by part-time clinics will not be allowed.
- Psychotherapy services only will be permitted, not case management and related services.
- Billings for group psychotherapy will not permitted in Article 28 clinics.
- Payment will only be made for services that occur in Federally Qualified Health Centers (FQHCs).

Needs and Benefits:

For some time, the Department of Health (DOH) has interpreted existing regulation Part 86-4.9(c) as restricting threshold reimbursement for medical social work services in Article 28 outpatient and Diagnostic and Treatment Center (D&TC) clinics. Advocacy groups (e.g., United Cerebral Palsy (UCP), Community Health Care Association of New York (CHCANYS)) have challenged this policy interpretation arguing that the prohibition only relates to the provision of social work services coincident to medical care, not to medical/behavioral health services provided by certified social workers.

In addition, DOH's policy interpretation has also been inconsistent with the billing practices of the Office of Alcoholism and Substance Abuse (OASAS), the Office of Mental health (OMH), and the Office of Mental Retardation and Developmental Disabilities (OMRDD). It is clear that permitting certified social workers to be reimbursed for behavioral health services is the generally accepted practice model. Thus, this amendment will to some extent, provide consistency with billing practices of other state agencies in Article 31, 16 and 32 clinics. Furthermore, recent Federal changes related to Medicaid reimbursement for FQHCs mandate that psychotherapy services provided by a social worker be considered a billable service.

This approach will ensure access to social work services in the most underserved areas and increase consistency with the policies of other state agencies.

Costs:

Costs for the Implementation of, and Continuing Compliance with this Regulation to Regulated Entity:

Annually the estimated gross Medicaid cost for all CSW psychotherapy visits in FQHCs totals $600,000, with a state share of $150,000. This increase is anticipated to be partially offset by the savings associated with the elimination of clinic payments for group psychotherapy and the prohibition of CSW psychotherapy in part-time clinics.

Cost to the Department of Health:

There will be no additional costs to DOH.

Local Government Mandates:

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

Paperwork:

This amendment will increase the paperwork for providers only to the extent that providers will bill for social work services.

Duplication:

This regulation does not duplicate, overlap or conflict with any other state or federal law or regulations.

Alternatives:

Recent changes to federal law make it clear that states must reimburse FQHCs under Medicaid for the services of certified social workers. The alternative to not permit payment for these psychotherapy services in FQHCs is not feasible since it could result in fiscal sanctions and/or litigation.

Federal Standards:

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

Compliance Schedule:

The proposed amendment will become effective on the 1st day of the month following publication of a Notice of Adoption in the *State Register*.

Regulatory Flexibility Analysis

Effect on Small Businesses and Local Governments:

To the extent that there are FQHCs that fall into the category of small businesses, there will be reimbursement but their costs will be reduced.

Compliance Requirements:

This amendment does not impose new reporting, record keeping or other compliance requirements on small businesses or local governments.

Professional Services:

No new professional services are required as a result of this proposed action. The proposed regulation will allow threshold visits to be billed in Article 28 clinics by CSW's with a "P" or "R" designation on their State Education Department's (SED) Certification or by CSWs who are working in a supervised situation towards that certification, in a primary or extension (not part-time) clinic. Although some providers might experience problems hiring the higher level of supervision, the new prospective reimbursement system for FQHCs should ease the hiring of this staff.

Compliance Costs:

This amendment does not impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

Minimizing Adverse Impact:

There are no adverse impact.

Economic and Technological Feasibility:

DOH staff has had conversations with the National Association of Social Workers (NASW), UCP, and CHCANYS concerning the interpretation of the current regulation as well as proposed changes to the existing regulation. Although some systems changes will be necessary to ensure that payment is made only to FQHCs, the proposed regulation will not

change the way providers bill for services, and thus there should be no concern about technical difficulties associated with compliance.

Small Business and Local Government Participation:

Participation is open to any FQHC that is certified under Article 28 of the Public Health Law, regardless of size.

Rural Area Flexibility Analysis

Types and Estimated Number of Rural Areas:

With the exception of part-time clinics, this rule will apply to all Article 28 primary and extension clinics (not part-time clinics) in New York. These businesses are located in rural, as well as suburban and metropolitan areas of the State.

Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:

No new reporting, recordkeeping or other compliance requirements and professional are needed in a rural area to comply with the proposed rule.

Compliance Costs:

There are no direct costs associated with compliance. However, part-time clinic providers that perform fraudulent billing may be investigated and subsequently realize reduced Medicaid reimbursement.

Minimizing Adverse Impact:

There is no adverse impact.

Opportunity for Rural Area Participation:

The Department has met with provider advocacy groups and the National Association of Social Workers Association to discuss Medicaid reimbursement for social work services. These groups and Association represent social workers from across the State, including rural areas.

Job Impact Statement

Nature of Impact:

It is anticipated that this rule will result in decreased Medicaid reimbursement to Article 28 part-time clinics that are currently providing CSW services, and primary and extension clinics that provide CSW services in group settings. This decreased revenue may have an adverse impact on jobs and employment opportunities in clinics.

Categories and Numbers Affected:

There are approximately 58 FQHCs, FQHC look-alikes, and rural health clinics.

Regions of Adverse Impact:

This rule will affect all regions within the State and businesses out of New York State that are enrolled in the Medicaid Program as an Article 28 clinic.

Minimizing Adverse Impact:

The Department is required by federal rules to reimburse FQHCs for the provision of primary care services, including clinical social work services, based upon the Center's reasonable costs for delivering covered services.

Self-Employment Opportunities:

The rule is expected to have no impact on self-employment opportunities since the change affects only services provided in a clinic setting.

EMERGENCY RULE MAKING

Controlled Substances in Emergency Kits

I.D. No. HLT-18-04-00011-E
Filing No. 454
Filing date: April 20, 2004
Effective date: April 20, 2004

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

Action taken: Amendment of sections 80.11, 80.47, 80.49 and 80.50 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 3308(2)

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

Specific reasons underlying the finding of necessity: We are proposing that these regulations be adopted on an emergency basis because immediate adoption is necessary to protect the public health and safety. Having consulted closely with administrators, nursing personnel and consultant pharmacists of Class 3a health care facilities (nursing homes, adult homes, and other long-term facilities), the Department has determined that the current Part 80 and Part 400 regulations do not ensure timely access to controlled substances by practitioners and patients when immediate administration is medically necessary.

Current regulations require controlled substances to be administered to patients in Class 3a facilities only pursuant to a prescription. On urgent occasions, such as when a patient suffers a sudden seizure or onset of acute pain, the severity of the situation may make it impossible for a practitioner to first issue a prescription to promptly treat the condition. Even if a practitioner is able to first issue a prescription in an emergency, the prescription may not immediately be dispensed by a pharmacy. In these situations, a patient is deprived of timely relief from severe symptoms and suffering.

The proposed amendments will allow controlled substances to be maintained in an emergency medication kit in a Class 3a facility and administered to a patient in an emergency situation. To simultaneously protect the public health against the potential for diversion of such drugs, the amendments also specify limitations on their quantities, record-keeping requirements for their administration, and security requirements for their safeguarding. Immediate adoption of these regulations is necessary to enhance and ensure the quality of health care of every patient in a long-term care facility. Ensuring timely access to controlled substances for immediate administration during medical emergencies will result in substantial benefit to the public health and safety.

Subject: Controlled substances in emergency kits.

Purpose: To allow class 3A facilities to obtain, posses and administer controlled substances in emergency kits.

Text of emergency rule: Paragraph (6) of subdivision (b) of Section 80.11 is amended to read as follows:

(6) [be] not *be*, and not have been, a habitual user of narcotics or any other habit-forming drugs.

Subdivision (f) of Section 80.11 is amended to read as follows:

(f) Persons conducting distributing activities of controlled substances within the State of New York shall obtain a class 2 license from the department, *except that;*

(1) A pharmacy may distribute a controlled substance to a practitioner in a Class 3a institutional dispenser limited solely for stocking in sealed emergency medication kits Such distribution shall be pursuant only to a written request by the Class 3a facility indicating the name and address of the facility, the name and address of the pharmacy, the date of the request, the type and quantity of the drug requested and the signature of the authorized person making the request. With each distribution, the pharmacy shall provide the Class 3a facility with an itemized list indicating the name and address of the pharmacy, the name and address of the Class 3a facility, the date of the distribution, the type and quantity of the drug distributed, and the signature of the pharmacist.

Section 80.47 is amended by creating subdivisions (a), (b) and (c) and new subdivision (b) is amended to read as follows:

Section 80.47 Institutional dispenser, limited. *(a)* Nursing homes, convalescent homes, health-related facilities, homes for the aged, dispensaries or clinics not qualifying as institutional dispensers in license class 3 shall apply for an institutional dispenser, limited license. Such institutional dispensers qualifying for controlled substances privileges shall obtain a class 3a license from the department.

(b) An institutional dispenser licensed in class 3a may administer controlled substances to patients only pursuant to a prescription issued by an authorized physician or other authorized practitioner and filled by a registered pharmacy; except that [an] *controlled substances in emergency medication kits may be administered to patients as provided in Section 80.49(d) of this Part.*

(c) An institutional dispenser, limited, licensed in class 3a, which is operated as an integral and physical part of a facility licensed as a class 3 institutional dispenser may be provided with bulk stocks of controlled substances obtained pursuant to such class 3 institutional dispenser license. Records of distribution and administration of such bulk stocks of controlled substances shall be kept as provided in section 80.48(a) of this Part.

Subdivision (c) of section 80.49 is amended and a new subdivision (d) is added to read as follows:

(c) A separate record shall be maintained of the administration of *prescribed* controlled substances indicating the date and hour of administration, name and quantity of controlled substances, name of the prescriber, patient's name, signature of person administering and the balance of the controlled substances on hand after such administration.

(d) In an emergency situation, a controlled substance from a sealed emergency medication kit may be administered to a patient by an order of an authorized practitioner. An oral order for such controlled substance shall be immediately reduced to writing and a notation made of the condition which required the administration of the drug. Such oral order shall be signed by the practitioner within 48 hours.

(1) For purposes of this subdivision, emergency means that the immediate administration of the drug is necessary and that no alternative treatment is available.

(2) A separate record shall be maintained of the administration of controlled substances from an emergency medication kit. Such record shall indicate the date and hour of administration, name and quantity of controlled substances, name of the practitioner ordering the administration of the controlled substance, patient's name, signature of the person administering and the balance of the controlled substances in the emergency medication kit after such administration.

(3) The institutional dispenser limited shall notify the pharmacy furnishing controlled substances for the emergency medication kit within 24 hours of each time the emergency kit is unsealed, opened, or shows evidence of tampering.

Subdivision (e) of section 80.50 is amended and a new paragraph (1) is added to read as follows:

(e) *Except as provided in paragraph (1) of this subdivision,* [I]*i*nstitutional dispensers limited may only possess controlled substances prescribed for individual patient use, pursuant to prescriptions filled in a registered pharmacy. These controlled substances shall be safeguarded as provided in subdivision (d) of this section.

(1) Institutional dispensers limited may possess limited supplies of controlled substances in sealed emergency medication kits for use as provided in section 80.49 (d) of this Part. Each kit may contain up to a 24-hour supply of a maximum of ten different controlled substances in unit dose packaging, no more than three of which may be in an injectable form. Each kit shall be secured in a stationary, double-locked system or other secure method approved by the Department.

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 July 18, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

Section 3308(2) of the Public Health Law authorizes and empowers the Commissioner to make any regulations necessary to supplement the provisions of Article 33 of the Public Health Law in order to effectuate its purposes and intent.

Section 3321(1)(b) authorizes the commissioner to make regulations that exempt a pharmacy from the licensing requirements of article 33 for the sale of controlled substances to a practitioner for the immediate needs of the practitioner receiving such substances.

Legislative Objectives:

Article 33 of the Public Health Law, officially known as the New York State Controlled Substances Act, was enacted in 1972 to govern and control the possession, prescribing, manufacturing, dispensing, administering, and distribution of licit controlled substances within New York. Section 3300-a expressly states that one of the statute's purposes is to allow the legitimate use of controlled substances in health care.

Needs and Benefits:

This regulation effectuates the above stated legislative purpose of section 3300-a of the New York State Controlled Substances Act. It will ensure timely access to controlled substances by practitioners and patients for emergency situations in extended care facilities and other health care facilities licensed by the Department as Class 3a, institutional dispenser limited. (See section 3302(18) of the Public Health Law for the definition of "institutional dispenser".)

Section 80.47 of Title 10 regulations requires that controlled substances be administered to patients in healthcare facilities licensed by the Department as Class 3a institutional dispensers limited (i.e.; nursing homes, convalescent homes, health-related facilities, adult homes, homes for the aged, correctional facilities) only pursuant to a prescription issued by an authorized practitioner. The regulation also requires that such prescriptions must be dispensed by a registered pharmacy.

Administrators, nursing personnel, and consultant pharmacists of Class 3a facilities have expressed their concern to the Department that the prescription requirements of Section 80.47 are a restriction to timely access to controlled substances by practitioners and patients when immediate administration is medically necessary. On urgent occasions such as a sudden seizure or onset of intractable pain, the severity of the situation may make it impossible for a practitioner to first issue a prescription for the drug in order to promptly treat the condition. Further, Class 3a facilities do not have onsite pharmacies. Even if a practitioner is able to first issue a prescription for a controlled substance to treat a patient in an emergency, that prescription may not immediately be dispensed by an outside pharmacy because the pharmacy may be too distant from the Class 3a facility or the emergency may have occurred during the pharmacy's non-business hours. These situations can, and do, result in needed medications not being administered in a timely fashion to relieve a patient's severe symptoms or suffering.

The proposed amendment to Section 80.47 of the regulations authorizes the administration of a controlled substance from an emergency medication kit to a patient in an emergency situation in a Class 3a healthcare facility. Necessary complements to this amendment are the proposed amendments to Sections 80.11 (f), 80.49 and 80.50 (e) of Title 10 regulations. The proposed changed to Section 80.11(b)(6) is merely grammatical.

The amendment to Section 80.11 (f) authorizes a licensed pharmacy to supply controlled substances to a practitioner in a Class 3a facility for stocking in emergency medication kits. The amendments to Section 80.50 (e) authorize a Class 3a healthcare facility to possess a limited supply of controlled substances in an emergency medication kit and specify limitations on the quantities of such substances and requirements for their safeguarding. The amendment to Section 80.49 specifies record-keeping requirements for controlled substances administered from emergency kits. When instituted together, these amendments will provide for timely access to controlled substances by practitioners and patients in the long-term care facility environment while simultaneously requiring adequate measures to ensure the security of such substances.

The Federal Drug Enforcement Administration (DEA) also recognizes the need for storing controlled substances in emergency kits for administration to patients during urgent situations in long-term care facilities that are not eligible to hold a DEA registration. Since 1980, the DEA has issued a Statement of Policy containing guidelines for state regulatory agencies to follow when authorizing long-term care facilities to maintain such kits. Such guidelines have been incorporated in the proposed regulatory amendments.

The proposed regulatory amendments will enhance the quality of care of every patient in a long-term care facility licensed by the Department of Health. Such regulation will result in substantial benefit to the public health, which the Department has both a civic and legislative responsibility to ensure.

Costs:

Costs to Regulated Parties

Healthcare facilities licensed as Class 3a institutional dispensers limited already possess required secure cabinets for safeguarding controlled substances. Such secure cabinets can also safeguard emergency kits containing controlled substances. Those facilities choosing to maintain such emergency kits will incur minimal costs to do so. These costs will be reflected in the purchase of the limited supplies of controlled substances and the sealable emergency kits required to secure and store them.

Costs to State and Local Government

There will be no costs to state or local government.

Costs to the Department of Health

There will be no additional costs to the Department.

Local Government Mandates:

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

Paperwork:

Class 3a healthcare facilities are currently required by regulations to keep records of the receipt of all controlled substances prescribed for individual patients. Such facilities are also required to record all controlled substances dispensed and administered to such patients. These record-keeping requirements would include the requisition and receipt of controlled substances for stocking in emergency medication kits.

Practitioners authorized to prescribe controlled substances are required by regulations to make a notation in a patient record of all controlled substances prescribed for that patient. The amendment to Section 80.47 requires that the administration of a controlled substance to a patient from an emergency kit in a Class 3a facility be pursuant to the written or oral medical order of a practitioner.

The Department anticipates a minimal increase in paperwork documenting the requisition, distribution, medical order, and administration of controlled substances contained in emergency medication kits. Such in-

crease will be more than offset by the enhancement of healthcare for patients in the long term care environment.

Duplication:

The requirements of this proposed regulation do not duplicate any other state or federal requirement.

Alternatives:

The intent of the proposed regulation is to ensure access to controlled substance medications when urgently needed. The department believes it is in the best interest of the public health to authorize such accessibility to relieve pain or suffering. There are no alternatives that would ensure accessibility to controlled substances by practitioners and patients for emergency situations in long term care facilities and other health care facilities licensed as Class 3a, institutional dispenser limited.

Federal Standards:

The regulatory amendment does not exceed any minimum standards of the federal government. This amendment achieves consistency with existing federal and New York State laws and regulations promulgated to authorize the legitimate use of controlled substances in health care.

Compliance Schedule:

These regulations will become effective immediately upon filing a Notice of Emergency Adoption with the Secretary of State. At that time, in order that the public health derive maximum benefit from this regulatory amendment, all Class 3a license holders will be authorized to possess and administer controlled substances in an emergency medication kit to meet the immediate, legitimate need of a patient.

Regulatory Flexibility Analysis

Effect of Rule on Small Business and Local Government:

This proposed rule will affect practitioners, pharmacists, retail pharmacies, and nursing homes, adult homes, convalescent homes, homes for the aged, and other healthcare facilities licensed by the Department as Class 3a institutional dispensers limited. Local government will only be affected if it operates one of the above facilities.

According to the New York State Department of Education, Office of the Professions, as of April, 2003, there were 113,666 licensed and registered practitioners authorized to prescribe and order the administration of controlled substances. However, this rule will affect only those practitioners who prescribe or order the administration of controlled substances for patients and residents of long term care facilities or supply such facilities with controlled substances for emergency medication kits.

According to the New York State Board of Pharmacy, as of June 30, 2003, there were a total of 4,521 pharmacies in New York State. Of these, 60 are sole proprietorship, 297 are partnerships, 73 are small chains (fewer than 3 pharmacies per chain) and the rest are large chains or other corporations (some of which may be small businesses) or located in public institutions. According to the New York State Education Department's Office of the Professions, as of April 1, 2003, there were 18,950 licensed and registered pharmacists in New York. However, this rule will affect only those pharmacies and pharmacists that dispense prescriptions for controlled substances to patients and residents of long term care facilities or supply such facilities with controlled substances for emergency medication kits.

Of the 1,282 healthcare facilities licensed by the department as Class 3a institutional dispensers limited, the rule will affect only those facilities that choose to maintain controlled substances in emergency medication kits.

Compliance Requirements:

There are no compliance requirements. While the proposed amendment authorizes Class 3a facilities to possess and administer controlled substances from emergency medication kits, the regulation does not require such facilities to do so.

Professional Services:

No additional professional services are necessary.

Compliance Costs:

Other than the cost of the controlled substances and sealable emergency medication kits for those Class 3a facilities choosing to possess such kits, there are no compliance costs associated with the proposed regulation.

Economic and Technological Feasibility:

The proposed rule is both economically and technologically feasible. Class 3a healthcare facilities that choose to possess and administer controlled substances from emergency medication kits will use existing equipment for security and record-keeping requirements.

The Department anticipates that these facilities will incur minimal expenditures for limited supplies of controlled substances and the sealable emergency kits in which to store them. Such expenditures will be more than offset by the enhancement of medical care for patients in Class 3a healthcare facilities.

Minimize Adverse Impact:

The agency considered the approaches in section 202-b(1) of SAPA and found them inapplicable. The proposed regulation minimizes any adverse impact by not requiring pharmacies to supply controlled substances to Class 3a facilities for emergency medication kits. Pharmacies are authorized to engage in such activity strictly on a voluntary basis.

Small Business and Local Government Participation:

To ensure that small businesses were given the opportunity to participate in this rule making, the Department met with the pharmacy societies representing independent pharmacies. Local governments are not affected.

During the drafting of this regulation, the Department met with the Pharmaceutical Society of the State of New York (PSSNY), the Chain Pharmacy Association of New York State, the New York Council of Health Systems Pharmacists, and the New York State Chapter of American Society of Consultant Pharmacists.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

The proposed rule will apply to participating pharmacies and Class 3a healthcare facilities located in all rural areas of the state. Outside of major cities and metropolitan population centers, the majority of counties in New York contain widespread rural areas. These can range in extent from small towns and villages, and their surrounding areas, to locations that are very sparsely populated.

Compliance Requirements:

There are no compliance requirements. The proposed amendment authorizes pharmacies to distribute limited supplies of controlled substances to Class 3a facilities for maintaining in emergency medication kits. The regulation also authorizes those healthcare facilities to possess and administer controlled substances to patients from such kits in an emergency situation. However, these actions are undertaken on a voluntary basis by both pharmacy and healthcare facility. The regulation does not require either party to participate.

Present regulations require pharmacies and Class 3a facilities to maintain specified records of dispensing, receipt, and administration of controlled substances. The proposed regulation requires a minimum of additional record-keeping to ensure limited access to emergency medication kits and safeguarding of the controlled substances contained therein.

Professional Services:

Pharmacies already employ the professional services of licensed and registered pharmacists. Class 3a healthcare facilities employ the services of practitioners, nurses, and consultant pharmacists. The proposed regulation would require no additional professional services, either public or private, in rural areas.

Compliance Costs:

Compliance costs to pharmacies opting to distribute limited supplies of controlled substances to Class 3a facilities will be negligible, since these pharmacies already maintain an existing inventory of such controlled substances. Other than the cost of the controlled substances and the sealable medication kits in which to store them, the compliance cost to Class 3a facilities choosing to possess such kits will be minimal.

Economic and Technological Feasibility:

The proposed rule is both economically and technologically feasible. Class 3a healthcare facilities that choose to possess and administer controlled substances from emergency medication kits will use existing equipment for security and record-keeping requirements.

The Department anticipates that these facilities will incur minimal expenditures for limited supplies of controlled substances and the sealable emergency kits in which to store them. Such expenditures will be more than offset by the enhancement of medical care for patients in Class 3a healthcare facilities.

Minimizing Adverse Impact:

The agency considered the approaches in Section 202-bb(2) of SAPA and found them inapplicable.

In ensuring access to controlled substances for legitimate medical treatment by practitioners and patients in Class 3a healthcare facilities, the proposed amendment does not impose any adverse impact upon rural areas. In fact, because in a rural setting pharmacies supplying prescriptions for controlled substances may be located at increased distances from long term care facilities, it is anticipated that these healthcare facilities would derive maximum benefit for their patients by being authorized to maintain limited supplies of controlled substances in sealed medication kits for use in emergency situations.

Rural Area Participation:

During the drafting of this regulation, the Agency met with and solicited comment from consultant pharmacists to Class 3a facilities, many of

which are located in rural areas. It was the overwhelming consensus that pharmacists could better meet and greatly enhance the healthcare of the patients they serve in such facilities by being authorized to supply controlled substances for emergency medication kits. Administrative and nursing personnel in such facilities have also voiced to the Agency their need for emergency access to controlled substances for administration to patients to alleviate suffering in urgent situations. The agency addressed many of these concerns in the proposed regulation.

Job Impact Statement

Nature of Impact:

This proposal will not have a negative impact on jobs and employment opportunities. In benefiting the public health by ensuring access to controlled substances for legitimate healthcare needs, the proposed amendment is not expected to either increase or decrease jobs overall.

EMERGENCY RULE MAKING

Part-Time Clinics

I.D. No. HLT-18-04-00012-E
Filing No. 456
Filing date: April 20, 2004
Effective date: April 20, 2004

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

Action taken: Amendment of sections 703.6 and 710.1 of Title 10 NYCRR.

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

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

Specific reasons underlying the finding of necessity: The agency finds the immediate adoption of this rule is necessary to preserve the public health, safety and general welfare and compliance with State Administrative Procedure Act Section 202(1) would be contrary to the public interest. These regulations repeal existing section 703.6 of 10 NYCRR and add a new section 703.6, amend sections 710.1 (c) (1) (i) and 710.1 (c) (4) (ii) and add section 710.1 (c) (6) (v) to establish additional standards for the approval and operation of part-time clinics under Article 28 of the Public Health Law. The proposed rules would help ensure the provision of quality health care through needed preventive health screening programs and other public health initiatives to underserved populations and others in safe environments that protect both the patient and the general public.

A review of the part-time clinics approval system and operations raised serious questions and concerns as to whether care was being provided in appropriate sites, under adequate supervision, whether unnecessary care was being provided, whether the site environments were adequate and safe, and whether the type of services provided exceeded the original intent of the part-time clinic regulation. Examples of the problem areas include:

- The provision of radiology services in stationary sites and mobile vans where shielding may be inadequate.
- The provision of a full range of primary care services where minimum physical plant standards may not be met, as part-time clinics are exempt from most physical plant requirements. Inadequate space to provide the range of services safely compromised patient safety with narrow corridors which, if an emergency arises, would not provide for stretcher or wheelchair access or egress.
- The provision of a variety of complex services where more extensive supervision would be expected.
- The provision of services to all the residents in a given location, such as an Adult Home, raises questions about appropriate utilization.
- The provision of specialty services, such as pediatric cardiology utilizing sophisticated equipment, is considered inappropriate for a part-time clinic setting, since a comprehensive, integrated plan of care is needed to treat these patients effectively.
- The use of part-time clinics by some patients as their main source of health care compromises the continuity of their care, as the link to emergency and after-hours treatment becomes problematic.
- The improper application of infection control principles for sterilizing equipment.

The persistence of these problems warrants the issuance of these rules on an emergency basis.

The principal changes in the proposed rules are:

- A more detailed description of the types of services permitted in part-time clinics.
- Explicit exclusion of certain types of locations and premises as acceptable sites for part-time clinics.
- Addition of a requirement that part-time clinics be in sufficient proximity to the sponsoring hospital or diagnostic an treatment center to ensure adequate supervision.
- Enhanced operating standards, including requirements for quality assurance and improvement and for credentialing of staff.
- Addition of a requirement for prior limited review of all new part-time clinic sites and the continuation or proposed relocation of existing clinics.
- Recognition that part-time clinics which are operated by city and county health departments are governed by section 614 of the Public Health Law.

Compliance with the requirements of the State Administrative Procedure Act for filing of a regulation on a non-emergency basis, including the requirements for a period of time for public comment, would be contrary to the public interest because to do so would place patients at continued risk that they would be served in sub-standard environments without adequate supervision and where continuity of care cannot be insured. In addition, the proposed rules guard against the unnecessary expenditure of Medicaid funds for unneeded or duplicative services thereby making funds available for needed care. This emergency regulation will go into effect immediately after the expiration of the prior emergency regulation. Its duration will extend until permanent regulations are promulgated or a subsequent regulation is adopted on an emergency basis.

Subject: Part-time clinics.

Purpose: To clarify and enhance the requirements that apply to part-time clinics and require prior limited review of all part-time clinic sites.

Text of emergency rule: The current section 703.6 is repealed and a new section 703.6 is hereby adopted as follows:

Section 703.6 Part-time clinics

(a) Applicability. In lieu of Parts 702, 711, 712 and 715 of this Title, this section shall apply to part-time clinic sites, except for those operated by the State Department of Health (other than those part-time clinics which are operated as an extension of Article 28 hospitals operated by the State Department of Health) or by the health department of a city or county as such terms are defined in section 614 of the Public Health Law. Such cities and counties shall submit to the State Department of Health information which lists the location(s), hours of operation and services offered at each part-time clinic operated by or under the authority of the city or county health department. This information shall be submitted annually, by January 30 of each year, as an update to the Municipal Public Health Services Plan (MPHSP) submitted by the city or county pursuant to section 602 of the Public Health Law, and shall provide such information for each part-time clinic operated by or under the authority of the city or county health department in the previous calendar year. Consistent with the definition of part-time clinic site in section 700.2(a)(22) of this Title, a part-time clinic shall:

(1) provide services which shall be limited to low-risk (as determined by prevailing standards of care and services) procedures and examinations which do not normally require backup and support from the primary delivery site of the operator or other medical facility. Such services may include health screening (such as blood pressure screening), preventive health care and other public health initiatives, procedures and examinations (such as well child care, the provision of immunizations and screening for chronic or communicable conditions which are treatable or preventable by early detection or which are of public health significance);

(2) be located at a site that has adequate and appropriate space and resources to provide the intended services safely and effectively and is located in proximity to the primary delivery site to ensure that supervision and quality assurance are not compromised; and

(3) not be located at a private residence or apartment, an intermediate care facility, congregate living arrangements (not including an individualized residential alternative, a shelter for adults or other group shelter operated by governmental or other organizations to provide temporary housing accommodations in a safe environment to at-risk populations), an area within an adult home, a residence for adults or enriched housing program as defined in section 2 of the Social Services Law unless the part-time clinic is an outpatient mental health program approved by the Office of Mental Health, or the private office of a health care practitioner or group of practitioners licensed by the State Education Department, except if the private office space is leased for a defined period of time and on a regular basis for the provision of services consistent with paragraph (l) of this subdivision.

(b) Department approval and/or notification.

(1) An operator of part-time clinics may initiate patient care services at a specific site only upon written approval from the department in accordance with the department's prior limited review process set forth at section 710.1(c)(6)(v) of this Title. To request such approval, the operator shall submit to the department, for each such site, information and documentation in a format acceptable to the department and in sufficient detail to enable the Commissioner to make a decision, including the following:

(i) the location, type and nature of the building, days and hours of operation, expected duration of operation (specified limited period of time, for example, seasonally), staffing patterns and objectives of the part-time clinic;

(ii) the leasing or other arrangement for gaining access to the site's real property, (including a copy of the agreement which grants the applicant the right to use and occupy the space for the part-time clinic site);

(iii) the plans and strategies for meeting the operational standards set forth in this section and an explanation of how the operator will provide adequate supervision and ensure quality of care;

(iv) a listing of all part-time clinic sites already operated by the applicant;

(v) a description of the services to be provided and the populations to be served; and

(vi) procedures or strategies for advising patients on making arrangements for follow-up care.

(2) After initiating patient care services, an operator of part-time clinics may relocate a part-time clinic or change a category of service only upon written approval from the department in accordance with the department's prior limited review process as set forth in section 710.1(c)(6)(v) of this Title. The operator shall give written notification to the department at least 45 days prior to the relocation or change in services of a part-time clinic site. To request approval, the operator shall submit to the department, for the site of relocation or change in services, information concerning:

(i) the location, type and nature of the building, days and hours of operation, and expected duration of operation (specified limited period of time, for example, seasonally);

(ii) the leasing or other arrangement for gaining access to the site's real property (including a copy of the agreement which grants the applicant the right to use and occupy the space for the part-time clinic site); and

(iii) a description of the services to be provided and the populations to be served.

(3) After initiating patient care services, the operator shall give written notification, including a closure plan acceptable to the department, to the appropriate regional office of the department at least 15 days prior to the discontinuance of a part-time clinic site other than a scheduled discontinuance as indicated in accordance with subparagraph (i) of paragraph (l) of this subdivision. No part-time clinic site shall discontinue operation without first obtaining written approval from the department.

(4)(i) The operator of any part-time clinic that was in operation on the effective date of this paragraph, and in conformance with all pertinent statutes and regulations in effect prior to that date, and has submitted request(s) to the department for approval to continue providing services for each such site by November 13, 2000 in accordance with such requirements shall be permitted to operate until and unless the department issues a written denial of approval to continue operation. If a request to continue operation of a part-time clinic site is denied, the operator shall cease providing services at such site.

(ii) The operator of any part-time clinic site for which an application to continue providing services at such site was not submitted to the department by November 13, 2000, shall give the department the written notification and a closure plan required by subdivision (b)(3) of this section by November 28, 2000. Notwithstanding any other provision of this section, any part-time clinic for which an application to continue providing services at such site was not submitted to the department by November 13, 2000, shall cease operations by December 31, 2000.

(c) Policies and procedures. (1) The operator shall ensure the development and implementation of written policies and procedures specific to each part-time clinic site which shall include, but need not be limited to:

(i) security, confidentiality, maintenance, access to and storage of medical records for each patient, including documentation of any diagnoses or treatments;

(ii) handling and storage of drugs in accordance with state law and regulation;

(iii) provision and storage of sterile supplies including plans for sterilization or disposal of contaminated supplies and equipment;

(iv) disposal of solid wastes and sharps;

(v) handling of patient emergencies, including written transfer agreements with hospitals within the service area;

(vi) a fire plan consistent with local laws;

(vii) credentialing of staff by the governing authority of the operator and assurance that only appropriately licensed and/or certified staff perform functions that require such licensure or certification;

(viii) quality assurance/improvement initiatives coordinated with such activities at the operator's primary delivery site(s);

(ix) utilization review;

(x) community outreach efforts designed to ensure that community members are aware of the availability of and the range of clinic services and hours of operation; and

(xi) assurance that patients can access necessary services without regard to source of payment.

(2) The following services shall not be provided at a part-time clinic site:

(i) services that require specialized equipment such as radiographic equipment, computerized axial tomography, magnetic resonance imaging or that required for renal dialysis;

(ii) services that involve invasion or invasive treatment procedures or disruption of the integrity of the body that normally require a surgical operative environment; and

(iii) services other than those available at the primary delivery site(s) listed on the primary facility's operating certificate.

(d) Services and personnel. The operator shall ensure that all health care services and personnel provided at the part-time clinic site shall conform with generally accepted standards of care and practice and with the following:

(1) Part-time clinics operated by hospitals shall comply with pertinent standards established in Part 405 of this Title including, but not limited to, sections 405.7 (Patients' rights) and 405.20 (Outpatient services), which cross-references the outpatient care provisions of sections 752.1 and 753.1 of this Title.

(2) Part-time clinics operated by diagnostic and treatment centers shall comply with the pertinent provisions of Parts 750, 751, 752 and 753 of this Title including, but not limited to, section 751.9 (Patients' rights).

(e) Environmental health. The operator shall ensure that:

(1) exits and access to exits are clearly marked;

(2) lighting is provided for exit signs and access ways when located in dark areas and/or during night hours or power interruptions;

(3) passageways, corridors, doorways and other means of exit are kept unobstructed;

(4) the part-time clinic site is kept clean and free of safety hazards;

(5) all water used at the part-time clinic site is provided from a water supply which meets all applicable standards set forth in Part 5 of this Title;

(6) equipment to control a limited fire is available; and

(7) smoking is prohibited within patient care areas.

(f) Waivers. The Commissioner, upon a request from the operator, may waive one or more provisions of this section upon a finding that such waiver would:

(1) enable at risk or medically underserved patients to obtain needed care and services which are otherwise unavailable or difficult to access;

(2) contribute to attaining a generally recognized public health goal;

(3) not jeopardize the health or safety of patients or clinic staff; and

(4) not conflict with existing federal or state law or regulation.

Section 710.1(c)(1)(i) is hereby amended to read as follows:

(i) the *requirements relating to the* addition, modification or decertification of a licensed service other than the addition of a service or decertification of a facility's services as provided for in paragraph (6) of this subdivision or the addition or deletion of approval to operate part-time clinics, regardless of cost [;]. *The addition or deletion of approval to operate part-time clinics shall not be applicable to the State Department of Health (other than for the addition or deletion of approval to operate part-time clinics as an extension of an Article 28 hospital operated by the State Department of Health) or to the health department of a city or county as such terms are defined in section 614 of the Public Health Law;*

Section 710.1(c)(4)(ii) is hereby amended to read as follows:

(4) Proposals not requiring an application.

(ii) Any proposal to [add,] discontinue [or relocate] a part-time clinic site of a medical facility already authorized to operate part-time clinics pursuant to this Part shall not require the submission of an applica-

tion pursuant to this Part, but compliance is required with the applicable notice provisions of Parts 405 and 703 of this Title.

Paragraph (6) of subdivision (c) of section 710.1 is hereby amended by the addition of a new sub-paragraph (v) to read as follows:

710.1(c)(6) Proposals requiring a prior review.

* * *

(v) Any proposal to operate, change services offered or relocate a part-time clinic site shall be subject to a prior limited review under Article 28 of the Public Health Law.

(a) Requests for approval under the prior limited review process shall be consistent with the provisions of section 703.6(b) of this Title.

(b) Requests for approval to operate, change a category of service offered or relocate a part-time clinic site in accordance with section 703.6(b) of this Title shall be made directly to the Division of Health Facility Planning.

(c) If the proposal is acceptable to the department, the applicant shall be notified in writing within 45 days of acknowledgement of receipt of the request. If the proposal is not acceptable, the applicant shall be notified in writing within 45 days of such determination and the bases thereof, and the proposal shall be deemed an application subject to full review, including a recommendation by the State Hospital Review and Planning Council, pursuant to section 2802 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 July 18, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

The authority for the promulgation of these regulations is contained in section 2803(2) of the Public Health Law which authorizes the State Hospital Review and Planning Council (SHRPC) to adopt and amend rules and regulations, subject to the approval of the Commissioner, to implement the purposes and provisions of Article 28 of the Public Health Law, and to establish minimum standards governing the operation of health care facilities. This section also grants authority to establish requirements for projects subject to Certificate of Need review and other Department approvals.

Legislative Objectives:

Article 28 of the PHL seeks to ensure that hospitals and related services are of the highest quality, efficiently provided and properly utilized at a reasonable cost. Consistent with this legislative intent, the proposed amendments would update standards under which part-time clinics are permitted to operate and establish new procedures for the process by which clinics are approved to provide services. These changes will promote improved quality and appropriateness of care at a reasonable cost to payors.

Needs and Benefits:

Part-time clinics provide low-risk procedures and examinations which do not normally require back-up and support from the hospitals and diagnostic and treatment centers that sponsor them. Typical of such services are well-child care, immunization and screening for chronic and communicable conditions treatable or preventable by early detection. Part-time clinics may not deliver services which require specialized equipment, such as magnetic resonance imaging or dialysis, nor may they provide invasive treatment procedures which normally require a surgical environment. Once approved, part-time clinics may operate on either a short-term or permanent basis but may not offer services for more than a total of 60 hours per month.

Part-time clinics were established as a separate category of service to encourage the provision of basic preventive health care in community-based settings easily accessible to the general public and to groups targeted for particular services (e.g., senior citizens). Consequently, the approval process for these clinics is simpler than that for extension clinics of hospitals and diagnostic and treatment centers, whose services are more elaborate and hours of operation less restricted. The initial authority for a hospital or diagnostic and treatment center to operate part-time clinics requires administrative approval under the Certificate of Need (CON) process. However, the subsequent opening of individual clinic sites previously required only a letter of notification to the appropriate area office of the Department of Health, submitted a minimum 15 business days in advance of the proposed commencement of service. Environmental requirements for part-time clinics are minimal, calling only for compliance with prevailing standards for life safety, sanitation and infection control. Some 300 hospitals and diagnostic and treatment centers are authorized to operate part-time clinics.

The leniency of regulation which has encouraged the provision of needed services has also led to the delivery of services in locations and on a scale not intended for part-time clinics. Some providers, for example, have set up part-time clinics in sites such as an adult home and patients' private residences and in other settings not sanctioned under the current regulations. Other operators of part-time clinics have offered services far more elaborate than the low-risk screening and basic care procedures to which part-time clinics are restricted. Still others have engaged in questionable billing practices, submitting claims to the Medicaid program at rates approved only for the broader array of services offered at diagnostic and treatment centers and hospital-based clinics.

With large part-time clinic networks (one network has over 600 sites), there are the issues of service quality and patient safety in settings that lack appropriate medical supervision and staff support and which do not meet operational and environmental requirements. The delivery of services under these circumstances can pose a threat to patient safety and demands the issuance of the new rules on an emergency basis.

An emergency regulation addressing part-time clinics was adopted effective August 15, 2000. Additional emergency regulations were adopted effective on November 13, 2000, February 12, 2001, May 14, 2001, August 10, 2001, November 8, 2001, February 7, 2002, May 6, 2002, August 1, 2002, October 29, 2002, January27, 2003, April 25, 2003, July 24, 2003, October 22, 2003 and January 20, 2004. The last emergency adoption is scheduled to expire on April 19, 2004. This new emergency regulation will repeal and/or amend the regulations which would have gone back into effect upon the expiration of the January 20, 2004 emergency regulation.

The proposed emergency regulations will repeal the existing 10 NYCRR section 703.6 and replace it with a new section 703.6 more explicit in the requirements and prohibitions that apply to part-time clinics. They further amend section 710.1 to require a formal approval process for individual clinic sites. The principal changes in the proposed rules are:

- A more detailed description of the types of services permitted in part-time clinics
- Explicit exclusion of certain types of locations and premises as acceptable sites for part-time clinics
- A requirement that part-time clinics be in sufficient proximity to the sponsoring hospital or diagnostic and treatment center to ensure adequate supervision
- Enhanced operational standards, including requirements for quality assurance and improvement and for credentialing of staff
- A requirement for prior limited review of new part-time clinic sites and proposed relocations of existing clinics. Requests for prior limited review must be submitted to the Department's central office at least 45 days in advance of the proposed commencement of service, instead of the 15 business days required for notification to the appropriate Department regional office.
- Recognition that part-time clinics which are operated by city and county health departments are governed by Section 614 of the Public Health Law.

The proposed rules apply to all existing part-time clinics as well as to all future sites. To ensure that the new regulations do not impede access to care by patients currently receiving services or penalize providers operating bona fide clinics, the proposed rules allow existing sites to continue in operation while their operators' applications for prior limited review of current services and sites are under review by the Department. The rules allowed operators 90 days from the effective date of the original emergency regulation, which was August 15, 2000, to submit such applications, which may include proposals to relocate noncompliant clinics to sites that are in compliance with the proposed regulations. For clinics that failed to submit such timely applications, the rules establish a deadline for submission of a closure plan.

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

Both part-time clinics in existence at the time of the original emergency regulations and any new part-time clinics will be subject to the prior limited review process as set forth in the proposed amendments to section 710.1. The collection and submission of information for the prior limited review process will represent a new cost to the facility, but the Department has minimized that cost through issuance of a standardized form which can

be filed electronically. Some facilities may incur additional costs in bringing substandard part-time clinics up to the standards established in the proposed regulations.

The cost impact of the proposed regulations will depend on the number of operators that seek to establish new part-time clinics, relocate existing clinics or change services in existing sites. For the individual provider, costs will vary with the condition of the existing or proposed site. For sites needing little or no renovation, costs will be minimal. For other locations, costs will depend on the degree of renovation needed, on whether the provider engages the services of architectural or construction firms to carry out the renovations, and on which firms the provider chooses to employ. Because the Department lacks data on the number of proposed sites that will need to pay for renovation, it is difficult to estimate these costs with any precision. However, it is expected that any expenditures will be insignificant in relation to the benefits of improved patient care and reductions in the costs to taxpayers of Medicaid claims for part-time clinic services rendered in inappropriate settings.

Cost to State and Local Government:

There will be no additional cost to State or local governments. If inappropriate or duplicative Medicaid billings are reduced, or if sites providing unsafe or inappropriate services discontinue operations, State and local governments will realize a share of the Medicaid savings. However, certain city and county health departments may incur minimal costs associated with submitting to the Department annually basic information regarding any part-time clinics they operate.

Cost to the Department of Health:

Additional costs related to the processing of prior limited review applications and stricter programmatic oversight of part-time clinics will be absorbed within existing resources.

Local Government Mandates:

This 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. However, certain city and county health departments may incur minimal costs associated with submitting to the Department annually basic information regarding any part-time clinics they operate.

Paperwork:

The governing body will be responsible for filing requests for approval to operate specific sites under the limited prior review process. DOH will attempt to limit the paperwork burden by developing a standardized format for such submissions which may be filed electronically. DOH also considered requiring that each site maintain a patient log with numerous data elements. It was decided not to include this requirement in the operating standards because many of the data elements duplicated information in the medical record, and some could interpret the requirement as an unnecessary paperwork burden unrelated to patient care. However, certain city and county health departments may incur minimal costs associated with submitting to the Department annually basic information regarding any part-time clinics they operate.

Duplication:

The regulations will not duplicate, overlap or conflict with federal or state statutes or regulations.

Alternative Approaches:

The alternative of taking no regulatory action was rejected because of the ongoing potential for questionable quality of care provided at inappropriate sites and because of fiscal irregularities at part-time clinics under current regulations. DOH also considered subjecting all current and proposed part-time clinics to the administrative review process rather than to the prior limited review process. That option was rejected in order to promote a streamlined review process for clinics and DOH and to avoid imposing on facilities the $1,250 filing fee required for administrative reviews.

Federal Requirements:

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

Compliance Schedule:

The emergency regulations will go into effect immediately upon filing with the Department of State. Part-time clinics in operation at that time must have submitted requests to continue operating within 90 days of the effective date of the adoption of the first emergency regulation (issued August 15, 2000) but may continue to operate until and unless DOH issues a written denial of approval to operate. If the governing body of a primary delivery site wishes to open a new part-time clinic site after the effective date of the regulation, it must submit an application. If the proposal is acceptable, DOH will so notify the applicant within 45 days of acknowledgement of receipt of the request.

Regulatory Flexibility Analysis

Effect of rule:

New York State has 9 hospitals, 167 diagnostic and treatment centers and approximately 455 adult homes and 53 congregate living centers that could be considered small businesses affected by this rule. Physician offices, of which the Department has no statistics on how many there are, also could be considered small businesses and impacted by this regulation. The Office of Mental Health approved approximately 980 outpatient mental health programs, the majority of which are small businesses. The Office of Mental Retardation and Developmental Disabilities approves Intermediate Care Facilities (ICFs) many of which would be considered small businesses and which also could be impacted by the regulation. With respect to local governments, to the extent the New York City Department of Health and 57 county health departments operate or propose to operate part-time clinics, they would be impacted by this regulation.

Compliance requirements:

In order to comply with these requirements, an operator/applicant will need to determine that the services to be provided at the part-time clinic(s) are limited to low-risk procedures and examinations which do not normally require backup and support from the primary delivery site of the operator or other medical facility as described in section 703.6(a)(1), be located at a site as described in 703.6(a)(2) and not be located at one of the sites as described in 703.6(a)(3). In addition, the operator/applicant must obtain written approval pursuant to the Department's prior limited review process set forth in section 710.1(c)(6)(v).

Professional services:

There should be no additional professional services required that a small business or local government is likely to need to comply with the proposed rule. Applicants for, and current operators of, part-time clinics must already be licensed pursuant to Public Health Law Article 28 to provide outpatient services. Therefore, adequate administrative mechanisms already should be in place to comply with any reporting and record-keeping requirements.

Compliance costs:

The collection and submission of information for the prior limited review process will represent a new cost to the facility, including facilities operated by a small business or local government. The Department has attempted to minimize that cost through the issuance of a standardized form, which may be obtained and submitted electronically. Some facilities may incur additional costs in bringing substandard part-time clinics up to the standards in the proposed regulations.

The cost impact of the proposed regulations will depend on the number of operators that seek to establish new part-time clinics, relocate existing clinics or change services in existing sites. For the individual provider, costs will vary with the condition of the existing or proposed site. For sites needing little or no renovation, costs will be minimal. For other locations, costs will depend on the degree of renovation needed, on whether the provider engages the services of architectural or construction firms to carry out the renovations, and on which firms the provider chooses to employ. Because the Department lacks data on the number of proposed sites that will need to pay for renovation, it is difficult to estimate these costs with any precision. However, it is expected that any expenditures will be insignificant in relation to the benefits of improved patient care and reductions in the costs to taxpayers of Medicaid claims for part-time clinic services rendered in inappropriate settings.

Economic and technological feasibility:

It should be economically and technologically feasible for small businesses and local governments to comply with the regulations. Providers should not need to hire additional professional or administrative staff to comply with the requirements of the regulations. Due to the nature of the services provided at part time clinics, such sites should not involve significant capital expenditures. Also, applicants under the prior limited review process for reviewing part time clinic proposals are not required to pay the $1,250 fee applicable to full review and administrative review applications. Therefore, overall costs of compliance should be minimal. The Department of Health also has developed a standardized electronic application form that applicants may use by accessing the Department's "web" page. This is technologically feasible using readily available, standard personal computers and internet access programs.

Minimizing adverse impact:

In developing the regulation, the Department considered the approaches set forth in section 202-b(1) of the State Administrative Procedure Act. The Department considered requiring all current and proposed

part-time clinics to undergo the full administrative review process rather than the prior limited review process. That option was rejected in order to permit a streamlined review process for part-time clinics and to permit facilities to avoid the $1,250 filing fee required for full or administrative reviews. The Department also has developed a standardized electronic form to minimize the paperwork burden for requests for approval to operate specific sites under the prior limited review process. The Department also rejected a plan to require that each site maintain a patient log with numerous data elements. The maintenance of such a form was determined to be an unnecessary paperwork burden which duplicated information already in the medical record. This proposal also allows for a waiver from one or more provisions of the new regulations if the Department finds, upon a request from an applicant/operator, that a waiver would enable at-risk or medically underserved patients to obtain needed care and services which would be otherwise unavailable or difficult to access.

Language in this regulation in section 703.6(a)(2) specifies that part-time clinics shall be located at a site that "is located in proximity to the primary delivery site to ensure that supervision and quality assurance are not compromised." In order to allow providers flexibility in bringing needed services to patients, the Department has refrained from specifying a mileage limit for this requirement. In evaluating the distance of a part-time clinic from the sponsor's main site, the Department's principal consideration will be whether the sponsor can provide appropriate supervision and oversight of staff and services at the proposed site.

Part-time clinics may continue to operate while going through the prior approval process. Those in operation on the effective date of the first emergency adoption (August 15, 2000) had 90 days from such date to submit applications for the prior limited review process. If an operator wishes to open a new part-time clinic after the effective date of the regulation, it must submit an application. If the proposal is acceptable, the Department will so notify the applicant within 45 days of acknowledgement of receipt of the request.

Small business and local government participation:

Interested parties were given notice of this proposal by its inclusion in the agenda of the Codes and Regulations Committee of the State Hospital Review and Planning Council for its September 21, 2000 meeting and for its March 21, 2002 and November 21, 2002 meetings and for subsequent meetings. Comments were solicited and provided at the September 21, 2000 meeting. While comments were solicited at the March 21, 2002 and November 21, 2002 meetings and at subsequent meetings, none were provided.

Rural Area Flexibility Analysis

Effect on Rural Areas

This rule applies uniformly throughout the State including all rural areas. Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene	Saratoga	

The following 9 counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements

This regulation should not adversely affect current rural part-time clinics that are providing quality services in appropriate settings. The new regulations will provide facilities with clarified operating standards that will enable them to operate in conformance with the law and meet generally accepted standards for quality care and safety of patients. Operators of part-time clinics in the State (including rural areas) must obtain written approval from the Department to continue operation, relocate, or open new part-time clinics in accordance with the Department's prior limited review process as outlined in section 710.1(c)(6)(v) of 10 NYCRR.

Professional Services

Hospitals should not need to hire additional professional or other staff to comply with the requirements of the new regulation. Applicants for, and current operators of, part-time clinics must already be licensed pursuant to Public Health Law Article 28 to provide outpatient services. Therefore, additional staff should not need to be hired, as administrative mechanisms should already be in place to comply with any reporting and record keeping requirements.

Compliance Costs

Some facilities may incur additional costs in bringing substandard part-time clinics up to the standards established in the proposed regulations. It is impossible to quantify such costs because the Department lacks the data on the number of part-time clinics currently out of compliance with the proposed standards and on the cost of bringing such facilities into conformity with the proposed rules. In general, however, establishment of part-time clinics will not require significant capital expenditures because such clinics are intended to be limited to low risk procedures and examinations that normally do not require backup and support from the primary delivery site of the operator or other medical facilities.

Minimizing Adverse Impact

In developing the regulation, the Department considered the approaches set forth in section 202-bb(2) of the State Administrative Procedure Act.

To minimize the paperwork and reporting requirements, the Department has developed a standardized application form which may be obtained and submitted electronically. Because the approval process is a limited review, the $1,250 filing fee required for full or administrative reviews will not be imposed. The Department recognizes that part-time clinics can provide valuable sources of primary care in rural areas. These regulations will help to assure rural residents that such care meets appropriate quality and safety standards. This proposal also allows for a waiver from one or more provisions of the new regulations if the Department finds, upon a request from an applicant/operator, that a waiver would enable at risk or medically underserved patients to obtain needed care and services which are otherwise unavailable or difficult to access. While language in this regulation in section 703.6(a)(2) specifies that part-time clinics shall be located at a site that "is located in proximity to the primary delivery site to ensure that supervision and quality assurance are not compromised," The Department recognized that rural part-time clinics could serve a wide geographical area and did not specify a mileage limit for this requirement. In evaluating the distance of a part-time clinic from the sponsor's main site, the Department's principal consideration will be whether the sponsor can provide appropriate supervision and oversight of staff and services at the proposed site.

Part-time clinics may continue to operate while going through the prior approval process. Those in operation on the effective date of the first emergency adoption (August 15, 2000) had 90 days from such date to submit applications for the prior limited review process. If an operator wishes to open a new part-time clinic after the effective date of the regulation, it must submit an application. If the proposal is acceptable, the Department will so notify the applicant within 45 days of acknowledgement of receipt of the request. The Department also rejected a plan to require that each site maintain a patient log with numerous data elements. The maintenance of such a form was determined to be an unnecessary paperwork burden which duplicated information already in the medical record.

Opportunity for Rural Area Participation

Rural areas were given notice of this proposal by its inclusion in the agenda of the Codes and Regulations Committee of the State Hospital Review and Planning Council for its September 21, 2000 meeting and for its March 21, 2002 and November 21, 2002 meetings and for subsequent meetings. Comments were solicited and provided at the September 21, 2000 meeting. While comments were solicited at the March 21, 2002 and November 21, 2002 meetings and at subsequent meetings, none were provided.

Job Impact Statement

A Job Impact Statement is not included in accordance with Section 201-a(2) of the State Administrative Procedure Act, because it is apparent from the nature and purpose of these proposed amendments that they will not have a substantial adverse impact on jobs and employment opportunities for those part-time clinics which provide appropriate services in appropri-

ate locations. Those clinics which provide services in locations the Department deems unacceptable will be given an opportunity to relocate to an appropriate setting. The proposed amendments will help to ensure that qualified people provide clinical care and services. Appropriately operating part-time clinics will be allowed to continue providing care and services and newly-proposed sites will be permitted to open provided they can meet the standards established in the regulation. Thus, the jobs of people qualified to provide services, and currently doing so, will not be negatively impacted.

EMERGENCY RULE MAKING

Nursing Home Pharmacy Regulations

I.D. No. HLT-18-04-00013-E
Filing No. 457
Filing date: April 20, 2004
Effective date: April 20, 2004

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

Action taken: Amendment of section 415.18(g) and (i) of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2803

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

Specific reasons underlying the finding of necessity: There is an increasing need to have available to nursing home residents a wider number of antibiotic and pain management medications to respond quickly in the event of a health crisis to these medically fragile residents. Presently, emergency medication kits are limited as to their content and facilities are not permitted to have certain medications including controlled substances in the emergency kits. Delay in responding to resident needs because a medication is not immediately available in the facility, and has to be secured from the pharmacy, is resulting in needless suffering on the part of nursing home residents.

Subject: Nursing home pharmacy regulations.

Purpose: Make available in nursing home emergency medication kits, a wider variety of medications to respond to the needs of resident; provide nursing homes the ability to return unused medication for credit; and allow verbal orders from a legally authorized practitioner.

Text of emergency rule: Subdivisions (g) and (i) of Section 415.18 are amended to read as follows:

Section 415.18 Pharmacy Services.

* * *

(g) Emergency medications. The facility shall ensure the provision of (an) emergency medication kit(s) as follows:

(1) The contents of each kit shall be approved by the medical director, pharmacist and director or nursing.

(2) [Controlled Substances shall be prohibited in emergency kits.] *Limited supplies of controlled substances for use in emergency situations may be stocked in sealed emergency medication kits.*

(i) Each such kit may contain up to a 24 hour supply of a maximum of ten different controlled substances in unit dose packaging, three of which may be injectable drugs.

(ii) Controlled substances contained in emergency medication kits may be administered by authorized personnel pursuant to an order of an authorized practitioner to meet the immediate need of a resident. Such authorized personnel shall include the facility's director of nursing services, registered nurse on duty, licensed practical nurse on duty or the pharmacist or the authorized practitioner supplying such controlled substances.

(iii) The facility shall maintain all records of controlled substances furnished or transferred from the pharmacy and the disposition of all controlled substances in emergency kits, as required by article 33 of the Public Health Law and corresponding regulations.

(3) For medications other than controlled substances [The] the medication contents of each kit shall be limited to injectables except that the kit may also include:

(i) sublingual nitroglycerine; and

(ii) up to five noninjectable, prepackaged medications not to exceed a 24-hour supply; [which are the same noninjectable, prepackaged medications in all emergency kits throughout the facility.] The total number of noninjectables may not exceed 25 medications for the entire facility;

(4) Each kit shall be kept and secured within or near the nurses' station.

* * *

(i) Verbal orders. All medications administered to residents shall be ordered in writing by a legally authorized practitioner unless unusual circumstances justify a verbal order, in which case the verbal order shall be given to a licensed nurse, or to a licensed pharmacist, immediately reduced to writing, authenticated by the nurse or registered pharmacist and countersigned by the prescriber within 48 hours. In the event a verbal order is not signed by the prescriber or a *legally* designated alternate [physician] *practitioner* within 48 hours, the order shall be terminated and the facility shall ensure that the resident's medication needs are promptly evaluated by the medical director or another legally authorized prescribing practitioner.

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 July 18, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

These regulation revisions of 10 NYCRR Section 415.18, Pharmacy Services, in nursing homes, are proposed under the authority granted to the Commissioner of Health under PHL Section 2803. The PHL outlines the responsibility to conduct inspections of health care facilities to determine compliance with statutes and regulations promulgated under the provisions of those statutes and authorizes the commissioner to propose rules, regulations and amendments thereto for consideration by the State Hospital Review and Planning Council "the Council". The Council, by a majority vote of its members, shall amend rules and regulations, subject to the approval of the commissioner, to effectuate the provisions and purposes as stated in the PHL.

Legislative Objectives:

The Department of Health possesses the comprehensive responsibility for the development and administration of programs, standards and methods of operation, and all other matters of policy with respect to nursing home services. Furthermore, through the Social security Act, the federal government authorizes the State to administer programs and services through Medical Assistance (i.e., Medicaid). This includes responsibility for standards of care within those settings, in order to ensure the health needs of recipients are met. These amended regulations will enable nursing homes to respond more quickly and efficiently to the health care needs of residents requiring emergency medications. The regulation will ensure the protection of the nursing home resident and promote the highest quality of care.

Needs and Benefits:

This proposal to amend 10 NYCRR sections 415.18(g) and 415.18(i) responds to the fact that current regulations for nursing home emergency medication kits and verbal orders are outdated and not in keeping with actual practice.

The State's nursing homes provide a variety of clinical services which were not anticipated when the current pharmacy services regulations were promulgated. The Rug-II case mix reimbursement methodology which began in 1986, has allowed nursing homes to open their doors to residents who require resources which were previously unavailable. Currently, nursing homes accept residents whose clinical needs at one time were met in a hospital. In addition, some nursing homes have units that address the unique needs of special populations such as HIV, traumatic brain injury (TBI), or ventilator residents.

The present regulation, section 415.18(g), provides for emergency medication kits but limits the contents to injectables. It also provides for the kit to contain sublingual nitroglycerine and up to five noninjectable prepackaged medications. At the time this regulation was promulgated, the extensive array of oral medications currently available did not exist and emergency medications were primarily viewed in terms of injectable medications. With the greater complexity of clinical conditions often seen in today's nursing home, resident issues of pain management have taken on greater significance. The availability of oral medications for pain and the of a wide range of antibiotics that did not exist at the time the regulations were written would significantly affect how nursing homes could respond to an emergency need of a resident.

The present regulations call for the contents of the emergency medication kits to be identical on every unit throughout the facility. At a time when the needs of residents were similar in terms of clinical management, this made sense. However, with nursing homes providing care to special populations including HIV, TBI and ventilator care, this requirement inhibits the most efficient use of emergency medications kits to best meet the unique clinical needs of special populations. When promulgated, these regulations were seeking to address concerns that facilities would establish "mini" pharmacies by having a wide range of noninjectables in the emergency medication kit and that the presence of a high number of medications may result in administration errors. With safe product packaging that is present today, safety concerns have been significantly reduced. In addition, the proposed regulation changes would limit the total number of noninjectables that would be available in emergency kits to no more than twenty-five. This would further ensure resident safety and eliminate the concern that nursing homes might stock an unlimited amount of noninjectables in the emergency kits. The proposed revisions would also allow for the presence of controlled substances in nursing home emergency kits. This would allow for the nursing home to respond quickly to pain management concerns that are a major issue for some residents.

Regulations at 415.18(i) provide that all medications administered to residents shall be ordered in writing by a legally authorized practitioner unless unusual circumstances justify a verbal order. At the time the original regulations were promulgated only physicians could order medications. The proposed changes would insert the phrase designated alternate practitioner in place of designated alternate physician. This change would be reflective of current practices in which other prescribers, such as a nurse practitioner can order medications.

Costs:

Costs to Regulated Parties:

There will be no additional costs to regulated parties.

Costs to State and Local Government:

There will be no additional costs to State or local governments.

Costs to the Department of Health:

There will be no additional costs to the Department.

Local Government Mandates:

The proposed regulation imposes no program, duty, service, or other responsibility upon any city, town, village, school, fire or other special district.

Paperwork:

The regulation imposes no additional reporting requirements, forms or other paperwork.

Duplication:

The regulation does not duplicate any federal or state regulation.

Alternative Approaches:

No alternative approaches were considered, since all nursing homes would be allowed flexibility in determining the contents of the emergency medication kit in their facility.

Federal Standards:

This regulatory amendment does not exceed any minimum standards of the federal government.

Compliance Schedule:

The proposed regulation will be effective upon filing with the Secretary of State.

Regulatory Flexibility Analysis

Effect on Small Business and Local Government:

For the purposes of this Regulatory Flexibility Analysis, small businesses are considered any nursing home within New York State which is independently owned and operated, and employs 100 individuals or less. Approximately 100 nursing homes would therefore be considered "small businesses".

Compliance Requirements:

The regulation would impose no additional record keeping or other affirmative acts.

Professional Services:

The regulation would impose no additional professional services.

Compliance Costs:

The regulation would impose no additional costs.

Economic and Technical Feasibility Assessment:

The proposed regulation would impose no compliance requirements which would raise technological or feasibility issues.

Minimizing Adverse Impact:

The agency considered the approaches listed in section 202-b(1) of SAPA and found them inapplicable. The regulation would impose no adverse impact on small businesses or local governments.

Small Business and Local Government Input:

The regulation would have no impact on small businesses and local governments. The regulation is supported by provider and consumer groups and feedback from these groups have been gathered. The proposed revisions will be sent to the Code Committee of the Council and appear on the agenda of the Code Committee which is made up of representatives of groups that have as their members representatives of small business and local government.

Rural Area Flexibility Analysis

Effect on Rural Areas:

Rural areas are defined as counties with a population less that 200,000 and for counties with a population greater than 200,000, which include towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene	Saratoga	

The following 9 counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

The regulation would impose no additional reporting, record keeping or other affirmative acts.

Professional Services:

The regulation would not require additional professional services.

Compliance Costs:

The regulation would not impose additional costs.

Minimizing Adverse Impact:

The regulation would not result in any adverse economic impact on providers. The agency considered the approaches listed in section 202-bb(2) of SAPA and found them inapplicable.

Opportunity for Rural Area Participation:

The following groups are in support of the modification of 10 NYCRR 415.18:

New York Association of Homes and Services for the Aging

Nursing Home Community Coalition

New York State Health Facilities Association

New York State Office for Aging Long Term Care Ombudsman

Health Facility Association of New York

New York State Board of Pharmacy

New York Chapter of the American Society of Consulting Pharmacists

The proposed revisions will be sent to the Code Committee of the Council and appear on the agenda of the Code Committee which is made up of representatives of groups that have as their members representatives of rural areas.

Job Impact Statement

A Job Impact Statement is not necessary because it is apparent from the nature and purpose of the proposed regulation that it will not have a substantial adverse impact on jobs or employment opportunities. The proposal simply clarifies what drugs can be stocked in emergency medication kits, as well as who may sign verbal orders.

NOTICE OF ADOPTION

Need Methodology for Residential Health Care Facility Beds

I.D. No. HLT-48-03-00002-A
Filing No. 455
Filing date: April 20, 2004
Effective date: May 5, 2004

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

Action taken: Amendment of section 709.3 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2802 and 2803(2)

Subject: Need methodology for residential health care facility beds.

Purpose: To update the need methodology to reflect the 2000 census and changes in long term care services.

Text or summary was published in the notice of proposed rule making, I.D. No. HLT-48-03-00002-P, Issue of December 3, 2003.

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

Text of rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqna@health.state.ny.us

Assessment of Public Comment

Summary of Comments

The Department received comments from the New York Association of Homes and Services for the Aging (NYAHSA) and the Healthcare Association of New York State. The Department also received several comments from nursing homes and a coalition of long-term care providers in Syracuse challenging the proposed rule's projection of a need for RHCF beds in Onondaga County.

The comments opposing or suggesting modification of the proposed rule argued the following:

- The proposed rule continues to rely on the same basic methodology employed since the 1980s, including the use of blended statewide and county usage patterns for the determination of need in individual planning areas.
- The methodology does not sufficiently take into account the effects on RHCF bed need of home care, enriched housing, adult homes, adult day health care, the Program of All-inclusive Care for the Elderly (PACE), and other noninstitutional forms of long-term care.
- The proposed rule should rely on RHCF catchment areas, rather than the county, as the planning area for RHCF beds.
- The proposed rule should employ RHCF bed occupancy rates recalculated annually, rather than rely on those calculated for the base year and the planning target year. The Department should also use an occupancy rate of 98 percent, rather than 97 percent, as the occupancy threshold for consideration of applications for new beds in a planning area.
- The proposed rule does not consider labor shortages in the health care workforce that may affect staffing for RHCF beds.
- The proposed rule should be amended to require an evaluation of the potential impact of additional RHCF beds on the finances and referrals of existing providers in the planning area.
- There is no need for additional beds in Onondaga County.

Department of Health Response

- The proposed rule continues to rely on the same basic methodology first used in the 1980s.

As stated in the regulatory impact statement accompanying the proposed rule, the recent decline of high occupancy rates in nursing homes throughout the State, the absence of significant waiting lists for nursing home placement over the past several years, and the low number of patients on hospital alternative level of care (ALC) status suggest that the overall framework of the current RHCF bed need methodology remains adequate today. In addition, the proposed changes provide a means for the consideration of distinctive local and regional circumstances in the review of individual Certificate of Need (CON) applications for RHCF beds. The Department also notes that commenters questioning the continued use of the basic elements of the original need methodology proposed no specific alternative approaches to the calculation of RHCF bed need nor suggested any substitute language for pertinent subdivisions of the proposed rule.

- The methodology does not sufficiently take into account the effects on RHCF bed need of the various noninstitutional forms of long-term care.

Suggestions that the proposed methodology be adjusted to reflect the growing use of alternatives to nursing home care overlook the fact that the methodology takes into account long-term community based care, including the Long Term Home Health Care Program; certified home health agency (CHHA) clients who are served for an extended period of time; and the personal care program. The methodology also considers supportive housing, which consists of adult care facilities, both adult homes and enriched housing programs serving the elderly population. The need estimates for RHCF beds statewide and in each planning area are derived in part from use rates for these noninstitutional services in preference to traditional RHCF care. And as discussed in the regulatory impact statement, the imputed occupancy rate of 99 percent for the calculation of blended need estimates for RHCF beds for each county is intended to reflect an expected and continued gradual decline in occupancy rates as home and community-based long-term care services become more widely available.

The Department received comments that the methodology should take into account the effects of adult day health care (ADHC) and the PACE program on the need for RHCF beds. Our response is that these services were considered in the inclusion of home health care in the calculation of RHCF bed need, because PACE and ADHC clients are also home health care recipients. To count ADHC and PACE utilization separately would be to double-count the effects of these services on RHCF bed need.

Commenters also suggested that the proposed rule include the effects on RHCF bed need of CHHA services of less than three months. The Department's response is that clients enrolled in home health care for periods of less than three months typically do not have needs that would make them candidates for inpatient RHCF care.

- The proposed rule should rely on RHCF catchment areas, rather than the county, as the planning area for RHCF beds.

The Department received a suggestion that the planning area for the methodology be altered from the county in which the individual RHCF is located to "a 50-mile radius around the facility", which is the "discharge community" for hospitals and RHCF's as defined in 18 NYCRR 505.20(b) and is regularly employed for discharge planning purposes. The commenter contended that this would be more typical of the actual catchment areas of most RHCFs than the standard county planning area.

The Department notes that discharge planning, involving as it does the diagnoses and service needs of clients from all age groups and from hospitals as well as RHCFs, must of necessity employ a less precisely defined planning area than that used for RHCF care. Furthermore, the suggestion that the standard planning area of the county be replaced by the fluid and often overlapping catchment areas of individual RHCFs would take away the basis for consistency in the assessment of need that is provided by reliance on the county as the geographical framework for the planning of RHCF beds and other long-term care services. The commenter's suggestion also seems to overlook the flexibility afforded by section 709.3(j), which allows an RHCF applicant to propose a service area that includes a long term care planning area outside of that in which the facility or proposed facility is located. The comment also fails to recognize that the consideration of local factors in the review of individual RHCF bed applications as provided for in subdivision (h) of the proposed rule permits the consideration of occupancy rates in existing RHCFs, including those in counties contiguous to the planning area in which the new facility or beds are proposed.

- The proposed rule should employ RHCF bed occupancy rates recalculated annually, rather than rely on those calculated for the base year and the planning target year. The Department should also use an occupancy rate of 98 percent, rather than 97 percent, as the occupancy threshold criterion for consideration of applications for new beds in a planning area.

The suggestion that RHCF occupancy rates used in the proposed rule be recalculated annually would require annual amendment of the rule, which would be impractical. The Department also notes that subdivision (d) of the proposed rule requires an evaluation of the appropriateness of the imputed occupancy rate of 99 percent and the 97 percent occupancy threshold criterion for consideration of new applications before December 31, 2005. To further help ensure that the methodology remains flexible, adequate and timely, the proposed rule requires the Department to conduct an evaluation of the revised need formula by December 31, 2007. We also note that in considering requests for additional RHCF beds based on local occupancy rates and other local factors as provided for in subdivision (h), it will be standard Department practice to employ the latest available occupancy figures for established facilities in the particular planning area.

Commenters suggested that because Medicaid rates for most RHCFs are based on a 98 percent bed occupancy rate, the threshold occupancy rate for consideration of new beds in a planning area should be 98 percent rather than the 97 percent set forth in subdivision (f) of the proposed rule. The Department responds that the 97 percent threshold occupancy rate is based on recent statewide trends in occupancy and therefore is appropriate for current purposes. The Medicaid 98 percent occupancy rate was developed for reimbursement purposes and may or may not be reflective of actual occupancy in a planning area, or for an individual facility, in any given year. In addition, the 97 percent threshold occupancy rate is high enough to ensure vigorous utilization of existing RHCF beds in a planning area and at the same time low enough to allow for increases in bed capacity in areas whose populations could benefit from access to a larger number of RHCF beds.

- The proposed rule does not consider labor shortages in the health care workforce that may affect staffing for RHCF beds.

The Department received comments that because of the current and projected severe labor shortage in health care, the proposed rule should be amended to ensure that the availability of appropriate staffing in the planning area be evaluated in the review of individual CON applications for RHCF beds. It is the Department's response that workforce factors can be considered in the review of local factors affecting individual RHCF bed applications, as provided for in subdivision (h) of the proposed rule.

- The proposed rule should be amended to require an evaluation of the potential impact of additional RHCF beds on the finances and referrals of existing providers in the planning area.

By requiring that reviews of requests for additional beds be evaluated in terms of their impact on existing providers, the proposed change would discourage applications by new providers and hamper the expansion of access to RHCF beds in areas of need. However, if the purpose of the commenter's proposed change is to ensure that the addition of new providers or beds does not result in the elimination of access to existing long-term care services, such an impact could be considered as a relevant need modification factor, in appropriate situations, under the provisions of new subdivision (h) of the proposed amendments. The presence of adequate services, current or future, in a long-term care planning area would result in a finding of no need under the proposed section 709.3. This would mean disapproval of individual applications and thus prevent the presumed adverse effects on existing long-term care providers that are the subject of the commenter's suggested change in the proposed rule.

- There is no need for additional RHCF beds in Onondaga County.

The comments from the Syracuse area challenged the methodology's projection of a need for 173 additional beds in Onondaga County. According to a coalition of long-term care providers in Syracuse, occupancy levels in the area are declining, and there are consistently between 60 and 80 unoccupied beds on a daily basis within the county. The operators of two nursing homes in Onondaga County stated that there was an average of 76 vacant nursing home beds in the county in 2003.

The methodology in the proposed rule is based on trends in actual RHCF occupancy and length of stay over several years and on an analysis of the long term care system as it existed in 2000, the base year for the revised methodology. It further reflects county-specific data from the 2000 U. S. Census, adjusted for dependency in the age group over 65 years. The methodology also projects need for the planning target year of 2007, while the data cited by the commenters is for one year only (2003) and makes no reference to local demographic projections based on Census data. It cannot be inferred that bed vacancies experienced in Onondaga County in 2003 will necessarily be maintained through 2007. In addition, the 76 vacant beds cited by the nursing homes constitute only 2.5 percent of total existing beds in Onondaga County in 2003, which would mean an occupancy rate of 97.5 percent. This already exceeds the 97 percent threshold required by the proposed rule for consideration of applications for new beds in a planning area.

Conclusion

In summary, the Department finds no basis for modification of the proposed rule based on comments received during the public comment period.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Communicable Disease — Arboviral Infection Reporting

I.D. No. HLT-18-04-00002-P

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

Proposed action: Amendment of section 2.1(a) of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 225(4), (5)(a), (h), (i), 206(1)(d) and (e)

Subject: Communicable diseases — arboviral infection reporting.

Purpose: To add arboviral infection to the list of communicable diseases.

Text of proposed rule: Subdivision (a) of Section 2.1 is amended to read as follows:

2.1 Communicable diseases designated: cases, suspected cases and certain carriers to be reported to the State Department of Health.

(a) When used in the Public Health Law and in this Chapter, the term infectious, contagious or communicable disease, shall be held to include the following diseases and any other disease which the commissioner, in the reasonable exercise of his or her medical judgment, determines to be communicable, rapidly emergent or a significant threat to public health, provided that the disease which is added to this list solely by the commissioner's authority shall remain on the list only if confirmed by the Public Health Council at its next scheduled meeting:

Amebiasis
Anthrax
Arboviral infection
Babesiosis
Botulism
Brucellosis
Campylobacteriosis
Chancroid
Chlamydia trachomatis infection
Cholera
Cryptosporidiosis
Cyclosporiasis
Diphtheria
E. coli 0157:H7 infections
Ehrlichiosis
Encephalitis
Giardiasis
Glanders
Gonococcal infection
Group A Streptococcal invasive disease
Group B Streptococcal invasive disease
Hantavirus disease
Hemolytic uremic syndrome
Hemophilus influenzae (invasive disease)
Hepatitis (A; B; C)
Hospital-associated infections (as defined in section 2.2 of this Part)
Legionellosis
Listeriosis
Lyme disease
Lymphogranuloma venereum
Malaria
Measles
Melioidosis
Meningitis
  Aseptic
  Hemophilus
  Meningococcal
  Other (specify type)
Meningococcemia
Mumps
Pertussis (whooping cough)
Plague
Poliomyelitis
Psittacosis
Q Fever
Rabies
Rocky Mountain spotted fever
Rubella
Congenital rubella syndrome
Salmonellosis
Severe Acute Respiratory Syndrome (SARS)
Shigellosis
Smallpox
Staphylococcal enterotoxin B poisoning
Streptococcus pneumoniae invasive disease
Syphilis, specify stage

Tetanus
Toxic Shock Syndrome
Trichinosis
Tuberculosis, current disease (specify site)
Tularemia
Typhoid
Vaccinia disease (as defined in section 2.2 of this Part)
Viral hemorrhagic fever
[Yellow Fever]
Yersiniosis

* * *

Text of proposed rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: 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.

Regulatory Impact Statement

Statutory Authority:

Sections 225(4) and 225(5)(a), (h), and (i) of the Public Health Law ("PHL") authorize the Public Health Council to establish and amend State Sanitary Code provisions relating to designation of communicable diseases dangerous to public health and the nature of information required to be furnished by physicians in each case of communicable disease. PHL Section206(1)(d) authorizes the commissioner to "investigate the causes of disease, epidemics, the sources of mortality, and the effect of localities, employments and other conditions, upon the public health." PHL Section 206(1)(e) permits the commissioner to "obtain, collect and preserve such information relating to marriage, birth, mortality, disease and health as may be useful in the discharge of his duties or may contribute to the promotion of health or the security of life in the state." PHL Article 21 requires local boards of health and health officers to guard against the introduction of such communicable diseases as are designated in the sanitary code by the exercise of proper and vigilant medical inspection and control of persons and things infected with or exposed to such diseases. PHL Section 2102 requires laboratories to report the results of laboratory examinations disclosing evidence of communicable disease to local or state health officials.

Legislative Objectives:

This regulation meets the legislative objective of protecting the public health by adding arboviral infections to the list of reportable disease. This change will permit enhanced disease monitoring and vector population intervention measures, if necessary, to prevent further transmission.

Needs and Benefits:

Arthropod-borne viruses (arboviruses) are transmitted to people primarily by the bite of an infected arthropod, typically by a mosquito or tick. Arboviruses can cause asymptomatic infections or a clinical illness that ranges in severity from a self-limited febrile illness to a severe neurologic illness with high fever, malaise, photophobia, encephalitis, meningitis, coma or death.

Arboviruses have been present in New York State for decades and include Eastern equine encephalitis virus, California encephalitis viruses and Powassan encephalitis virus. Over the past thirty years, other mosquito-borne viruses normally found in other areas of the country or the world, were introduced into New York State and resulted in epidemic illness. Examples are St. Louis encephalitis virus in 1975 and West Nile virus in 1999. Since its introduction in New York State, there have been over 175 human West Nile virus cases with 15 fatalities.

In 2002, public health investigations documented that West Nile virus can be transmitted from person to person via infected blood donations and organ transplants. In response to this new mode of West Nile virus transmission, some blood collection agencies in 2003 voluntarily implemented a West Nile virus-screening program of blood donors. Testing for West Nile virus is not mandatory. If, however, a blood collection agency tests for West Nile virus and the result is positive, the laboratory performing the test is required to report the result to the New York State Department of Health. Due to the increased testing of donors, it is anticipated that individuals with asymptotic or mild West Nile viral infection will be detected but the number of cases is expected to be low.

For those blood donors testing positive for West Nile virus, the rule change will enable the NYSDOH and local health departments to receive identifying information. Local health department staff will follow-up with the West Nile virus positive donors to counsel them, determine their travel history and evaluate geographic areas of risk.

The rule change will also require the reporting of other arboviral diseases. Existing communicable disease reporting requirements only include the reporting of encephalitis and meningitis. Encephalitis and meningitis are the most severe symptoms associated with a variety of arthropod borne diseases, as well as other communicable diseases. The change will enable the New York State Department of Health (NYSDOH)/and local health departments to detect and document diagnosed cases of mosquito and tick-borne viral infections, even those cases that do not progress to encephalitis or meningitis.

It should be understood that these regulations do not mandate testing for arboviral infections, including West Nile virus, but require physicians and laboratories that voluntarily conduct testing to report positive test results to the New York State Department of Health. Requiring the reporting of all arboviral infections will prevent further serious human infection through the earliest possible recognition of a problem and assist in defining the incidence and clinical spectrum of illness and instituting recommendations for disease prevention as early as possible.

In summary, adding arboviral infections to the reportable disease list will permit the NYSDOH to more comprehensively monitor for these diseases, and permit case reporting, investigation, and intervention to be made on a timely basis.

Costs:

Arthropod-borne diseases primarily cause encephalitis and/or meningitis symptoms in patients. Encephalitis and meningitis are already included on the communicable disease list in 10 NYCRR Section 2.1. This change will require all arboviral infections to be reported and will clarify the NYSDOH's authority to investigate these cases, including mild or asymptomatic cases. The number of additional cases of arboviral infections that will be reported is expected to be low. It is expected that there will be increased costs related to investigating cases and, potentially, implementing control strategies.

Costs to Regulated Parties:

It is imperative to the public health that cases of arboviral infection be reported immediately and investigated thoroughly to curtail additional exposure and potential morbidity and mortality and to protect the public health.

The costs associated with implementing the reporting of this disease are expected to be minimal as reporting processes and forms already exist. Hospitals, practitioners and clinical laboratories are accustomed to reporting communicable disease to public health authorities.

Costs to Local and State Governments:

Costs associated with the reporting of arboviral infections are expected to be mitigated because the staff who are involved in reporting this disease at the local and State health departments are the same as those currently involved with reporting of other communicable diseases listed in 10 NYCRR Section 2.1. Arbovirus enhanced surveillance activities are longstanding and ongoing in most local health departments partially as a result of the importation of West Nile virus into the Western hemisphere in 1999. Local health department staffs have been aggressively monitoring and investigating reports of arboviral infection in their jurisdiction.

Additional costs to local or state governments are associated with investigating and implementing control strategies to curtail the spread of arthropod-borne disease. It is expected that the number of additional cases reported as a result of this change will be low. It is not known how this information will influence county control measures. Control efforts include enhanced vector surveillance, vector population reduction measures and implementation of comprehensive educational campaigns. These intensive efforts are critical to minimize spread.

By potentially decreasing the spread of arthropod-borne virus infections, savings may include reducing costs associated with public health control activities, hospitalization, morbidity, treatment and premature death.

Costs to the Department of Health:

The New York State Department of Health already collects communicable disease reports from local health departments, checks the reports for accuracy and transmits them to the federal Centers for Disease Control and Prevention. The addition of arboviral infections to the list of communicable diseases should not lead to substantial additional costs for data entry, particularly as the Department adopts systems for electronic submission of case reports.

There are additional costs associated with ongoing arbovirus enhanced surveillance; these activities are long-standing and ongoing. New York

State Department of Health has been aggressively monitoring and investigating reports of arboviral infection in New York State.

Paperwork:

The existing general communicable disease reporting form (DOH-389) will be revised to include arboviral infections. This form is familiar to and already used by regulated parties.

Local Government Mandates:

Under Part 2 of the State Sanitary Code (10 NYCRR Part 2), the city, county or district health officer receiving reports from physicians in attendance on persons with or suspected of being infected with arboviral infection, will be required to immediately forward such reports to the State Health Commissioner and to investigate and monitor the cases reported.

Duplication:

There is no duplication of this initiative in existing State or federal law.

Alternatives:

No other alternatives are available.

Reporting of cases of specified arboviral infections is of critical importance to public health. There is an urgent need to conduct surveillance, identify human cases in a timely manner, and reduce the potential for further exposure to other individuals.

Federal Standards:

This proposed action is consistent with current CDC standards for reporting of vector-borne diseases.

Compliance Schedule:

This regulation will be effective upon publication of a Notice of Adoption in the New York *State Register*.

Regulatory Flexibility Analysis

Effect on Small Business and Local Government:

There are approximately 6 hospitals, 15 nursing homes and 1,000 clinical laboratories that employ less than 100 people in New York State. There are 397 licensed clinics; information about how many operate as small businesses is not available. There are approximately 70,000 physicians in New York State but it is not known how many can be categorized as small businesses. This regulation will apply to all local health departments.

It is expected that the proposed rule will have minimal impact on small business (hospitals, clinics, nursing homes, physicians, and clinical laboratories) and local government since encephalitis and meningitis symptoms are already reportable. The number of additional cases of arboviral infections that will be reported is estimated to be low. Existing report forms and systems will be used.

Compliance Requirements:

Hospitals, clinics, physicians, nursing homes, and clinical laboratories that are small businesses and local governments will utilize revised Department of Health reporting forms which are familiar to them.

Professional Services:

No additional professional services will be required since providers are expected to be able to utilize existing staff to report occurrences of arboviral infections.

Compliance Costs:

No initial capital costs of compliance are anticipated. Annual compliance costs will depend upon the number of cases of arboviral infections which is expected to be low because existing reporting forms and mechanisms will be used. The reporting of arboviral infections should have a minimal effect on the estimated cost of disease reporting by hospitals. The cost would be less for physicians and other small businesses.

Minimizing Adverse Impact:

Adverse impacts have been minimized since familiar forms and existing reporting staff can be utilized by regulated parties. Electronic reporting will save time and expense. The approaches suggested in the State Administrative Procedure Act Section 202-b(1) were rejected as inconsistent with the purpose of the regulation.

Feasibility Assessment:

Small businesses and local governments will likely find it easy to report conditions due to the availability to them of electronic reporting and tabulation.

Small Business and Local Government Participation:

Local governments have been consulted in the process through ongoing communication on this issue with local health departments and the New York State Association of County Health Officers (NYSACHO).

Rural Area Flexibility Analysis

Effect on Rural Areas:

The proposed rule will apply statewide. A rural area is a county of under 200,000 population or an area with a population density of 175 persons or less per square mile. There are 42 rural counties in New York State and all are in Upstate New York. The number of cases that will be reported from rural areas is estimated to be low and have minimal impact on local health units, physicians, hospitals and laboratories that are located in rural areas.

Compliance Requirements:

Local health units, hospitals, clinics, physicians and clinical laboratories in rural areas will continue to utilize Department of Health reporting forms that will be revised to include arboviral infections.

Professional Services:

No additional professional services will be required. Rural providers are expected to use existing staff to comply with the requirements of this regulation.

Compliance Costs:

No initial capital costs of compliance are anticipated. See cost statement in Regulatory Impact Statement for additional information.

Minimizing Adverse Impact:

Adverse impacts have been minimized since familiar forms and existing reporting staff will be utilized by regulated parties. The approaches suggested in State Administrative Procedure Act Section 202-bb(2) were rejected inconsistent with the purpose of the regulation.

Rural Area Input:

The New York State Association of County Health Officers, including representatives of rural counties, has been informed about this change and supports the need for it.

Job Impact Statement

This regulation will not have a substantial adverse impact on jobs and employment opportunities. It adds arboviral infection to the list of diseases that health care providers must report to public health authorities. The staff who will be involved in reporting arboviral infections at the local and State health departments are the same as those currently involved with reporting, monitoring and investigating other communicable diseases. Although it is not possible to predict the extent of arboviral infection outbreaks, the number of additional cases that will be detected, or the degree of additional demands it will place on existing staff, all are expected to be low and the impact on jobs to be minimal if there is any impact at all.

Higher Education Services Corporation

NOTICE OF ADOPTION

World Trade Center Scholarships

I.D. No. ESC-09-04-00002-A
Filing No. 451
Filing date: April 19, 2004
Effective date: May 5, 2004

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

Action taken: Addition of section 2201.2 to Title 8 NYCRR.

Statutory authority: Education Law, sections 652.2, 653.9, 544.4, 608 and 668-d

Subject: World Trade Center Scholarships.

Purpose: To provide necessary classification of program criteria.

Text or summary was published in the notice of emergency/proposed rule making, I.D. No. ESC-09-04-00002-EP, Issue of March 3, 2004.

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

Text of rule and any required statements and analyses may be obtained from: Donna Fesel, Senior Attorney, Office of Counsel, Higher Education Services Corporation, 99 Washington Ave., Rm. 1350, Albany, NY 12255, (518) 474-3219, e-mail: Donna_Fesel@hesc.com

Assessment of Public Comment

The agency received no public comment.

Department of Law

NOTICE OF WITHDRAWAL

Broker-Dealer and Salesperson Registration for Securities and Real Estate Securities

I.D. No. LAW-52-03-00017-W

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

Action taken: Notice of proposed rule making, I.D. No. LAW-52-03-00017-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on December 31, 2003.

Subject: Broker-dealer, salesperson and real estate securities registration.

Office of Mental Health

NOTICE OF ADOPTION

Operation and Medical Assistance for Outpatient Programs

I.D. No. OMH-48-03-00009-A
Filing No. 453
Filing date: April 20, 2004
Effective date: May 5, 2004

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

Action taken: Amendment of Parts 587 and 588 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09(b), 31.04(a) and 43.02(a); and Social Services Law, sections 364(3) and 364-a(1)

Subject: Operation of outpatient programs and medical assistance for outpatient programs.

Purpose: To explicity permit the provision of family treatment, through the addition of a definition of the service and standards for reimbursement.

Text or summary was published in the notice of proposed rule making, I.D. No. OMH-48-03-00009-P, Issue of December 3, 2003.

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

Text of rule and any required statements and analyses may be obtained from: Dan Odell, Bureau of Policy, Legislation and Regulation, Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 473-6945, e-mail: dodell@omh.state.ny.us

Assessment of Public Comment

The following summarizes the written comments received by the Office of Mental Health (OMH) subsequent to publication of the proposed regulation, and the Offices responses:

1. A comment was received from a social worker in an OMH licensed outpatient program stating that the proposed changes would enable billing for one family session instead of two separate sessions. The comment stated that although this might seem a minor change, much time is now spent on writing two separate notes for one session and they hope the new regulations are passed and looked forward to them being implemented.

The Office acknowledges this comment in support of the proposed regulation.

2. A comment was received from the executive director of a large agency providing outpatient services. The comment stated that this proposal will allow agencies greater flexibility in working with individuals and their families while remaining cost neutral. Currently the agency is using a combination of a 30-minute regular visit and a 30-minute collateral visit in order to document provision of family therapy. The proposed change would give greater flexibility in how the 60-minute time frame is used. This regulation change recognizes the importance of family therapy and will allow agencies to provide family psycho education services as they are intended to be provided. Under this proposal, documentation requirements would be reduced and simplified as only one note would be required for the 60-minute session rather than a note for the regular visit and a second note for the collateral visit. The comment stated they believe this proposal will improve the services provided to individuals and their families.

The Office acknowledges this comment in support of the proposed regulation.

3. A comment was received from the statewide organization representing local mental hygiene directors stating they were pleased to support the regulatory amendments which would explicitly permit the provision of family treatment in OMH licensed mental health outpatient clinic treatment programs, both for adults and for children, through the addition of a definition for family treatment services and standards for Medicaid fee-for-service family treatment reimbursement. These proposed amendments would provide an alternative to current regulatory program and billing language which now leads to the artificial splitting of a family-oriented session by forcing a segment of the session to focus on the recipient and another segment of the session to focus on collateral-related issues. These proposed changes would not increase costs and would make sessions more responsive, flexible and productive.

The Office acknowledges this comment in support of the proposed regulation.

4. A comment was received from a large suburban countys director of childrens mental health services. The comment stated that they are in support of the amendment to Part 587, which adds "family treatment" as an additional clinic treatment service and as a billable category. They further stated that this is a positive change that more accurately reflects the work that is being done in mental health clinics, especially those that serve children and families. In addition, they said that once "family treatment" is included in the regulations, they would recommend that the state take an additional step and allow agencies to create a family treatment record. This would be an advantage to both families and providers who now must work with multiple records with duplicative documentation to cover all of the members of a family who are involved in treatment. A family treatment record would better reflect the nature of the work, at the same time resulting in reduced paperwork and more available time for service provision.

The Office acknowledges this comment in support of the proposed regulation and will consider the associated recommendation that agencies be allowed to create a family treatment record.

5. A comment was received from a staff member of a licensed mental health outpatient program stating that they were in support of the amendment.

The Office acknowledges this comment in support of the proposed regulation.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Residential Treatment Facilities for Children and Youth

I.D. No. OMH-18-04-00010-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 584.5(e) of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09(b), 31.04(a)(2) and 31.26(b)

Subject: Operation of residential treatment facilities for children and youth.

Purpose: To continue the temporary increase in the capacity of certain RTF's to serve the needs of emotionally disturbed children and youth.

Text of proposed rule: Subdivision 584.5(e) of Part 584 of 14 NYCRR is amended to read as follows:

(e) An operating certificate shall be issued for a residential treatment facility for a resident capacity of no less than 14 and no more than 56; provided, however, that for the period commencing April 1, 2000 through [September 30, 2003,] *September 30, 2004*, bed capacity for facilities primarily serving New York City residents may be temporarily increased up to an additional ten beds over the maximum certified capacity with the prior approval of the Commissioner. In order to receive such approval, the residential treatment facility must demonstrate that the additional capacity will be used to serve those children and youth deemed most in need of RTF services by the New York City Preadmission Certification Committee as set forth in Section 583.8.

Text of proposed rule and any required statements and analyses may be obtained from: Dan Odell, Bureau of Policy, Legislation and Regulation, Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 473-6945, e-mail: dodell@omh.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: §§ 7.09(b), 31.04(a)(2) and 31.26(b) of the Mental Hygiene Law grant the Commissioner the power and responsibility to adopt regulations that are necessary and proper to implement matters under his jurisdiction, to set standards of quality and adequacy of facilities, and to adopt regulations governing Residential Treatment Facilities for Children and Youth, respectively.

2. Legislative Objectives: NYCRR Part 584 sets forth standards for the operation of Residential Treatment Facilities for Children and Youth. This amendment to Part 584 allows for the temporary increase of capacity of certain facilities to allow additional children and youth to be served in the program.

3. Needs and Benefits: The Office of Mental Health has determined that it is necessary to continue the existing capacity of these Residential Treatment Facilities for Children and Youth (RTFs) which serve seriously emotionally disturbed children and youth who are residents of New York City. Under the existing regulation, (14 NYCRR Section 584.5(e)), RTF bed capacity serving primarily New York City residents may be temporarily increased until September 30, 2003 by up to 10 additional beds over the permitted maximum of 56 per facility.

There are a number of initiatives underway that focus on improving the use of the current RTF resources by decreasing the length of stay. These initiatives include focused development of supervised community residences, family based treatment programs, case management and family support to assist the youth discharged from an RTF to successfully reintegrate into the community.

To expand capacity, a total of 21 temporary beds were added to 5 existing RTF facilities serving New York City residents. These beds were added on a voluntary basis with the cooperation of the facilities and the support of the New York City Department of Mental Health. Three of the facilities that were not at the 56 bed maximum had their capacity increased administratively by a total of 13, without going over the maximum. One of the facilities, St. Christopher Otillie, was at 56 beds and another, Linden Hill, was at 55 beds. St. Christopher Otillie added 5 beds. Linden Hill added 3 beds. Therefore, 7 beds are permitted to be added under 14 NYCRR Section 584.5(e) as it currently exists. That permission expired on September 30, 2003. Although significant improvements in development of residential alternatives, such as the supervised community residences and the family based treatment beds, have been made in the last year, the expiration date must be changed to September 30, 2004, in order to permit the continued necessary increase in RTF capacity.

4. Costs:

(a) Costs to private regulated parties: There will be no mandated costs to the regulated parties associated with allowing an increase in capacity to the RTF program.

(b) Cost to state and local government: The annual state cost for the 7 beds is estimated to be $438,000. These additional funds will be covered by the State share of Medicaid appropriation. There is no local share for the RTF program.

(c) The cost projection was calculated by applying the per bed projected Medicaid rate to the 7 additional beds.

5. Local Government Mandates: There will be no additional mandates to local government.

6. Paperwork: There are no new paperwork requirements associated with this amendment.

7. Duplication: There are no duplicate, overlapping or conflicting mandates which may effect this rule.

8. Alternatives: The only alternative would be to allow the temporary additional capacity authority to expire, which is not acceptable given the critical need for these services.

9. Federal Standards: The rule does not exceed any Federal standards.

10. Compliance Schedule: Providers will be able to comply with this rule immediately.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rules will not impose any adverse economic impact on small businesses, or local governments.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this notice because the amended rules impact only Residential Treatment Facilities for Children and Youth serving children who are New York City residents.

Job Impact Statement

Because this amendment will impact only 2 providers of Residential Treatment Facilities for Children and Youth, and only permits these 2 providers to continue the temporary operation of a total of 7 beds until September 30, 2004, it will not have any impact on jobs and employment activities.

Department of Motor Vehicles

NOTICE OF ADOPTION

Tompkins County Motor Vehicle Use Tax

I.D. No. MTV-08-04-00004-A
Filing No. 458
Filing date: April 20, 2004
Effective date: May 5, 2004

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

Action taken: Amendment of section 29.12(g) of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a) and 401(6)(d)(ii); and Tax Law, section 1202(c)

Subject: Tompkins County motor vehicle use tax.

Purpose: To increase the tax.

Text or summary was published in the notice of proposed rule making, I.D. No. MTV-08-04-00004-P, Issue of February 25, 2004.

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

Text of rule and any required statements and analyses may be obtained from: Michele Welch, Counsel's Office, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Nassau County Motor Vehicle Use Tax

I.D. No. MTV-08-04-00008-A
Filing No. 459
Filing date: April 20, 2004
Effective date: May 5, 2004

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

Action taken: Amendment of section 29.12(c) of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a) and 401(6)(d)(ii); and Tax Law, section 1202(c)

Subject: Nassau County motor vehicle use tax.

Purpose: To increase the tax.

Text or summary was published in the notice of proposed rule making, I.D. No. MTV-08-04-00008-P, Issue of February 25, 2004.

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

Text of rule and any required statements and analyses may be obtained from: Michele Welch, Counsel's Office, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Registration of Pickup Trucks

I.D. No. MTV-18-04-00017-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 106.6(b) of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 401(7) and (15)

Subject: Registration of pickup trucks.

Purpose: To raise the registration weight for certain pickup trucks to 5,500 pounds.

Text of proposed rule: Subdivision (b) of Part 106.6 is amended to read as follows:

(b) A pickup truck which is used exclusively for non-commercial purposes with an unladen weight of five thousand *and five hundred* pounds or less, and with no business advertising may receive a passenger registration, at the registrant's option. *This subdivision shall also apply to pick-up trucks weighing five thousand and five hundred pounds or less that are leased and rented, provided that the lessee or renter of the pickup truck certifies on a form, provided by the leasing or rental company, that the pickup truck shall be used exclusively for non-commercial purposes. No rental or leasing company shall permit the renting or leasing of a pickup truck if the renter or lessee fails to complete the certification required by this subdivision or if such company knows or has reason to know that the renter or lessee is operating a pickup truck for commercial purposes.*

Text of proposed rule and any required statements and analyses may be obtained from: Michele Welch, Counsel's Office, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

Data, views or arguments may be submitted to: Ida L. Traschen Associate Counsel, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

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

Regulatory Impact Statement

1. Statutory authority: Vehicle and Traffic Law section 215(a) provides that the Commissioner of Motor Vehicles may enact rules and regulations that regulate and control the exercise of the powers of the Department. VTL section 401(7) provides the registration fee schedule for vehicles "constructed or specially equipped for the transportation of goods, wares and merchandise, commonly known as auto trucks ..." Section 401(15) specifically authorizes the Commissioner of Motor Vehicles to promulgate regulations "... for the proper enforcement of the provisions of this section with respect to the registration of auto trucks..."

2. Legislative objectives: The proposal is consistent with the legislative objectives underlying the registration requirements for motor vehicles: to identify vehicles as belonging to a particular class, to insure that appropriate fees are paid and, indirectly, to authorize or prohibit the use of particular roadways by particular types of vehicles.

3. Needs and benefits: In 2000, the Department adopted amendments to Part 106.6 to provide:

A pickup truck which is used exclusively for non-commercial purposes with an unladen weight of five thousand pounds or less, and with no business advertising may receive a passenger registration, at the registrant's option.

The justification for that regulation is relevant to the necessity of adopting this proposed rule, which would allow the registration of pickup trucks with passenger plates up to 5,500 pounds if such pickup is used exclusively for non-commercial purposes.

In 2000, the Department explained that over the past several years, sales of light duty trucks, including pickup trucks, had increased substantially. More and more, pickup trucks were being sold to customers who intended to use them for daily transportation and other personal uses, rather than in connection with a commercial enterprise. Despite that, DMV regulations and procedures required that "unmodified" pickups be issued commercial class license plates. As a result, such vehicles were prohibited from using many of the State's parkways and other roadways, on which the regulating jurisdictions prohibit the use of "commercial" vehicles. While those jurisdictions are not required to use a vehicle's registration classification as the sole or primary determinant of a vehicle's status under their particular regulations, they often do.

In fact, DMV contended in 2000, particularly given the trend in the vehicle population toward SUVs and "modified" pickup trucks, which are issued passenger registrations, the unmodified pickup is not substantially different in terms of construction, size or usage than other vehicles which are permitted to use these roadways under current regulations of the responsible jurisdictions. In DMV's view, this needlessly glorified form over substance, and should be rectified.

Section 401(7) has been relied upon by DMV to mandate issuance of commercial plates for pickups. While we believe that this statute would still require the payment of the 401(7) fee for unmodified pickups, which are constructed to transport "goods, wares and merchandise," it does not mandate the issuance of any particular license plate, which rests with the Commissioner's regulatory authority under Section 401(15).

Since the adoption of the regulation in 2000, the Department has received numerous requests from citizens encouraging DMV to raise the threshold for registering pickups with passenger plates. These citizens primarily argue that since many SUVs weigh more than 5,000 pounds and operate freely on the parkways, pickup trucks, which are not significantly different in size and weight than many SUVs, should also be allowed to operate on parkways.

This argument was also recently endorsed by a major rental car company that does business in New York State. The rental car company explains that they have a substantial number of customers, referred to as "Soccer Moms and Dads", who wish to rent pickups for non-commercial purposes, but are hesitant to do so because most of them weigh more than 5,000 pounds and, therefore, may not operate on the State's parkways. Two of their most popular pickups are the Chevy Silverado and the Dodge Ram, which weigh 5,100 and 5,400 pounds, respectively. The rental company argues that it is only fair to allow these vehicles to operate on the parkways when we allow SUVs weighing more than 5,000 pounds to obtain passenger plates. They cite as examples the Expedition (5,700 pounds) and the Navigator (6,000 pounds).

The Department finds this argument persuasive. Therefore, we propose to raise the weight limit for pickups registered as passenger vehicles to 5,500 pounds. This would apply to all pickups, including leased and rented vehicles, as well as those purchased outright by the consumer. In the case of leased or rented vehicles, we would require the lessee or renter of the vehicle to certify to the leasing or rental company that the pickup truck would be used exclusively for non-commercial purposes.

We believe that this proposal balances the needs of rental companies and their customers, as well as the safety considerations expressed by those who are concerned about permitting large vehicles to operate on the State's parkways.

In addition, the proposed regulation has the benefit of an enforcement provision, i.e., the rental company may not permit a renter or lessee to lease or rent the pickup unless a certification is completed asserting that the renter or lessee shall use the vehicle only for non-commercial purposes. In addition, the rental company may not allow a customer to rent or lease a vehicle if the company knows or has reason to know that the renter or lessee will operate the vehicle for commercial purposes.

4. Costs: There are no costs to consumers, state agencies or local governments. As indicated, the fee for registration for unmodified pickups will continue to be imposed under Section 401-7 of the VTL, and is not, therefore, impacted by the proposal. Rental and leasing companies will incur minimal costs in developing a form or amending an existing form whereby the consumer will certify that the pickup truck will be used exclusively for non-commercial purposes.

5. Local government mandates: The proposal does not impose any mandates on local governments.

6. Paperwork: The proposal does not impose any additional paper requirements on the Department. Rental and leasing companies will be required to develop a form or amend an existing form whereby the consumer will certify that the pickup truck shall be used exclusively for non-commercial purposes.

7. Duplication: This proposal does not duplicate, overlap or conflict with any relevant rule or legal requirement of the State and federal governments.

8. Alternatives: The Department considered raising the registration threshold for pick-ups beyond the proposed 5,500 pounds. However, the Department is aware that many members of the public have safety concerns about the operation of large pick-up trucks on parkways. In light of these concerns, the Department deemed it prudent not to exceed the 5,500 pound limit. The Department did not consider a weight lower than 5,500 pounds. Finally, a no action alternative was not considered.

9. Federal standards: The proposal does not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: Compliance with this rule is not an issue, since the proposal gives vehicle owners/renters/lessees the option of acquiring passenger plates on pickups.

Regulatory Flexibility Analysis

A RFA is not attached because this rule will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments.

Rural Area Flexibility Analysis

A RAFA is not attached because this rule will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

A JIS is not submitted because this rule will have no adverse impact on job creation or job development in New York State.

Public Service Commission

NOTICE OF ADOPTION

Transfer of Assets by Time Warner Cable, Inc.

I.D. No. PSC-39-03-00019-A
Filing date: April 16, 2004
Effective date: April 16, 2004

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

Action taken: The commission, on Dec. 17, 2003, adopted an order in Case 03-V-1237 authorizing the transfer of certain cable television franchises and certain partnership interests in Time Warner Cable, Inc. (TWC), Time Warner Entrertainment Company, L.P. (TWE) and Time Warner Entertainment-Advance/Newhouse Partnership (TWEAN) to Time Warner NY Cable, Inc. (TWNYC).

Statutory authority: Public Service Law, section 222

Subject: Transfer of certain cable franchises, facilities and State certificates of confirmation.

Purpose: To allow TWNYC to acquire certain cable television franchises and certain partnership interests from TWC, TWE and TWEAN.

Substance of final rule: The Commission approved the transfer of certain cable television franchises and partnership interests in Time Warner Cable, Inc., Time Warner Entertainment Company, L.P. and Time Warner Entertainment-Advance/Newhouse Partnership to Time Warner NY Cable, Inc. by Time Warner Cable, Inc, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. 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.
(03-V-1237SA1)

NOTICE OF ADOPTION

Calculation of Billing by Nucor Steel Auburn, Inc.

I.D. No. PSC-40-03-00013-A
Filing date: April 19, 2004
Effective date: April 19, 2004

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

Action taken: The commission, on April 8, 2004, adopted an order in Case 03-E-1306 approving in part Nucor Steel Auburn, Inc.'s request that New York State Electric & Gas Corporation (NYSEG) modify its procedures for the billing of marginal cost adjustments under flexible rate contracts.

Statutory authority: Public Service Law, sections 5(b), 65(1), 66(1)-(5), (12), (12-b), (12-c) and (14)

Subject: Flex rate contract policies and practices.

Purpose: To resolve Nucor Steel Auburn, Inc.'s complaint against NYSEG.

Substance of final rule: The Commission granted in part Nucor Steel Auburn, Inc.'s petition regarding New York State Electric & Gas Corporation's policies and practices for calculating and billing marginal cost adjustments under flexible rate contracts and established methods and procedures for the billing of marginal cost adjustments, subject to the terms and conditions set forth in this order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. 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.
(03-E-1306SA1)

NOTICE OF ADOPTION

Calculation of Billing by Corning Incorporated

I.D. No. PSC-40-03-00014-A
Filing date: April 19, 2004
Effective date: April 19, 2004

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

Action taken: The commission, on April 8, 2004, adopted an order in Case 03-E-1307 approving in part Corning Incorporated's request that New York State Electric & Gas Corporation (NYSEG) revise its procedures for the billing of marginal cost adjustments under flexible rate contracts.

Statutory authority: Public Service Law, sections 5(b), 65(1), 66(1)-(5), (12), (12-b), (12-c) and (14)

Subject: Flex rate contract policies and practices of NYSEG.

Purpose: To resolve Corning Incorporated's complaint against NYSEG.

Substance of final rule: The Commission granted in part Corning Incorporated's petition regarding New York State Electric & Gas Corporation's policies and practices for calculating and billing marginal costs adjustments under flexible rate contracts and established methods and procedures for the billing of marginal cost adjustments, subject to the terms and conditions set for in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. 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.
(03-E-1307SA1)

NOTICE OF ADOPTION

Recovery of Certain Cost Related to Phase 5 of the Retail Access Program by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-49-03-00008-A
Filing date: April 14, 2004
Effective date: April 14, 2004

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

Action taken: The commission, on April 8, 2004, adopted an order in Case 03-E-1584 allowing Consolidated Edison Company of New York, Inc. (Con Edison) to recover costs related to the operation of Phase 5 of the Retail Access Program.

Statutory authority: Public Service Law, sections 65 and 66

Subject: Retail Access Program.

Purpose: To permit Con Edison to offset costs against the balance of deferred credits set aside for the benefit of ratepayers.

Substance of final rule: The Commission authorized Consolidated Edison Company of New York, Inc. to apply $6.5 million of deferred

electric rate reduction credits to offset $6.5 million of costs associated with Phase 5 of its Retail Access Program, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. 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.

(03-E-1584SA1)

NOTICE OF ADOPTION

Wireless Attachments by Niagara Mohawk Power Corporation

I.D. No. PSC-04-04-00019-A
Filing date: April 14, 2004
Effective date: April 14, 2004

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

Action taken: The commission, on April 8, 2004, adopted an order in Case 02-M-1288 approving the procedures proposed by Niagara Mohawk Power Corporation (Niagara Mohawk) for wireless attachments to its transmission facilities.

Statutory authority: Public Service Law, sections 66(1) and (70)

Subject: Wireless attachments.

Purpose: To ensure that system reliability and safety are not compromised and environmental impacts are minimized.

Substance of final rule: The Commission approved the procedure proposed by Niagara Mohawk Power Corporation (Niagara Mohawk) for the attachment of wireless facilities to its transmission towers. All future petitions for approval of wireless attachments shall be filed with the Commission in compliance with the Order in this case, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. 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.

(02-M-1288SA2)

NOTICE OF ADOPTION

New Cashout Option by Orange and Rockland Utilities, Inc.

I.D. No. PSC-07-04-00025-A
Filing date: April 16, 2004
Effective date: April 16, 2004

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

Action taken: The commission, on April 8, 2004, adopted an order in Case 02-G-1553 approving various changes to Orange and Rockland Utilities, Inc.'s schedule for gas service—P.S.C. No. 4.

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

Subject: Tariff amendments.

Purpose: To provide customers participating in the gas transportation service program a cashout option.

Substance of final rule: The Commission allowed Orange and Rockland Utilities, Inc. to revise its S.C. No. 11 - Continuous Receipt of Customer-Owned Gas to provide marketers serving firm monthly-metered transportation customers with a cashout option, as an alternative or in addition to the current rollover option, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. 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.

(02-G-1553SA3)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection Agreement between DFT Local Service Corporation and Chautauqua and Erie Telephone Corporation

I.D. No. PSC-18-04-00004-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, a proposal filed by DFT Local Service Corporation and Chautauqua and Erie Telephone Corporation for approval of a mutual traffic exchange agreement executed on March 31, 2004.

Statutory authority: Public Service Law, section 94(2)

Subject: Interconnection of networks for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement.

Substance of proposed rule: DFT Local Service Corporation and Chautauqua and Erie Telephone Corporation have reached a negotiated agreement whereby DFT Local Service Corporation and Chautauqua and Erie Telephone Corporation will interconnect their networks at mutually agreed upon points of interconnection to exchange local traffic.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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.

(04-C-0458SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection Agreement between Frontier Communications of AuSable Valley, Inc., *et al.* and Ogden Telephone Company

I.D. No. PSC-18-04-00005-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, a proposal filed by Frontier Communications of AuSable Valley, Inc., Frontier Communications of Sylvan Lake, Inc., Frontier Communications of New York, Inc., Frontier Communications of Seneca Gorham, Inc. and Ogden Telephone Company, executed on Feb. 5, 2004.

Statutory authority: Public Service Law, section 94(2)

Subject: Interconnection of networks for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement.

Substance of proposed rule: Frontier Communications of AuSable Valley, Inc.; Frontier Communications of Sylvan Lake, Inc.; Frontier Communications of New York, Inc.; Frontier Communications of Seneca Gorham, Inc. and Ogden Telephone Company have reached a negotiated agreement whereby Frontier Communications of AuSable Valley, Inc.; Frontier Communications of Sylvan Lake, Inc.; Frontier Communications of New York, Inc.; Frontier Communications of Seneca Gorham, Inc. and Ogden Telephone Company will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until February 5, 2005, or as extended.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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.

(04-C-0487SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Submetering of Electricity by Hudson Waterfront Company A, LLC

I.D. No. PSC-18-04-00006-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 Hudson Waterfront Company A, LLC to submeter electricity at 240 Riverside Blvd., Trump Place, New York, NY.

Statutory authority: Public Service Law, sections 65(1) and 66(1)-(5), (12) and (14)

Subject: Submetering of electricity for new master metered residential rental units owned or operated by private or government entities.

Purpose: To permit electric submetering at 240 Riverside Blvd., Trump Place, New York, NY.

Substance of proposed rule: The Commission will consider individual submetering proposals on a case-by-case basis in the category of new, renovated or existing residential properties owned or operated by private or government entities according to established guidelines. The Owner at 240 Riverside Boulevard at Trump Place, New York, New York, Hudson Waterfront Company A, LLC, has submitted a proposal to master meter and submeter this new residential complex that is undergoing construction. The total electric building usage for this complex will be master metered and each residential unit will be individually submetered.

The submetering plan sets forth proposals on electric rates, security, grievance procedures and dispute resolution, economic benefits and metering systems in compliance with the Home Energy Fair Practices Act (HEFPA). The Commission may accept, deny or modify, in whole or in part, the proposal to submeter electricity at 240 Riverside Boulevard at Trump Place, New York, New York.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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.

(04-E-0483SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Transfer of Certain Cable System Facilities by Time Warner NY Cable, Inc.

I.D. No. PSC-18-04-00007-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 the transfer of certain cable system facilities in Delaware County by Time Warner NY Cable, Inc. to Heart of the Catskills Communications, Inc. d/b/a MTC Cable.

Statutory authority: Public Service Law, section 222

Subject: Transfer certain cable system facilities in the Towns of Middetown and Roxbury, including the Village of Fleischmanns, Delaware County, currently owned and operated by Time Warner NY Cable, Inc. to Heart of the Catskills Communications, Inc. d/b/a MTC Cable.

Purpose: To approve the transfer.

Substance of proposed rule: The Public Service Commission is reviewing a joint petition submitted by Time Warner NY Cable, Inc. and Heart of the Catskills Communications, inc. d/b/a MTC Cable, requesting approval to transfer certain cable system facilities currently owned and operated by Time Warner NY Cable, Inc. to Heart of the Catskills Communications, Inc. d/b/a MTC Cable. The subject cable system facilities are located in the Towns of Middletown and Roxbury and the Village of Fleischmanns, in Delaware County.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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.

(04-V-0367SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Transfer of Certain Cable Franchises by Bath Television & Service Co., Inc.

I.D. No. PSC-18-04-00008-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 reviewing a petition from Bath Television & Service Co., Inc. (Bath Television) requesting the transfer of certain franchises to Time Warner Entertainment-Advance/Newhouse Partnership (TWEAN).

Statutory authority: Public Service Law, section 222

Subject: Transfer certain cable franchises, facilities and State certificates of confirmation of Bath Television & Service Co., Inc.

Purpose: To transfer assets to Time Warner Entertainment-Advance/Newhouse Partnership.

Substance of proposed rule: The Public Service Commission is considering the transfer of a cable system, franchises, facilities and State certificates of confirmation of Bath Television & Service Co., Inc. ("Bath Television") to Time Warner Entertainment-Advance/Newhouse Partnership ("TWEAN").

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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.
(04-V-0465SA1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Surcharge by Aquarion Water Company of New York

I.D. No. PSC-18-04-00009-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:
Proposed action: The Public Service Commission is considering a petition filed by Aquarion Water Company of New York for permission to implement a surcharge that would recover amounts associated with the increased costs of purchased water from Westchester Joint Water Works.
Statutory authority: Public Service Law, section 89-c(10)
Subject: Surcharge.
Purpose: To recover amounts associated with increased costs of purchased water from Westchester Joint Water Works.
Substance of proposed rule: On April 7, 2004, Aquarion Water Company of New York filed a petition for permission to implement a 1.78% surcharge on customers' bills that would recover on a going forward basis amounts associated with the current increased costs of purchased water from Westchester Joint Water Works. The surcharge will increase the average annual bill of $587 by an additional $10.45. The Commission may approve or reject, in whole or in part, or modify the company's petition.
Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204
Data, views or arguments may be submitted to: Jaclyn A. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530
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.
(04-W-0464SA1)

Department of State

NOTICE OF WITHDRAWAL

Identification of Buildings Utilizing Truss Type Construction

I.D. No. DOS-04-04-00011-W

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:
Action taken: Notice of proposed rule making, I.D. No. DOS-04-04-00011-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on January 28, 2004.
Subject: Identification of buildings utilizing truss type construction.

Office of Temporary and Disability Assistance

NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Office of Temporary and Disability Assistance publishes a new notice of proposed rule making in the NYS *Register*.

Families in Transition Act

I.D. No.	Proposed	Expiration Date
TDA-15-03-00003-P	April 16, 2003	April 15, 2004