RULE MAKING ACTIVITIES

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

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

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

Department of Agriculture and Markets

EMERGENCY RULE MAKING

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

I.D. No. AAM-34-18-00001-E
Filing No. 1135
Filing Date: 2018-12-10
Effective Date: 2018-12-12

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

Action taken: Amendment of section 68.3(b) of Title 1 NYCRR.

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

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

Specific reasons underlying the finding of necessity: Chronic Wasting Disease ("CWD") is a disease of captive and free-ranging susceptible cervids. CWD is generally spread from an infected cervid, via its bodily fluids and excretions, to an uninfected cervid. A cervid that has contracted CWD will experience weight loss, stumbling, tremors, and other symptoms and will, eventually, die due to having contracted such disease.

The proposed rule will amend 1 NYCRR section 68.3(b) to extend the prohibition upon the importation of cervids susceptible of contracting CWD from August 1, 2018, the date that such prohibition is due to expire, until August 1, 2023. The proposed rule is necessary to, generally, protect the general welfare and, specifically, to protect the State's cervid population and those industries and businesses that are dependent upon the health of such population.

Presently, the State's cervid population is believed to be to be free of CWD. However, CWD has been detected in both captive and free-ranging cervids in other states and, if an infected cervid were to be imported into New York, that cervid could, in turn, infect other cervids. The proposed rule, by extending the prohibition upon the importation of CWD-susceptible cervids, will not provide a guarantee but will significantly lessen the possibility that the State's cervid population will contract CWD; indeed, since the prohibition was initially promulgated (i.e., August 1, 2013), no CWD-infected cervid has been found in the State.

The proposed rule is necessary to ensure that the State's cervid population remains CWD-free. This objective cannot effectively be achieved by any other measure; at this time there is no ante-mortem test approved for determining if a cervid has contracted CWD and there is no generally-accepted procedure that would allow that determination to be made, based upon a cervid's appearance, because CWD-infected cervids typically do not exhibit symptoms until a period after being infected. Furthermore, it has been determined that a captive cervid in a herd enrolled in the United States Department of Agriculture's Herd Certification Program (designed to ensure that cervids in such a "certified herd" are at low risk for CWD) nevertheless had contracted that disease; as such, and based upon the foregoing, only a prohibition of the type referred to above will effectively promote the State's interest in ensuring that the State's cervid population is CWD-free.

Based upon the facts and circumstances set forth above, the Department has determined that the immediate adoption of the proposed rule is necessary for the preservation of the general welfare and that compliance with section 202(1) of the State Administrative Procedure Act would be contrary to the public interest.

Subject: Importation of cervids susceptible to Chronic Wasting Disease.

Purpose: To help control the spread of Chronic Wasting Disease into the State's cervid population.

Text of emergency rule: Subdivision (b) of section 68.3 of 1 NYCRR is amended to read as follows:

(b) All movements of CWD susceptible cervids into New York State are prohibited until August 1 [2018] *2023*, except movements to a zoo accredited by the Association of Zoos and Aquariums, 8403 Colesville Road, Suite 710, Silver Springs, MD 20910-3314. No such movements shall be made unless approved prior to the movement by the commissioner or his/her designee in consultation with the New York Department of Environmental Conservation. [Prior to August 1, 2018, the commissioner shall hold public hearings to reevaluate the risks and impacts of allowing limited movement of CWD susceptible cervids into New York from other states and propose amendments to this Part if needed to prevent the introduction of Chronic Wasting Disease into New York.]

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. AAM-34-18-00001-EP, Issue of August 22, 2018. The emergency rule will expire February 7, 2019.

Text of rule and any required statements and analyses may be obtained from: David Smith, D.V.M., Director, Division of Animal Industry, NYS Dept. of Agriculture and Markets, 10B Airline Drive, Albany, New York 12235, (518) 457-3502, email: David.Smith@agriculture.ny.gov

Regulatory Impact Statement

1. Statutory Authority:

Section 18(6) of the Agriculture and Markets Law ("A&ML") provides, in part, that the Commissioner of Agriculture and Markets ("Commissioner") may enact, amend and repeal necessary rules which shall provide generally for the exercise of the powers and performance of the duties of the Department of Agriculture and Markets ("Department").

Section 72 of the A&ML authorizes the Commissioner to adopt and enforce rules and regulations for the control, suppression or eradication of communicable diseases among domestic animals and to prevent the spread

of infection and contagion. That section also provides that whenever any infectious or communicable disease affecting domestic animals shall exist or have recently existed outside the State, the Commissioner shall take measures to prevent such disease from being brought into the State.

Section 74 of the A&ML authorizes the Commissioner to adopt rules and regulations relating to the importation of domestic or feral animals into the State.

2. Legislative Objectives:

The proposed rule will amend 1 NYCRR section 68.3(b) to extend the prohibition upon the importation of cervids susceptible to contracting Chronic Wasting Disease ("CWD") from the date that the prohibition is currently scheduled to expire (i.e. on August 1, 2018), to August 1, 2023.

By enacting the statutes set forth above, the legislature intended to prevent infectious or communicable diseases, affecting, inter alia, wild and domestic cervids, from being brought into the State. The proposed rule would further this legislative goal by extending the prohibition upon the importation of live CWD susceptible cervids from outside of the State, as more fully set forth above.

3. Needs and Benefits:

The proposed rule is needed to inhibit the spread of CWD into the State's wild and domestic cervid population. CWD is a progressive, uniformly fatal, degenerative neurological disease of captive and free-ranging susceptible cervid species. It was first recognized in 1967 as clinical wasting syndrome of unknown cause in captive mule deer in Colorado. CWD belongs to the family of diseases known as transmissible spongiform encephalopathies ("TSE"). The name derives from the pin-point sized holes in brain tissue of infected animals which gives the tissue a sponge-like appearance. TSEs include several different diseases affecting animals and humans including bovine spongiform encephalopathy ("BSE") in cattle, scrapie in sheep and goats, and Creutzfeldt-Jacob disease ("CJD") in humans. Although CWD shares certain features with other TSEs, it is a distinct disease affecting only certain cervid species. There is no known treatment, vaccine nor reliable antemortem diagnostic test for CWD.

The origin of CWD is unknown. The agent that causes CWD and other TSEs has not been completely characterized; however, the theory supported by most scientists is that TSE diseases are caused by proteins call prions. The exact mechanism of transmission is also unclear although the evidence suggests that, as an infectious and communicable disease, CWD is transmitted directly from one animal to another through saliva, feces and urine containing abnormal prions shed in those body fluids and excretions. There is also evidence to suggest that the landscape can become contaminated with prions excreted from infected animals -- this contamination can lead to infection through an environmental route.

The species known to be susceptible to CWD are, inter alia, Rocky Mountain Elk (Cervus Canadensis), red deer (Cervus elaphus), mule deer (Odocoileus hemionus), black-tailed deer (Odocoileus hemionus), white-tailed deer (Odocoileus virginianus), sika deer (Cervus nippon), and Moose (Alces alces).

CWD is a slow and progressive disease. Due to the long incubation period of 1 to 5 years, cervids infected with CWD may not manifest clinical signs yet still shed prions for a number of years after exposure and infection. As the disease progresses animals with CWD show changes in both appearance and behavior including progressive weight loss, stumbling, tremors, lack of coordination, excessive salivation and drooling, loss of appetite, excessive thirst and urination, listlessness, teeth grinding, abnormal head posture, and drooping ears.

The United States Department of Agriculture ("USDA") has an established CWD eradication program that is administered through the states. Despite these efforts, CWD has been detected in cervids in a number of states, as well as in three Canadian provinces. During the last year, USDA identified ten new CWD-positive captive cervid herds in the United States, including one in Lancaster County, Pennsylvania.

The proposed rule will continue the prohibition upon the importation into the State of CWD-susceptible cervids, until August 1, 2023. The proposed rule is needed to protect the State's wild and captive cervid populations from CWD. Presently, the Department believes that the State's cervid population is free of CWD and that status is due, in great part, to the prohibition upon importation of CWD-susceptible cervids that has been in place since August 1, 2013.

The State's cervid farmers and those who hold cervids on their property ("cervid farmers") will benefit from adoption of the proposed rule. Currently, there are approximately 311 cervid farmers in the State; approximately 240 of whom raise cervids defined as susceptible to CWD. The proposed rule will benefit such cervid farmers by helping to ensure that their cervids do not contract CWD which, if that were to happen, could result in depopulation of their herds and a substantial loss of income.

The State's hunters will also benefit by adoption of the proposed rule. During the 2016 hunting season, approximately 213,000 cervids were harvested; the proposed rule, if adopted, will help to ensure that cervid hunting remains a vital component of the State's agricultural economy.

4. Costs:

(a) Costs to regulated parties:

The proposed rule will most directly affect the State's cervid farmers. At this time it is unknown whether such farmers will incur a cost associated with the extension of the prohibition upon the importation of CWD-susceptible cervids.

As set forth above, there are approximately 311 cervid farmers located in the State; prior to the imposition of the prohibition upon importation, referred to above, only approximately 25 such cervid farmers actually imported susceptible cervids. Those cervid farmers who would want to import such cervids would not incur a cost to stock or replenish his/her herd if he/she, simply put, allows bucks to have access to does. If, however, that is not a preferred option, one measure of costs would be the difference between the cost of artificial insemination compared to the cost of importing a CWD-susceptible cervid; because the cost of each option is variable, it is impossible to determine that one option is necessarily more expensive than the other.

Another measure of cost is the difference in cost between a CWD-susceptible cervid raised in the State and such a cervid, of the same age, gender, and genetic background, raised out-of-state. Prices for captive bred cervids vary tremendously by species, age, sex, and the physical attributes of the cervids in question. Whitetail deer does for breeding may sell for $4,000 to $25,000. Prices for good quality breeding males range more widely, from $25,000 to well over $100,000 per head. Animals purchased for the purpose of stocking a shooting operation generally command lower prices. It is the Department's understanding that one of the main concerns of some New York captive deer operations is that they have no access to inexpensive "shooter bucks" from neighboring states, especially Pennsylvania. In talking with a prominent New York cervid farmer we learned that there may be more concern about the reduced selection of animals available for purchase, due to the importation ban, than the price difference of in-state versus out-of-state animals. This concern may be addressed at least in part by the fact that embryos for embryo transfer and semen for artificial insemination may still be imported and these are both viable ways to introduce new genetics into a cervid herd. From January 1, 2011 to March 29, 2013 (the years before the prohibition upon the importation of CWD-susceptible cervids was instituted), approximately 25 cervid owners purchased approximately 400 cervids from out-of-state; it is anticipated that approximately the same number of cervid farmers would, presently, purchase no more than approximately the same number of cervids, in the absence of a prohibition upon importation.

(b) Costs to the agency, the state, and local governments:

None.

5. Local Government Mandates:

None.

6. Paperwork:

None.

7. Duplication:

Title 9 of the Code of Federal Regulations ("9 CFR") Part 81 prohibits a farmed or captive cervid from being moved in interstate commerce unless it is from a herd certified as CWD-free and unless it does not show clinical signs associated with CWD.

8. Alternatives:

The Department considered four options relevant to the importation of CWD-susceptible cervids into the State; that is:

1) to discontinue the prohibition upon the importation of such cervids; or

2) to make the prohibition permanent; or

3) to modify the presently-existing prohibition to allow limited importations with conditions in addition to the animals' being qualified under the federal herd certification program; or

4) to extend the prohibition for another five-year period (that is, until August 1, 2023).

The first alternative was to allow the prohibition upon the importation of CWD susceptible cervids to lapse. This alternative was rejected because such prohibition has proven effective in preventing CWD from noticeably infecting the State's wild and captive cervid populations. Furthermore, allowing the ban to lapse, especially at this time, would be irresponsible in light of the continued spread of CWD throughout the United States, including in an adjacent state, and in several Canadian provinces.

The second alternative was to make the prohibition upon importation permanent. However, that alternative was rejected in light of the possibility that an effective ante-mortem test for CWD may be developed that would allow for importation, albeit only after such a test is administered. As such, the Department believes that a prohibition upon importation, without an end date, would be inappropriate.

A third alternative involves live animal testing for CWD. Tonsillar and rectal mucosa biopsy and histologic techniques have advanced greatly in the past year and their increasing reliability make them worthy of consideration as possible adjuncts to the federal CWD program's certifica-

tions when live animals are prospects for importation. We need to learn more about these tests and we look forward to having such discussions with industry, other stakeholders, and laboratories.

The fourth alternative, and the one ultimately chosen, was to extend the prohibition upon importation, until August 1, 2023. This alternative meets the current biosecurity needs of the State and allows for flexibility with the potential advancement of science. This alternative is supported by a number of cervid farmers, wildlife biologists, and other governmental agencies.

9. Federal Standards:

9 CFR Part 81 regulates the interstate movement of cervids but, in section 81.6, allows the states to adopt regulations that are more restrictive than the requirements set forth in that Part.

10. Compliance Schedule:

The rule will be effective upon filing with the Department of State.

Regulatory Flexibility Analysis

1. Effect of rule:

There are approximately 311 small businesses raising a total of approximately 10,146 captive cervids in New York State.

The proposed rule will have no impact on local governments and, as such, this Regulatory Flexibility Analysis will not refer to those political subdivisions.

2. Compliance requirements:

Presently, 1 NYCRR section 68.3(b) provides that CWD-susceptible cervids may not be imported from outside the State into New York during the period August 1, 2013 to August 1, 2018; the proposed rule will continue that prohibition, until August 1, 2023.

3. Professional services:

It is not anticipated that regulated parties will have to secure any professional services in order to comply with the proposed rule.

4. Compliance costs:

The proposed rule will not impose a direct cost upon persons wishing to import CWD-susceptible cervids into New York. A small business that farms or otherwise holds cervids ("a cervid farmer") will not incur a cost to stock or replenish his/her herd if he/she, simply put, allows bucks to have access to does. If, however, that is not a preferred option, one measure of costs would be the difference between the cost of artificial insemination compared to the cost of importing a CWD-susceptible cervid; because the cost of each option is variable, it is impossible to determine that one operation is necessarily more expensive than the other.

Another measure of cost is the difference in cost between a CWD-susceptible cervid raised in the State and such a cervid, of the same age, gender, and genetic background, raised out-of-State. Prices for captive bred cervids vary tremendously by species, age, sex, and the physical attributes of the cervids in question. Whitetail deer does for breeding may sell for $4,000 to $25,000. Prices for good quality breeding males range more widely, from $25,000 to well over $100,000 per head. Animals purchased for the purpose of stocking a shooting operation generally command lower prices. It is the Department's understanding that one of the main concerns of some New York captive deer operations is that they have no access to inexpensive "shooter bucks" from neighboring states, especially Pennsylvania. In talking with a prominent New York cervid farmer we learned that there may be more concern about the reduced selection of animals available for purchase, due to the importation ban, than the price difference of in-state versus out-of-state animals. This concern may be addressed at least in part by the fact that embryos for embryo transfer and semen for artificial insemination may still be imported and these are both viable ways to introduce new genetics into a cervid herd. From January 1, 2011 to March 29, 2013 (the years before the prohibition upon the importation of CWD-susceptible cervids was instituted), approximately 25 cervid owners purchased approximately 400 cervids from out-of-state; it is anticipated that approximately the same number of cervid farmers would, presently, purchase no more than approximately the same number of cervids, in the absence of a prohibition upon importation.

5. Economic and technological feasibility:

The proposed rule is economically feasible. Although there are now approximately 120 fewer cervid farmers in the State than there were in 2013, nevertheless approximately 550 more cervids are being held in captivity. Although it is possible that certain cervid farmers may pay more to stock or replenish their herds if the proposed rule were adopted, nevertheless the economic consequences associated with an outbreak of CWD in the State's wild and captive cervid populations would be far greater.

The proposed rule is, also, technologically feasible; cervid farmers will still be able to purchase cervids located within the State and/or have their female cervids artificially inseminated. They may also take advantage of embryo transfer to improve their herd genetics.

6. Minimizing adverse impact:

In conformance with State Administrative Procedure Act section 202-b(1), the proposed rule was drafted to minimize economic impact and reporting requirements upon cervid farmers. While the proposed rule prohibits cervid farmers from importing CWD-susceptible cervids from out of State, they would still be able to purchase such cervids from cervid farmers within the State and/or to have female cervids located in the State artificially inseminated. Market forces may result in higher prices for these purchasers; however, the economic consequences associated with the State's wild or captive cervid populations contracting CWD would be far greater absent the prohibition on importation, set forth in the proposed rule.

Another way to minimize impact would be to allow the importation of live cervids which in addition to being eligible for movement under the USDA CWD program, have also undergone live-animal CWD testing. Live animal tests have advanced quickly in the past year and the Department is open to considering this as a way to lessen the adverse impacts on the captive cervid industry. More discussion with industry, other stakeholders, and laboratories is necessary to explore this option.

7. Small business and local government participation:

In developing this rule, the Department has consulted with representatives of the Northeast Deer and Elk Farmers as well as the Department of Environmental Conservation (DEC). A hearing was held on March 28th, 2017 to acquire insights from industry and others on the issue. DEC supports the rule.

Outreach efforts will continue.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The approximately 311 entities raising captive cervids in New York State ("cervid farmers") are all located in rural areas, as defined by section 481(7) of the Executive Law.

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

Presently, 1 NYCRR section 68.3(b) provides that CWD-susceptible cervids may not be imported from outside the State into New York during the period August 1, 2013 to August 1, 2018; the proposed rule will continue that prohibition, until August 1, 2023.

The proposed rule imposes no reporting or recordkeeping requirements upon cervid farmers nor will they have to secure any professional services in order to comply with the proposed rule.

3. Costs:

The proposed rule will not impose a direct cost upon persons wishing to import CWD-susceptible cervids into New York. A business that farms or otherwise holds cervids ("a cervid farmer") will not incur a cost to stock or replenish his/her herd if he/she, simply put, allows bucks to have access to does. If, however, that is not a preferred option, one measure of costs would be the difference between the cost of artificial insemination compared to the cost of importing a CWD-susceptible cervid; because the cost of each option is variable, it is impossible to determine that one option is necessarily more expensive than the other.

Another measure of cost is the difference in cost between a CWD-susceptible cervid raised in the State and such a cervid, of the same age, gender, and genetic background, raised out-of-State. Prices for captive bred cervids vary tremendously by species, age, sex, and the physical attributes of the cervids in question. Whitetail deer does for breeding may sell for $4,000 to $25,000. Prices for good quality breeding males range more widely, from $25,000 to well over $100,000 per head. Animals purchased for the purpose of stocking a shooting operation generally command much lower prices. It is the Department's understanding that one of the main concerns of some New York captive deer operations is that they have no access to inexpensive "shooter bucks" from neighboring states, especially Pennsylvania. From January 1, 2011 to March 29, 2013 (the years before the prohibition upon the importation of CWD-susceptible cervids was instituted), approximately 25 cervid owners purchased approximately 400 cervids from out-of-state; it is anticipated that approximately the same number of cervid farmers would, presently, purchase no more than approximately the same number of cervids, in the absence of a prohibition upon importation.

4. Minimizing adverse impact:

In conformance with State Administrative Procedure Act section 202-b(1), the rule was drafted to minimize economic impact and reporting requirements for regulated parties located in rural areas. While the proposed rule prohibits cervid farmers from importing CWD-susceptible cervids from out of state, they would still be able to purchase such cervids from cervid farmers within the State and/or to have female cervids located in the State artificially inseminated. They may also avail themselves of embryo transfer, since both semen and embryo importation are unaffected by the prohibition on importation of live CWD susceptible species. Market forces may result in higher prices for these purchasers; however, the economic consequences associated with the State's wild or captive cervid populations contracting CWD would be far greater absent the ban on importation set forth in the proposed rule.

Several people have proposed that the concern of protecting wild deer populations could be addressed with stricter fencing requirements for New

York cervid farms to prevent nose-to-nose contact between captive and wild cervid. This is commonly referred to as "double fencing" and typically involves a secondary fence around the primary enclosure. Double fencing may help reduce risk of nose-to-nose contact, but our experience in New York has been that captive deer escaping their enclosures is a significant risk for wild deer to be exposed to captive cervids. This happens most frequently through gates being left open accidentally, poor fence maintenance, damage done by storms, and sometimes due to intentional acts such as vandalism. Also, there are recent concerns about CWD prions being carried by plant material, so direct exposure due to live animal contact and contact with excreta from CWD affected animals may not be the only risks. While double fencing may help reduce risk, it would come at a significant cost for our producers and for the reasons just described, we would not envision relying on it instead of the importation ban.

Another way to reduce risk and possibly allow importation again may be to use live animal testing in conjunction with the requirements of the federal herd certification program. Live animal testing has rapidly progressed over the past year and this idea is worthy of consideration; however, we need to learn more about its strengths and limitations and, in this connection, we look forward to having conversations on live animal testing with the industry and other stakeholders.

We believe that taking every reasonable precaution to avoid importing CWD into the state is a wise precaution. It may well be inevitable that the disease will be reintroduced to New York through the natural movements of wild animals or by some other mechanism. Nonetheless reducing the risk through the avenues we can control and delaying new cases of CWD for as long as can will protect both the captive and wild cervid industries.

5. Rural area participation:

In developing this rule, the Department has consulted with representatives of the Northeast Deer and Elk Farmers as well as the Department of Environmental Conservation (DEC). DEC strongly supports the rule. In addition, a public hearing on the importation ban and whether it should be renewed was held on March 28, 2017.

Outreach efforts will continue.

Job Impact Statement

1. Nature of Impact:

It is not anticipated that the proposed rule will have an impact on presently-existing jobs or upon employment opportunities.

2. Categories and Numbers Affected:

The number of persons employed by the 311 entities engaged in raising captive deer in New York State is unknown.

3. Regions of Adverse Impact:

The 311 entities in New York State engaged in raising captive deer are located throughout the State.

4. Minimizing Adverse Impact:

By helping to protect the approximately 10,146 captive deer currently raised by approximately 311 New York entities from the further introduction of CWD, this rule will help to preserve the jobs of those currently employed in this agricultural industry.

Assessment of Public Comment

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

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

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

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

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

EMERGENCY RULE MAKING

Spotted Lanternfly ("SL")

I.D. No. AAM-41-18-00001-E
Filing No. 1131
Filing Date: 2018-12-06
Effective Date: 2018-12-10

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

Action taken: Addition of Part 142 to Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 18, 164 and 167

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

Specific reasons underlying the finding of necessity: The Spotted Lanternfly (Lycorma delicatula) is an insect nonindigenous to the United States. It was first detected in Berks County, Pennsylvania, in September, 2014, and since then has spread to the Commonwealth of Virginia and the States of Delaware and New Jersey. The proposed rule will require each person who wants to import, into New York, an article that is capable of being infested by or with Spotted Lanternfly, and that has originated from or passed through certain counties in Delaware, New Jersey, Pennsylvania, or Virginia, to obtain a "certificate of inspection" from an appropriate state official, before importation into New York.

The proposed rule has been adopted, as an emergency rule, to protect the public welfare. The Spotted Lanternfly infests different types of trees, including fruit trees, as well as plants, including grape plants and hops plants. Once infested, a tree or plant is deprived of nutrients, is incapable of producing fruit to the extent it had prior to infestation, and is not useful as a source of wood. The proposed rule is designed to prevent the Spotted Lanternfly from entering the State and thereby jeopardizing its forest-based industries and its fruit-based industries which, in sum, contribute approximately $7 billion to the State's economy, annually.

Based on the facts and circumstances set forth above, the Department has determined that the immediate adoption of this rule is necessary for the preservation of the general welfare and that compliance with 202(1) of the State Administrative Procedure Act would be contrary to the public interest.

Subject: Spotted Lanternfly.

Purpose: To prevent spotted lanternfly-infested articles originating in or moving through areas in other states where spotted lanternfly is present from entering NYS.

Text of emergency rule: 1 NYCRR is amended by adding thereto a new Part 142, to read as follows:

PART 142. EXTERIOR QUARANTINE OF SPOTTED LANTERNFLY (LYCORMA DELICATULA)

§ 142.1 Definitions.

For this Part, the following words, names and terms shall be construed respectively, to mean:

(a) AML. The Agriculture and Markets Law.

(b) Certificate of inspection. A valid form issued by the certifying authority of a state, certifying that a regulated article may be moved into the State of New York, pursuant to the provisions of this Part.

(c) Certifying Authority. A State Plant Regulatory Official (SPRO) or an individual authorized by a SPRO to issue a certificate of inspection.

(d) Commissioner. The Commissioner of the Department of Agriculture and Markets of the State of New York, or his or her duly authorized representative.

(e) DEC. The Department of Environmental Conservation of the State of New York.

(f) Department. The Department of Agriculture and Markets of the State of New York.

(g) Firewood. Wood, cut or not cut, split or not split, regardless of length, which is either in a form and size appropriate for use as fuel, or intended for use as fuel. Firewood does not include: (1) kiln dried dimensional lumber; (2) wood that has been chipped; and (3) logs or wood being transported to or possessed by the following operations and facilities for use in their primary manufacturing process:

(i) sawmills for dimensional lumber;

(ii) pulp and/or paper mills;

(iii) wood pellet manufacturing facilities;

(iv) plywood manufacturing facilities;

(v) wood biomass-using refineries or power plants;

(vi) re-constituted wood or wood composite product manufacturing plants; and

(vii) facilities treating firewood in accordance with Department regulations.

(h) Inspector. An inspector of the Department, or cooperator from DEC or the United States Department of Agriculture (USDA), when authorized by the Department to act in that capacity.

(i) Move; movement. Shipped, offered or received for shipment, carried, transported, or relocated into or through any area of the State of New York.

(j) Nursery stock. All trees, shrubs, plants and vines and parts thereof.

(k) Person. An individual, organization, corporation or partnership, public authority, county, town, village, city, municipal agency or public corporation, or any other legal entity other than the DEC or the Department and its respective authorized agents.

(l) Spotted lanternfly or SLF. The insect known as Spotted lanternfly, Lycorma delicatula, in any life stage.

(m) State. One of the fifty constituent political entities of the United States.

(n) Regulated Article. An article listed in Section 142.3 of the Part.

§ 142.2 Quarantine area.

The quarantine area consists of the following counties:

(a) In the Commonwealth of Pennsylvania, the counties of Berks, Bucks, Carbon, Chester, Delaware, Lancaster, Lebanon, Lehigh, Monroe, Montgomery, Northampton, Philadelphia, and Schuylkill.

(b) In the Commonwealth of Virginia, the county of Frederick.

(c) In the State of New Jersey, the counties of Hunterdon, Mercer, and Warren.

(d) In the State of Delaware, the county of New Castle.

§ 142.3 Regulated articles.

The following articles are regulated when originating from, located within, or moved through the area as described in Section 142.2 of this Part:

(a) Any living life stage of the Spotted lanternfly.

(b) Brush, debris, bark, or yard waste.

(c) Landscaping, remodeling, or construction waste.

(d) Logs, stumps, or any tree parts.

(e) Firewood of any species.

(f) Packing materials, such as wood crates or boxes.

(g) All plants and plant parts including but not limited to nursery stock, green lumber, fruit and produce and other material living, dead, cut, fallen (including stumps), roots, branches, mulch, and composted and uncomposted chips.

(h) Outdoor household articles, including, but not limited to, recreational vehicles, lawn tractors and mowers, mower decks, grills, grill and furniture covers, tarps, mobile homes, tile, stone, deck boards, mobile fire pits, and any equipment associated therewith, and trucks or vehicles not stored indoors.

(i) Any other article, commodity, item, or product that has or that is reasonably believed to be infested with or harboring Spotted lanternfly.

§ 142.4 Restrictions on movement of regulated articles originating from or moved through a quarantine area, into the State of New York.

(a) No person shall move a regulated article that has originated from a quarantine area into the State of New York unless:

(1) such regulated article is accompanied by a certificate of inspection or will be moved into the State of New York for experimental or scientific purposes, on such conditions and under such safeguards as may be prescribed in writing by the Department; and

(2) such regulated article has been loaded, handled, or shipped in a manner reasonably designed to prevent it from becoming infested with or harboring Spotted lanternfly; and

(3) the regulated article is accompanied by a waybill that sets forth its point of origin and intended destination.

(b) No person shall move a regulated article that has not originated from a quarantine area but has moved through a quarantine area, into the State of New York unless:

(1) such regulated article is accompanied by a waybill that sets forth its point of origin and intended destination; and

(2) such regulated article has moved directly through a quarantine area without stopping except for refueling and traffic conditions.

§ 142.5 Conditions governing the issuance of a certificate of inspection.

(a) The Department will not accept or recognize a certificate of inspection, nor a substantially revised certificate of inspection, unless a copy thereof is furnished to the Department for its approval, prior to use.

(b) The Department will not accept or recognize a certificate of inspection unless the certificate of inspection provides, and clearly and convincingly indicates, that:

(1)(i) The regulated article has been inspected and found to be free of Spotted lanternfly; or (ii) the regulated article has been treated, fumigated, or processed by an approved method; or (iii) the regulated article has been grown, produced, manufactured, stored, or handled in such a manner that it would be free of Spotted lanternfly; and

(2) The regulated article is eligible for unrestricted movement under all other state plant quarantines and regulations.

§ 142.6 Inspection and disposition of shipments.

(a) The Department may inspect any container, conveyance, package, or vehicle reasonably believed to contain a regulated article.

(b) When a regulated article has been moved into the State of New York in violation of the provisions of this Part, an inspector may take such action as deemed necessary to eliminate the danger of introduction and/or spread of the Spotted lanternfly.

(c) If a regulated article is found to be infested with or harboring Spotted lanternfly, such regulated article must be rendered free of infestation without cost to the State of New York.

§ 142.7 Other laws and regulations.

No provision of this Part relieves any person from the obligation to comply with any other applicable federal, state, county, regional, or local law or regulation.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. AAM-41-18-00001-EP, Issue of October 10, 2018. The emergency rule will expire February 3, 2019.

Text of rule and any required statements and analyses may be obtained from: Christopher Logue, Director, Division of Plant Industry, Agriculture and Markets, 10B Airline Drive, Albany, NY 12235, (518) 457-2087, email: christopher.logue@agriculture.ny.gov

Regulatory Impact Statement

1. Statutory authority:

Section 18 of the Agriculture and Markets Law provides, in part, that the Commissioner of Agriculture and Markets ("Commissioner") may enact, amend, and repeal necessary rules which shall provide generally for the exercise of the powers and performance of the duties of the Department of Agriculture and Markets ("Department") as prescribed in the Agriculture and Markets Law ("AML") and the laws of the State and for the enforcement of their provisions and the provisions of the rules that have been enacted.

Section 164 of the AML provides, in part, that the Commissioner shall take such action as he or she may deem necessary to control or eradicate any injurious insects, noxious weeds, or plant diseases existing within the State.

Section 167 of the AML provides, in part, that the Commissioner is authorized to make, issue, promulgate and enforce such order, by way of quarantines or otherwise, as he or she may deem necessary or fitting to carry out the purposes of AML Article 14. AML Section 167 also provides that the Commissioner may adopt and promulgate such rules and regulations to supplement and give full effect to the provisions of AML Article 14.

2. Legislative objectives:

The proposed rule will amend 1 NYCRR by adding a new Part 142, entitled "Exterior Quarantine of Spotted Lanternfly". The proposed rule, will, generally require each person who wants to move a "regulated article" that originated from, is located in, or has moved through certain counties in Delaware, New Jersey, Pennsylvania or Virginia into the State to obtain a certificate of inspection before doing so that indicates that such article is free of Spotted Lanternfly ("SLF") before moving the regulated article into the State.

The proposed rule will further the legislature's objective to help ensure that injurious insects, such as SLF, are not allowed to enter the State.

3. Needs and benefits:

The proposed rule regulates the movement of articles capable of transporting SLF which is an insect not currently found in the State that can cause serious damage to healthy trees and plants by feeding on the sap of over seventy different plants. This SLF activity results in loss of nutrients, and ultimately results in the low to no yield in fruiting plants and can possibly lead to death. The average adult SLF is an inch long and ½ an inch wide. Its forewings are grayish with black spots. The early instar nymphs are black with white spots with the final instar being red with black and white spots. Adult insects are visible late July into the fall.

Gravid females will lay egg masses of up to 30 eggs per mass. The female will lay her eggs on any object. This activity makes the spread of the insect easy if left unchecked. The nymphs emerge once temperatures become warm enough, and the life cycle begins anew. Evidence of the presence of the SLF includes weeping from feeding sites, the presence of honeydew (an excretion from the insects feeding), and sooty mold.

Preferred materials at risk of attack and infestation by the SLF include the Grape (both wild and cultivated), Walnut, Porcelain Berry, and Tree of Heaven. In addition, spotted lanternfly will feed on over seventy different plants including many important hardwoods and important fruit trees and vines.

SLF was first discovered in Berks County, Pennsylvania in September 2014, and has since spread to the Commonwealth of Virginia and the States of Delaware and New Jersey. Although the State of New York has not had any infestations, one dead SLF was reported by a pharmaceutical company in Delaware County. It is believed the insect was moved to the facility inadvertently with a shipment of bottles from an area in Pennsylvania that the Commonwealth has placed under quarantine.

The proposed rule is needed to better ensure that the SLF does not enter the State and cause the damage referred to above.

4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: A person who wants to import a "regulated article" into the State of New York that originates from, is located in, or has been moved through certain counties in Delaware, New Jersey, Pennsylvania or Virginia will be required to obtain a certificate of inspection from an appropriate State authority, attesting that the article is free of SLF; presently, no State authority imposes a fee for the issuance of such a certificate. The proposed rule provides that the Department of Agriculture and Markets will recognize a certificate if it indicates, inter alia, that a regulated article has been "treated, fumigated, or processed by an approved method" so as to be free of SLF; the cost of such treatment, fumigation, or processing is dependent upon the nature of the article being so treated, fumigated, or processed; the extent of infestation, if any; and the treatment, fumigation, or processing procedure actually used.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: Local governments, the Department of Agriculture and Markets, and the State will not incur any additional expenses due to the proposed rule.

(c) The information, including the sources of such information and the methodology upon which the cost analysis is based: The costs analysis set forth above is based upon observations of the industry and state regulatory agencies.

5. Local government mandates:

This rule imposes no mandates upon any county, city, town, village, school district, fire district, or other special district.

6. Paperwork:

Regulated articles inspected and certified to be free of SLF moving from the quarantine area established by the rule would have to be accompanied by a certificate of inspection.

7. Duplication:

There are no relevant rules or other legal requirements of the Federal or State governments that duplicate, overlap, or conflict with this rule.

8. Alternatives:

The alternative of no action was considered. However, this option is not feasible, given the threat SLF poses to the State's forests, agriculture, and tourism industries. Additionally, certain states with infestations have not implemented rules designed to eradicate or control SLF; this lack of regulatory oversight leaves New York State vulnerable to spread and serious economic losses in the industries described above. Considering these factors, there does not appear to be any viable alternative to the adoption of the proposed rule.

9. Federal standards:

There are no federal standards regulating the movement of articles infested, or capable of being infested with SLF.

10. Compliance schedule:

It is anticipated that regulated parties would be able to comply with the proposed rule immediately.

Regulatory Flexibility Analysis

1. Effect of rule:

The proposed rule requires a person who wants to move a "regulated article" (that is, an item that is capable of harboring the invasive insect, Spotted Lanternfly) that originates from or has moved through a designated county in Delaware, New Jersey, Pennsylvania or Virginia ("a designated county") to obtain a certificate from an appropriate state regulatory agency, attesting that such article is free of Spotted Lanternfly.

It is impossible to determine if, and the number of, small businesses that will want to move "regulated articles" from a designated county into the State.

It is anticipated that no local government would be involved in moving a regulated article from a designated county into the State; as such, this analysis addresses the impact of the proposed rule only upon small businesses.

2. Compliance requirements:

Each small business that wants to move a regulated article from a designated county ("a regulated party") will be required to obtain a certificate of inspection to ship a regulated article into the State from a state agency authorized to issue such a certificate or by a person duly-designated by such an agency.

3. Professional services:

The proposed rule provides that the Department of Agriculture and Markets will not recognize a certificate of inspection unless the regulated article to be moved into the State has been found to be free of Spotted Lanternfly or rendered free of that pest by having been properly treated, fumigated, or processed by an approved method – those procedures could require utilization of a professional service in the event the party still desires to move the regulated article into the State.

4. Compliance costs:

A regulated party will need to ensure that the article to be moved is free of Spotted Lanternfly or has been treated, fumigated, or processed by an approved method to render it free of such pest; the cost of such treatment, fumigation, or processing would be dependent upon the nature of the article being so treated, fumigated, or processed; the extent of the infestation, if any; and the treatment, fumigation, or processing procedure actually used.

In order to move a regulated article into the State, a regulated party will need to obtain a certificate of inspection from an appropriate state agency; this service is available from the state in which the shipment has originated from or has passed through. Presently, each state that issues such a certificate does not charge a fee therefor.

5. Economic and technological feasibility:

Small businesses will be economically and technically able to comply with the proposed rule. The technology exists to render an infested article free of Spotted Lanternfly. Furthermore, a small business that wants to move a regulated article into the State from a designated county will be able to obtain a certificate of inspection from the State in which such county is located, attesting that the article is free of Spotted Lanternfly, at no charge.

6. Minimizing adverse impact:

The Department has designed the proposed rule to minimize adverse economic impact on small businesses. The rule is aimed at protecting the State of New York's agriculture and tourism industries; those industries consist, in large part, of small businesses. Each small business engaged in agriculture or tourism would be adversely affected by the movement of the Spotted Lanternfly into the State.

7. Small business and local government participation:

The Department informed a number of organizations, consisting in part of small businesses, of its intent to promulgate the proposed rule; such organizations consist of the Empire State Forest Products Association, the Invasive Species Advisory Committee, the New York State Turfgrass Association, the New York Farm Bureau, the New York State Trucking Association, and the Catskill Regional Invasive Species Partnership. The Department received input from those organizations and took into account their concerns while drafting the proposed rule.

Rural Area Flexibility Analysis

1. Type and estimated numbers of rural areas:

The proposed rule requires a person who wants to move a "regulated article" (that is, an item that is capable of harboring the invasive insect, Spotted Lanternfly) that originates from or has moved through a designated county in Delaware, New Jersey, Pennsylvania or Virginia ("a designated county") to obtain a certificate from an appropriate state regulatory agency, attesting that such article is free of Spotted Lanternfly.

It is impossible to determine if residents of out-of-State rural areas will want to move "regulated articles" from a designated county into the State and, if so, the number of residents of such areas who will want to do so.

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

Each resident of a rural area who wants to move a regulated article from a designated county into the State will be required to obtain a certificate of inspection from a state agency authorized to issue such a certificate or by a person duly-designated by such an agency.

3. Costs:

The proposed rule requires that a regulated article may not be moved into the State unless it has been inspected and a certificate of inspection has been issued that indicates the article is free of Spotted Lanternfly; this service is available from the state in which the shipment has originated from or has passed through and, presently, each state that issues such a certificate does not charge a fee therefor.

The proposed rule will require that the Department of Agriculture and Markets ("Department") recognize a certificate of inspection only if the

regulated article has been found to be free of Spotted Lanternfly. If a regulated article has come into contact with Spotted Lanternfly, this certification can be made only if the article has been properly treated, fumigated, or processed by an approved method – the cost of these procedures would depend upon the nature of the article being so treated, fumigated, or processed; the extent of infestation, if any; and the treatment, fumigation, or processing procedure actually used.

4. Minimizing adverse impact:

In conformance with State Administrative Procedure Act section 202-bb(2), the Department has designed the rule to minimize adverse economic impact on persons and businesses located in rural areas. If Spotted Lanternfly were to become endemic in the State, residents of, and businesses in, rural areas would suffer disproportionally, both economically and otherwise.

5. Rural area participation:

The Department informed a number of organizations, consisting in large measure of businesses located in, and residents of, rural areas, of its intent to promulgate the proposed rule; such organizations consist of the Empire State Forest Products Association, the Invasive Species Advisory Committee, the New York State Turfgrass Association, the New York Farm Bureau, the New York State Trucking Association, and the Catskill Regional Invasive Species Partnership. The Department received input from these organizations and took into account their concerns while drafting the proposed rule.

Job Impact Statement

The proposed rule will provide for the addition of a new Part 142 to 1 NYCRR, requiring that a person who wants to move a designed article from or through certain counties of Delaware, New Jersey, Pennsylvania or Virginia, into New York, will be required to obtain a "certificate of inspection" that indicates that the article is free of "Spotted Lanternfly", before doing so. Spotted Lanternfly is an invasive insect that can cause serious damage to grapes, hops, and various types of trees including fruit trees and deciduous trees.

The proposed rule will not have an adverse impact on jobs or employment opportunities and, in fact, will likely aid in protecting jobs and employment opportunities now and in the future. Forest related activities in New York State provide employment for approximately 70,000 people. Of that number, 55,000 jobs are associated with the wood-based forest economy, including manufacturing. The forest-based economy generates payrolls of more than $2 billion. New York State's fruit industry is the largest on the east coast excluding citrus. New York State's fruit crop is valued at over $400 million annually. The two largest components of that is apples and grapes. New York State ranks 2nd nationally in production of apples and ranks 3rd nationally in the production of grapes. New York State's apple industry has 694 commercial apple orchards that directly employ 10,000 people and indirectly employ 7,500 people. New York State produces 29.5 million bushels of apples per year. The New York State grape and wine industry has 1,631 vineyards and over 400 wineries. New York State produces over 175 million bottles of wine annually. The grape, wine, and juice industry generates over $4.8 billion annually. The New York State tourism industry employs over 780,000 people generating $64 billion in direct sales and $34.6 billion in salary.

Implementation of the proposed rule will aid in preventing the further spread of this pest into the State. A spread of the infestation would have very adverse economic consequences. Additionally, a spread of the infestation could result in the imposition of more restrictive quarantines by the federal government, other states and foreign countries, which would have a detrimental impact upon the financial well-being of these industries.

By helping to prevent the spread of Spotted Lanternfly, the proposed rule helps prevent such adverse economic consequences, which protects the jobs and employment opportunities associated with the State's nursery, fruit growing, craft beverage, tourism, and forestry industries.

Assessment of Public Comment

The agency received no public comment.

Education Department

EMERGENCY RULE MAKING

School Breakfast Programs

I.D. No. EDU-40-18-00011-E
Filing No. 1142
Filing Date: 2018-12-11
Effective Date: 2018-12-11

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

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

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

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

Specific reasons underlying the finding of necessity: This proposed emergency amendment to Section 114.1 of the Regulations of the Commissioner of Education is necessary to make technical amendments to the current definitions, terms and meal pattern requirements contained in the Department's current School Breakfast Program Regulations, 8 NYCRR 114.1, to conform with recent changes to federal regulations (7 CFR Part 220) governing School Breakfast Programs administered by the Department.

In addition, the proposed emergency amendment to Section 114.1 of the Regulations of the Commissioner of Education is necessary to implement the 2018 Enacted State Budget (Section 2 of Part B of Chapter 56 of the Laws of 2018) which requires all public elementary or secondary schools with at least 70% or more of its students eligible for free or reduced–price meals under the National School Lunch Program to offer all students a school breakfast after the instructional day has begun beginning in the 2018-2019 school year, and continuing every school year thereafter.

The proposed amendment was presented at the September 2018 Regents meeting, as an emergency adoption effective September 18, 2018, for the preservation of the general welfare in order to immediately conform the Regulations of the Commissioner of Education to the requirements of Section 2 of Part B of Chapter 56 of the Laws of 2018, which requires the Breakfast After the Bell program to commence in the 2018-2019 school year and to make technical amendments to the current definitions, terms and meal pattern requirements contained in the Department's current School Breakfast Program Regulations, 8 NYCRR 114.1, to conform with recent changes to federal regulations (7 CFR Part 220). A Notice of Emergency Action and Proposed Rule Making was published in the State Register on October 3, 2018 for a 60 day public comment period. To date, the Department has not received any comments. No change to the proposed rule is recommended at this time. Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be presented for adoption, after expiration of the required 60-day comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5), would be the January 2019 Regents meeting.

Subject: School Breakfast Programs.

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

Text of emergency rule: Section 114.1 of the Regulations of the Commissioner of Education is amended, effective, September 18, 2018, as follows:

Section 114.1. School breakfast program.

(a) Definitions. As used in this section:

(1)…

(2) Severe need school shall mean a school where 40 percent or more of the lunches served to students at the school in the second preceding school year were served free or at a reduced price[, and in which the reimbursement rate per meal established by the United States Secretary of Agriculture is insufficient to cover the costs of a school breakfast program].

(3)…

(4)…

(5)…

(6) Breakfast after the Bell shall mean providing students access to school breakfast after the instructional school day begins.

(b) Nutritional standards. A breakfast shall [contain, as a minimum, each of the following food components in the amounts indicated:

(1) One-half pint of fluid milk served as a beverage or on cereal, or used in part for each purpose.

(2) A one-half cup serving of fruit or full-strength fruit or vegetable juice.

(3) Two servings from one of the following components or one serving from each:

(i) Bread/bread alternate—one slice of whole grain or enriched bread; one serving of a biscuit, roll, muffin, etc., made of whole grain or enriched flour, or a 3/4 cup or one ounce serving of whole grain or enriched or fortified cereal.

(ii) Meat/meat alternate—one ounce of meat/poultry, fish or cheese, 1/2 large egg, two tbsp. of peanut, nut or seed butter, four tbsp. of cooked dry beans, or one ounce or more of the following: peanuts, soynuts, tree nuts, or seeds.

(4) Offer versus serve. Each school shall offer its students all four required food items as set forth under subdivision (b) of this section. Each school may allow students to refuse one food item from any component that the student does not intend to consume. The refused food item may be any of the four items offered to the student. A student's decision to accept all four food items or to decline one of the four food items shall not affect the charge for breakfast.] *meet the minimum meal pattern requirements contained in 7 CFR 220.8 and 7 CFR 220.23 (Code of Federal Regulations, 2018 edition, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-0001: 2018—available at Office for Counsel, New York State Education Building, Room 148, 89 Washington Avenue, Albany, NY 12234 and such breakfast shall be served in conformance with the offer versus serve requirements contained in 7 CFR 220.8 (e) (Code of Federal Regulations, 2018 edition, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-0001: 2018—available at Office for Counsel, New York State Education Building, Room 148, 89 Washington Avenue, Albany, NY 12234).*

(c) [Eligible participants. Any public school district, private nonprofit school or residential child care institution, as defined in 7 CFR 220.2 (Code of Federal Regulations, 1993 edition, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402: 1993—available at Office for Regional Field Services, Room 775, Education Building Annex, Albany, NY 12234), may apply. In the case of a public school district, approval may be granted for selected schools rather than an entire district.

(d)] Free and/or reduced-price breakfasts. Children to whom free and/or reduced price breakfasts will be served are to be determined by local [sponsoring] agencies in conformity with their existing written policy statements on file in the official records of every sponsoring agency in conformance with [7 CFR 220.7(e) (Code of Federal Regulations, 1993 edition, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402: 1993—available at Office for Regional Field Services, Room 775, Education Building Annex, Albany, NY 12234).] *7 CFR Part 245 (Code of Federal Regulations, 2018 edition, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-0001: 2018—available at Office for Counsel, New York State Education Building, Room 148, 89 Washington Avenue, Albany, NY 12231).*

[(e) Application. Application will be made on forms required by the commissioner.

(f) Reporting requirements. Monthly reports shall be filed no later than the 10th day of each month. Severe need schools shall report financial data to support the need for the additional reimbursement on the December claim for the period July through December and the June claim for the period January through June.]

[(g)] *(d). . .*

[(h)] *(e). . .*

[(i)] *(f). . .*

[(j)] *(g). . .*

(h) Breakfast after the Bell program.

(1) All participating public elementary or secondary schools in this state, not including a charter school authorized by article 56 of the education law, with at least seventy percent or more of its students eligible for free or reduced-price meals under the federal National School Lunch Program as determined by the Commissioner based upon data submitted by schools through the basic educational data system (BEDS) for the prior school year, shall be required to offer all students a school breakfast after the instructional day has begun.

(2) Each public school may determine the breakfast service delivery model that best suits its students. Service delivery models may include, but are not limited to, breakfast in the classroom, grab and go breakfast, and breakfast served in the cafeteria. Time spent by students consuming breakfast may be considered instructional time when students consume breakfast in the students' classrooms and instruction is being provided while students are consuming breakfast. In determining a service delivery model, schools shall consult with teachers, parents, students and members of the community.

(3) Schools subject to this requirement shall provide annual notice to students' parents and guardians that the school will be offering breakfast to all students after the instructional day has begun.

(4) Any school identified pursuant to this section may apply to the Commissioner for a waiver from establishing a school breakfast program after the instructional day has begun. Such waivers shall be annually submitted to the Commissioner in a format and manner prescribed by the Commissioner prior to July 1st of each school year. Such waiver may be granted by the Commissioner upon the school demonstrating:

(i) a lack of need for a School Breakfast Program after the instructional day has begun because of a successful existing breakfast program; or

(ii) that providing a school breakfast program after the instructional day has begun would cause economic hardship for the school.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-40-18-00011-EP, Issue of October 3, 2018. The emergency rule will expire February 8, 2019.

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Ed.L.§ 101 charges SED with the general management and supervision of public schools and the educational work of the State.

Ed.L.§ 207 empowers the Board of Regents(Regents) and the Commissioner to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the Department by law.

Ed.L.§ 305(1) and (2) provide that the Commissioner, as chief executive officer of the State system of education and of the Regents, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or of any statute relating to education.

Ed.L. § 308 authorizes the Commissioner to enforce and give effect to any provision in the Education Law or in any other general or special law pertaining to the school system of the State or any rule or direction of the Regents.

Chapter 56 of the Laws of 2018 requires all public elementary or secondary schools with at least 70 percent or more of its students eligible for free or reduced-price meals under the National School Lunch Program to offer all students a school breakfast after the instructional day has begun, referred to as Breakfast After the Bell, beginning in the 2018-2019 school year, and each school year thereafter.

The Healthy Hunger Free Kids Act ("HHFKA") of 2010, Public Law 111-296, which amended section 4 of the Child Nutrition Act of 1966 which authorizes payments to States to assist them to initiate, maintain, or expand nonprofit breakfast programs in schools.

2. LEGISLATIVE OBJECTIVES:

The proposed rule is necessary to implement and otherwise conform Commissioner's regulations to Section 2 of Part B of Chapter 56 of the Laws of 2018. In addition, technical amendments to the definitions, terms and meal pattern requirements set forth in Section 114.1 are necessary to conform with recent changes to 7 CFR Part 220, the federal regulations governing School Breakfast Programs administered by the State Education Department ("Department"). Such federal regulations were promulgated pursuant to The Healthy Hunger Free Kids Act ("HHFKA") of 2010, Public Law 111-296, which amended section 4 of the Child Nutrition Act of 1966 which authorizes payments to States to assist them to initiate, maintain, or expand nonprofit breakfast programs in schools.

3. NEEDS AND BENEFITS:

Technical amendments to the definitions, terms and meal pattern requirements set forth in Section 114.1 are necessary to conform with recent changes to 7 CFR Part 220, the federal regulations governing School Breakfast Programs administered by the State Education Department (Department). Such federal regulations were promulgated pursuant to The Healthy Hunger Free Kids Act ("HHFKA") of 2010, Public Law 111-296, which amended section 4 of the Child Nutrition Act of 1966 which authorizes payments to States to assist them to initiate, maintain, or expand nonprofit breakfast programs in schools.

In addition, the Enacted 2018 State Budget (Section 2 of Part B of Chapter 56 of the Laws of 2018), requires all public elementary or secondary schools with at least 70 percent or more of its students eligible for free or reduced–price meals under the National School Lunch Program to offer all students a school breakfast after the instructional day has begun, referred to as Breakfast After the Bell, beginning in the 2018-2019 school year, and each school year thereafter. The schools meeting the 70 percent free and reduced-price meals criteria are determined by the Department based upon data submitted by each school through the basic educational data system (BEDS) from the prior school year.

Each public school required to implement the Breakfast After the Bell program shall consult with teachers, parents, students and members of the community to determine the breakfast service delivery model(s) that best suits its students. Service delivery models may include, but are not limited to, breakfast in the classroom, grab and go breakfast, and second chance breakfast, which would include breakfast served in the cafeteria. Time spent by students consuming breakfast in the classroom may be considered instructional time when instruction is being provided.

Schools subject to this requirement shall provide notice to students' parents and guardians that the school will be offering breakfast to all students after the instructional day has begun.

Any school identified pursuant to this section may annually apply to the Commissioner for a waiver from establishing a school breakfast program after the instructional day has begun. Such waiver may be granted by the Commissioner upon a demonstration of the following by the school:

• a lack of need for a school breakfast program after the instructional day has begun because of a successful existing breakfast program; or

• providing a school breakfast program after the instructional day has begun would cause economic hardship for the school.

4. COSTS:

(a) Costs to State government: None.

(b) Costs to local government: In general, the proposed rule does not impose any costs beyond those required by Section 2 of Part B of Chapter 56 of the Laws of 2018. The 2018 Enacted State Budget provided the Department funding in the amount of $7 million to be distributed to any eligible public school required to implement Breakfast After the Bell through a non-competitive grant. Each eligible public school will receive a one-time incentive of $5,000 that will allow schools to purchase food service equipment, including equipment used for the storage, preservation or distribution of food, that will assist in the implementation and success of a Breakfast After the Bell program.

(c) Costs to private regulated parties: None.

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

5. LOCAL GOVERNMENT MANDATES:

The proposed rule does not impose any new costs on the State, local governments, private regulated parties or the State Education Department, but merely implements and otherwise conforms Commissioner's regulations to Section 2 of Part B of Chapter 56 of the Laws of 2018. The 2018 Enacted State Budget provided the Department funding in the amount of $7 million to be distributed to any eligible public school required to implement Breakfast After the Bell through a non-competitive grant. Each eligible public school will receive a one-time incentive of $5,000 that will allow schools to purchase food service equipment, including equipment used for the storage, preservation or distribution of food, that will assist in the implementation and success of a Breakfast After the Bell program.

6. PAPERWORK:

The proposed rule does not impose any additional paperwork requirements.

7. DUPLICATION:

The proposed rule does not duplicate existing State or federal regulations.

8. ALTERNATIVES:

The proposed rule is necessary to implement and otherwise conform Commissioner's regulations to Section 2 of Part B of Chapter 56 of the Laws of 2018. In addition, technical amendments to the definitions, terms and meal pattern requirements set forth in Section 114.1 are necessary to conform with recent changes to 7 CFR Part 220, the federal regulations governing School Breakfast Programs administered by the State Education Department (Department). Such federal regulations were promulgated pursuant to The Healthy Hunger Free Kids Act ("HHFKA") of 2010, Public Law 111-296, which amended section 4 of the Child Nutrition Act of 1966 which authorizes payments to States to assist them to initiate, maintain, or expand nonprofit breakfast programs in schools. Therefore, no alternatives were considered.

9. FEDERAL STANDARDS:

There are no related federal standards.

10. COMPLIANCE SCHEDULE:

It is anticipated that regulated parties will be able to achieve compliance by the effective date of the rule.

Regulatory Flexibility Analysis

(a) Small businesses:

The proposed amendment will not impose any additional compliance requirements and is necessary to is necessary to implement and otherwise conform Commissioner's Regulations to Section 2 of Part B of Chapter 56 of the Laws of 2018. In addition, technical amendments to the definitions, terms and meal pattern requirements set forth in Section 114.1 are necessary to conform with recent changes to 7 CFR Part 220, the federal regulations governing School Breakfast Programs administered by the State Education Department (Department). Such federal regulations were promulgated pursuant to The Healthy Hunger Free Kids Act ("HHFKA") of 2010, Public Law 111-296, which amended section 4 of the Child Nutrition Act of 1966 which authorizes payments to States to assist them to initiate, maintain, or expand nonprofit breakfast programs in schools.

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

(b) Local government:

1. EFFECT OF RULE:

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

2. COMPLIANCE REQUIREMENTS:

The proposed amendment is consistent with the authority conferred by the above statutes and is necessary to implement the provisions of Section 2 of Part B of Chapter 56 of the Laws of 2018, 7 CFR Part 220, the federal regulations governing School Breakfast Programs administered by the State Education Department (Department) and the amendments to those federal regulations as promulgated pursuant to The Healthy Hunger Free Kids Act ("HHFKA") of 2010, Public Law 111-296, which amended section 4 of the Child Nutrition Act of 1966.

3. NEEDS AND BENEFITS:

Technical amendments to the definitions, terms and meal pattern requirements set forth in Section 114.1 are necessary to conform with recent changes to 7 CFR Part 220, the federal regulations governing School Breakfast Programs administered by the State Education Department (Department). Such federal regulations were promulgated pursuant to The Healthy Hunger Free Kids Act ("HHFKA") of 2010, Public Law 111-296, which amended section 4 of the Child Nutrition Act of 1966 which authorizes payments to States to assist them to initiate, maintain, or expand nonprofit breakfast programs in schools.

In addition, the Enacted 2018 State Budget (Section 2 of Part B of Chapter 56 of the Laws of 2018), requires all public elementary or secondary schools with at least 70 percent or more of its students eligible for free or reduced–price meals under the National School Lunch Program to offer all students a school breakfast after the instructional day has begun, referred to as Breakfast After the Bell, beginning in the 2018-2019 school year, and each school year thereafter. The schools meeting the 70 percent free and reduced-price meals criteria are determined by the Department based upon data submitted by each school through the basic educational data system (BEDS) from the prior school year.

Each public school required to implement the Breakfast After the Bell program shall consult with teachers, parents, students and members of the community to determine the breakfast service delivery model(s) that best suits its students. Service delivery models may include, but are not limited to, breakfast in the classroom, grab and go breakfast, and second chance breakfast, which would include breakfast served in the cafeteria. Time spent by students consuming breakfast in the classroom may be considered instructional time when instruction is being provided.

Schools subject to this requirement shall provide notice to students' parents and guardians that the school will be offering breakfast to all students after the instructional day has begun.

Any school identified pursuant to this section may annually apply to the Commissioner for a waiver from establishing a school breakfast program after the instructional day has begun. Such waiver may be granted by the Commissioner upon a demonstration of the following by the school:

• a lack of need for a school breakfast program after the instructional day has begun because of a successful existing breakfast program; or

• providing a school breakfast program after the instructional day has begun would cause economic hardship for the school.

4. PROFESSIONAL SERVICES:

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

5. COMPLIANCE COSTS:

In general, the proposed rule does not impose any costs beyond those required by Section 2 of Part B of Chapter 56 of the Laws of 2018. The 2018 Enacted State Budget provided the Department funding in the amount of $7 million to be distributed to any eligible public school required to implement Breakfast After the Bell through a non-competitive grant. Each eligible public school will receive a one-time incentive of $5,000 that will allow schools to purchase food service equipment, including equipment used for the storage, preservation or distribution of food, that will assist in the implementation and success of a Breakfast After the Bell program.

6. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

7. MINIMIZING ADVERSE IMPACT:
The proposed amendment is necessary to implement the provisions of Section 2 of Part B of Chapter 56 of the Laws of 2018, 7 CFR Part 220, the federal regulations governing School Breakfast Programs administered by the State Education Department (Department) and the amendments to those federal regulations as promulgated pursuant to The Healthy Hunger Free Kids Act ("HHFKA") of 2010, Public Law 111-296, which amended section 4 of the Child Nutrition Act of 1966. Accordingly, no alternatives were considered.
8. LOCAL GOVERNMENT PARTICIPATION:
Comments on the proposed rule have been solicited from school districts through the offices of the district superintendents of each supervisory district in the State, and from the chief school officers of the five big city school districts.

Rural Area Flexibility Analysis
1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:
The proposed rule applies to all school districts in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.
2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:
Technical amendments to the definitions, terms and meal pattern requirements set forth in Section 114.1 are necessary to conform with recent changes to 7 CFR Part 220, the federal regulations governing School Breakfast Programs administered by the State Education Department (Department). Such federal regulations were promulgated pursuant to The Healthy Hunger Free Kids Act ("HHFKA") of 2010, Public Law 111-296, which amended section 4 of the Child Nutrition Act of 1966 which authorizes payments to States to assist them to initiate, maintain, or expand nonprofit breakfast programs in schools.
In addition, the Enacted 2018 State Budget (Section 2 of Part B of Chapter 56 of the Laws of 2018), requires all public elementary or secondary schools with at least 70 percent or more of its students eligible for free or reduced–price meals under the National School Lunch Program to offer all students a school breakfast after the instructional day has begun, referred to as Breakfast After the Bell, beginning in the 2018-2019 school year, and each school year thereafter. The schools meeting the 70 percent free and reduced-price meals criteria are determined by the Department based upon data submitted by each school through the basic educational data system (BEDS) from the prior school year.
Each public school required to implement the Breakfast After the Bell program shall consult with teachers, parents, students and members of the community to determine the breakfast service delivery model(s) that best suits its students. Service delivery models may include, but are not limited to, breakfast in the classroom, grab and go breakfast, and second chance breakfast, which would include breakfast served in the cafeteria. Time spent by students consuming breakfast in the classroom may be considered instructional time when instruction is being provided.
Schools subject to this requirement shall provide notice to students' parents and guardians that the school will be offering breakfast to all students after the instructional day has begun.
Any school identified pursuant to this section may annually apply to the Commissioner for a waiver from establishing a school breakfast program after the instructional day has begun. Such waiver may be granted by the Commissioner upon a demonstration of the following by the school:
- a lack of need for a school breakfast program after the instructional day has begun because of a successful existing breakfast program; or
- providing a school breakfast program after the instructional day has begun would cause economic hardship for the school.

3. COMPLIANCE COSTS:
In general, the proposed rule does not impose any costs beyond those required by Section 2 of Part B of Chapter 56 of the Laws of 2018. The 2018 Enacted State Budget provided the Department funding in the amount of $7 million to be distributed to any eligible public school required to implement Breakfast After the Bell through a non-competitive grant. Each eligible public school will receive a one-time incentive of $5,000 that will allow schools to purchase food service equipment, including equipment used for the storage, preservation or distribution of food, that will assist in the implementation and success of a Breakfast After the Bell program.
4. MINIMIZING ADVERSE IMPACT:
The proposed amendment implements Section 2 of Part B of Chapter 56 of the Laws of 2018. Therefore, no alternatives were considered.
5. RURAL AREA PARTICIPATION:
Comments on the proposed amendment will be solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas.

Job Impact Statement
The proposed rule is necessary to implement and otherwise conform Commissioner's Regulations to Section 2 of Part B of Chapter 56 of the Laws of 2018. In addition, technical amendments to the definitions, terms and meal pattern requirements set forth in Section 114.1 are necessary to conform with recent changes to 7 CFR Part 220, the federal regulations governing School Breakfast Programs administered by the State Education Department (Department). Such federal regulations were promulgated pursuant to The Healthy Hunger Free Kids Act ("HHFKA") of 2010, Public Law 111-296, which amended section 4 of the Child Nutrition Act of 1966 which authorizes payments to States to assist them to initiate, maintain, or expand nonprofit breakfast programs in schools.
Because it is evident from the nature of the proposed rule that it will have no impact on the number of jobs or employment opportunities in New York state, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment
The agency received no public comment.

EMERGENCY RULE MAKING

Prohibition Against Meal Shaming

I.D. No. EDU-40-18-00012-E
Filing No. 1143
Filing Date: 2018-12-11
Effective Date: 2018-12-11

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

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

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

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

Specific reasons underlying the finding of necessity: The proposed amendment to add section 114.5 to the Commissioner's regulations is necessary to timely implement Section 1 of Part B of Chapter 56 of the Laws of 2018 which requires all public, charter and non-public schools that participate in the National School Lunch Program or School Breakfast Program in which there is a school at which all pupils are not eligible to be served breakfast and lunch under the Community Eligibility Provision or Provision Two of the federal National School Lunch Act, 42 U.S.C. Sec. 1751 et seq., to develop a plan to ensure that a pupil whose parent or guardian has unpaid school meal fees is not shamed or treated differently than a pupil whose parent or guardian does not have unpaid school meal fees by July 1, 2018.
The proposed amendment was presented at the September 2018 Regents meeting, as an emergency adoption effective September 18, 2018, for the preservation of the general welfare in order to immediately conform the Commissioner's regulations to the requirements of Section 1 of Part B of Chapter 56 of the Laws of 2018, which requires all public, charter and non-public schools that participate in the National School Lunch Program or School Breakfast Program in which there is a school at which all pupils are not eligible to be served breakfast and lunch under the Community Eligibility Provision or Provision Two of the federal National School Lunch Act, 42 U.S.C. Sec. 1751 et seq., to develop a plan to ensure that a pupil whose parent or guardian has unpaid school meal fees is not shamed or treated differently than a pupil whose parent or guardian does not have unpaid school meal fees by July 1, 2018. A Notice of Emergency Action and Proposed Rule Making was published in the State Register on October 3, 2018 for a 60 day public comment period. As of November 21, 2018, the Department has received comments from approximately twenty-five individuals; however, no change to the proposed rule is recommended at this time. Supporting materials are available upon request from the Secretary to the Board of Regents.
Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be presented for adoption, after expiration of the required 60-day comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5), would be the January 2019 Regents meeting.

Subject: Prohibition against meal shaming.

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

Text of emergency rule: A new section 114.5 is added to the Regulations of the Commissioner of Education, effective September 18, 2018, as follows:

§ 114.5 Prohibition against meal shaming.

(a) All public school districts, charter schools and non-public schools in the state that participate in the National School Lunch Program or School Breakfast Program in which there is a school at which all pupils are not eligible to be served breakfast and lunch under the Community Eligibility Provision or Provision Two of the federal National School Lunch Act, 42 U.S.C. Sec. 1751 et seq., shall develop a plan to ensure that a pupil whose parent or guardian has unpaid school meal fees is not shamed or treated differently than a pupil whose parent or guardian does not have unpaid school meal fees. The plan shall be submitted to the Commissioner by July 1, 2018 in conformance with this section. After submission of such plan, the school or school district shall adopt and post the plan on its website.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-40-18-00012-EP, Issue of October 3, 2018. The emergency rule will expire February 8, 2019.

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Ed.L. § 101 charges SED with the general management and supervision of public schools and the educational work of the State.

Ed.L. § 207 empowers the Board of Regents (Regents) and the Commissioner to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the Department by law.

Ed.L.§ 305(1) and (2) provide that the Commissioner, as chief executive officer of the State system of education and of the Regents, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or of any statute relating to education.

Ed.L. § 308 authorizes the Commissioner to enforce and give effect to any provision in the Education Law or in any other general or special law pertaining to the school system of the State or any rule or direction of the Regents.

Ed.L. § 908 sets forth the requirements for the prohibition against meal shaming.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is necessary to implement and otherwise conform Commissioner's Regulations to the requirements of Education Law § 908 as added by Section 1 of Part B of Chapter 56 of the Laws of 2018.

3. NEEDS AND BENEFITS:

In the enacted 2018 State Budget, a new Education Law § 908 was added which requires all public, charter and non-public schools that participate in the National School Lunch Program or School Breakfast Program in which there is a school at which all pupils are not eligible to be served breakfast and lunch under the Community Eligibility Provision or Provision Two of the Federal National School Lunch Act, 42 U.S.C. Sec. 1751 et seq., to develop a plan to ensure that a pupil whose parent or guardian has unpaid school meal fees is not shamed or treated differently than a pupil whose parent or guardian does not have unpaid school meal fees.

- In accordance with Education Law § 908, the proposed amendment requires plans to include the following elements: a statement that the school or school district shall provide the student with the student's meal of choice for that school day of the available reimbursable meal choices for such school day, if the student requests one, unless the student's parent or guardian has specifically provided written permission to the school to withhold a meal, provided that the school or school district shall only be required to provide access to reimbursable meals, not a la carte items, adult meals, or other similar items;
- an explanation of how staff will be trained to ensure that the school or school district's procedures are carried out correctly and how the affected parents and guardians will be provided with assistance in establishing eligibility for free or reduced-price meals for their children;
- procedures requiring the school or school district to notify the student's parent or guardian that the student's meal card or account balance is exhausted and unpaid meal charges are due. The notification procedures may include a repayment schedule, but the school or school district may not charge any interest or fees in connection with any meals charged;
- a communication procedure designed to support eligible families enrolling in the National Free and Reduced Price Meal Program. Such communication procedures shall also include a process for determining eligibility when a student owes money for five or more meals, wherein the school or school district shall: (i) make every attempt to determine if a student is directly certified to be eligible for free meals; (ii) make at least two attempts, not including the application or instructions included in a school enrollment packet, to reach the student's parent or guardian and have the parent or guardian fill out a meal application; and (iii) require a school or school district to contact the parent or guardian to offer assis-

tance with a meal application, determine if there are other issues within the household that have caused the child to have insufficient funds to purchase a school meal and offer any other assistance that is appropriate;

• a clear explanation of procedures designed to decrease student distress or embarrassment, provided that, no school or school district shall: (i) publicly identify or stigmatize a student who cannot pay for a meal or who owes a meal debt by any means including, but not limited to, requiring that a student wear a wristband or hand stamp; (ii) require a student who cannot pay for a meal or who owes a meal debt to do chores or other work to pay for meals; (iii) require that a student throw away a meal after it has been served because of the student's inability to pay for the meal or because money is owed for earlier meals; (iv) take any action directed at a pupil to collect unpaid school meal fees. A school or school district may attempt to collect unpaid school meal fees from a parent or guardian, but shall not use a debt collector, as defined in Section 803 of the Federal Consumer Credit Protection Act, 15 U.S.C. Sec. 1692a; or (v) discuss any outstanding meal debt in the presence of other students;

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

• procedures to enroll in the Free and Reduced Price Lunch Program, provided that such procedures shall include that, at the beginning of each school year, a school or school district shall provide a free, printed meal application in every school enrollment packet, or if the school or school district chooses to use an electronic meal application, provide in school enrollment packets an explanation of the electronic meal application process and instructions for how parents or guardians may request a paper application at no cost;

4. COSTS:

(a) Costs to State government: None.

(b) Costs to local government: The proposed rule does not impose any costs beyond those required by Education Law § 908 and Section 1 of Part B of Chapter 56 of the Laws of 2018.

(c) Costs to private regulated parties: None.

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

5. LOCAL GOVERNMENT MANDATES:

The proposed rule does not impose any new costs on the State, local governments, private regulated parties or the State Education Department, but merely implements and otherwise conforms Commissioner's Regulations Education Law § 908 and Section 1 of Part B of Chapter 56 of the Laws of 2018.

6. PAPERWORK:

The proposed amendment does not impose any additional paperwork requirements on regulated parties.

7. DUPLICATION:

The proposed rule does not duplicate existing State or federal regulations.

8. ALTERNATIVES:

The proposed rule is necessary to implement the provisions Education Law § 908 as added by Section 1 of Part B of Chapter 56 of the Laws of 2018. Therefore, no alternatives were considered.

9. FEDERAL STANDARDS:

The proposed rulemaking has several of the same or similar requirements as the Federal National School Lunch Program (NSLP) Unpaid Meal Charge policy that took effect July 1, 2017. The federal standards are incorporated in United States Department of Agriculture's (USDA) policy memos SP 23-2017, SP 47-2016, SP 46 2016. For a comprehensive overview of federal unpaid meal charge policy and guidance, please visit http://www.cn.nysed.gov/content/revised-prohibition-against-meal-shaming.

10. COMPLIANCE SCHEDULE:

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

Regulatory Flexibility Analysis

(a) Small businesses:

The proposed rule is necessary to implement the provisions of Education Law § 908 as added by Section 1 of Part B of Chapter 56 of the Laws of 2018. The proposed rule does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

(b) Local government:

1. EFFECT OF RULE:

The proposed rule applies to all public, charter and non-public schools that participate in the National School Lunch Program or School Breakfast Program in this State when there is a school at which all pupils are not eligible to be served breakfast and lunch under the Community Eligibility Provision or Provision Two of the Federal National School Lunch Act, 42 U.S.C. Sec. 1751 et seq..

2. COMPLIANCE REQUIREMENTS:

The proposed rule is consistent with the authority conferred by the above statutes and is necessary to implement the requirements of Education Law § 908 as added by Section 1 of Part B of Chapter 56 of the Laws of 2018.

3. NEEDS AND BENEFITS:

In the enacted 2018 State Budget, a new Education Law § 908 was added which requires all public, charter and non-public schools that participate in the National School Lunch Program or School Breakfast Program in which there is a school at which all pupils are not eligible to be served breakfast and lunch under the Community Eligibility Provision or Provision Two of the Federal National School Lunch Act, 42 U.S.C. Sec. 1751 et seq., to develop a plan to ensure that a pupil whose parent or guardian has unpaid school meal fees is not shamed or treated differently than a pupil whose parent or guardian does not have unpaid school meal fees.

• In accordance with Education Law § 908, the proposed amendment requires plans to include the following elements: a statement that the school or school district shall provide the student with the student's meal of choice for that school day of the available reimbursable meal choices for such school day, if the student requests one, unless the student's parent or guardian has specifically provided written permission to the school to withhold a meal, provided that the school or school district shall only be required to provide access to reimbursable meals, not a la carte items, adult meals, or other similar items;

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

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

• a communication procedure designed to support eligible families enrolling in the National Free and Reduced Price Meal Program. Such communication procedures shall also include a process for determining eligibility when a student owes money for five or more meals, wherein the school or school district shall: (i) make every attempt to determine if a student is directly certified to be eligible for free meals; (ii) make at least two attempts, not including the application or instructions included in a school enrollment packet, to reach the student's parent or guardian and have the parent or guardian fill out a meal application; and (iii) require a school or school district to contact the parent or guardian to offer assistance with a meal application, determine if there are other issues within the household that have caused the child to have insufficient funds to purchase a school meal and offer any other assistance that is appropriate;

• a clear explanation of procedures designed to decrease student distress or embarrassment, provided that, no school or school district shall: (i) publicly identify or stigmatize a student who cannot pay for a meal or who owes a meal debt by any means including, but not limited to, requiring that a student wear a wristband or hand stamp; (ii) require a student who cannot pay for a meal or who owes a meal debt to do chores or other work to pay for meals; (iii) require that a student throw away a meal after it has been served because of the student's inability to pay for the meal or because money is owed for earlier meals; (iv) take any action directed at a pupil to collect unpaid school meal fees. A school or school district may attempt to collect unpaid school meal fees from a parent or guardian, but shall not use a debt collector, as defined in Section 803 of the Federal Consumer Credit Protection Act, 15 U.S.C. Sec. 1692a; or (v) discuss any outstanding meal debt in the presence of other students;

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

• procedures to enroll in the Free and Reduced Price Lunch Program, provided that such procedures shall include that, at the beginning of each school year, a school or school district shall provide a free, printed meal application in every school enrollment packet, or if the school or school district chooses to use an electronic meal application, provide in school enrollment packets an explanation of the electronic meal application process and instructions for how parents or guardians may request a paper application at no cost;

4. PROFESSIONAL SERVICES:

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

5. COMPLIANCE COSTS:

In general, the proposed rule does not impose any costs beyond those

required by Education Law § 908 and Section 1 of Part B of Chapter 56 of the Laws of 2018.

6. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

7. MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement the provisions of Education Law § 908 as added by Section 1 of Part B of Chapter 56 of the Laws of 2018.

8. LOCAL GOVERNMENT PARTICIPATION:

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

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed rule applies to all public, charter and non-public schools that participate in the National School Lunch Program or School Breakfast Program in this State when there is a school at which all pupils are not eligible to be served breakfast and lunch under the Community Eligibility Provision or Provision Two of the Federal National School Lunch Act, 42 U.S.C. Sec. 1751 et seq., including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed rule is necessary to implement and otherwise conform Commissioner's Regulations to the requirements of Education Law § 908 as added by Section 1 of Part B of Chapter 56 of the Laws of 2018 which prohibits meal shaming in all public, charter and non-public schools that participate in the National School Lunch Program or School Breakfast Program in this State when there is a school at which all pupils are not eligible to be served breakfast and lunch under the Community Eligibility Provision or Provision Two of the Federal National School Lunch Act, 42 U.S.C. Sec. 1751 et seq. The proposed rule adds a new section 114.5 to Commissioner's regulations relating to the prohibition against meal shaming. Specifically, the proposed rule requires these schools to develop a plan to ensure that a pupil whose parent or guardian has unpaid school meal fees is not shamed or treated differently than a pupil whose parent or guardian does not have unpaid school meal fees.

Such plans shall include the following elements:

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

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

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

• a communication procedure designed to support eligible families enrolling in the National Free and Reduced Price Meal Program. Such communication procedures shall also include a process for determining eligibility when a student owes money for five or more meals, wherein the school or school district shall: (i) make every attempt to determine if a student is directly certified to be eligible for free meals; (ii) make at least two attempts, not including the application or instructions included in a school enrollment packet, to reach the student's parent or guardian and have the parent or guardian fill out a meal application; and (iii) require a school or school district to contact the parent or guardian to offer assistance with a meal application, determine if there are other issues within the household that have caused the child to have insufficient funds to purchase a school meal and offer any other assistance that is appropriate;

• a clear explanation of procedures designed to decrease student distress or embarrassment, provided that, no school or school district shall: (i) publicly identify or stigmatize a student who cannot pay for a meal or who owes a meal debt by any means including, but not limited to, requiring that a student wear a wristband or hand stamp; (ii) require a student who cannot pay for a meal or who owes a meal debt to do chores or other work to pay for meals; (iii) require that a student throw away a meal after it has been served because of the student's inability to pay for the meal or because money is owed for earlier meals; (iv) take any action directed at a pupil to collect unpaid school meal fees. A school or school district may attempt to collect unpaid school meal fees from a parent or guardian, but shall not use a debt collector, as defined in Section 803 of the Federal Consumer Credit Protection Act, 15 U.S.C. Sec. 1692a; or (v) discuss any outstanding meal debt in the presence of other students;

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

• procedures to enroll in the Free and Reduced Price Lunch Program, provided that such procedures shall include that, at the beginning of each school year, a school or school district shall provide a free, printed meal application in every school enrollment packet, or if the school or school district chooses to use an electronic meal application, provide in school enrollment packets an explanation of the electronic meal application process and instructions for how parents or guardians may request a paper application at no cost;

3. COMPLIANCE COSTS:

The proposed rule does not impose any new costs on the State, local governments, private regulated parties or the State Education Department, but merely implements and otherwise conforms Commissioner's Regulations to the requirements of Education Law § 908 as added by Section 1 of Part B of Chapter 56 of the Laws of 2018.

4. MINIMIZING ADVERSE IMPACT:

The proposed rule does not impose any additional compliance requirements or costs and is necessary to implement the provisions of the requirements of Education Law § 908 and Section 1 of Part B of Chapter 56 of the Laws of 2018. Therefore, no alternatives were considered.

5. RURAL AREA PARTICIPATION:

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

Job Impact Statement

The proposed rule relates to the prohibition against meal shaming as required by Education Law § 908 as added by Section 1 of Part B of Chapter 56 of the Laws of 2018. The proposed rule does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule that it will have no impact on the number of jobs or employment opportunities in New York state, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

As of November 21, 2018, the Department has received the following comments:

1. COMMENT:

Several commenters expressed the position that the regulation restricts food service staff from communicating with students or informing them of their school food balances. According to a few commenters "until this law we were able to talk to students about their accounts by reminding them they are getting low on funds or that would you please tell your parent you need to bring in money. It was handled in a delicate and meaningful way. You should be able to take into consideration the age of the child and gauge your discussion with the student accordingly. Now that we cannot say anything to the student they think there is money on their account because we are not asking them for money when they purchase a meal." Many commenters expressed concern that they are expressly prohibited from having any communication with a child relative to school meals.

DEPARTMENT RESPONSE:

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

ner, understanding of the child and the presence of other pupils when discussing food service account balances. The Department has issued guidance and best practices for this initiative and anticipates updating such guidance and best practices in the future, as necessary. The rulemaking is consistent with the statute and necessary to conform the regulations to Education Law § 908. Thus, no revisions are necessary at this time.

2. COMMENT:

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

DEPARTMENT RESPONSE:

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

3. COMMENT:

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

DEPARTMENT RESPONSE:

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

4. COMMENT:

Several commenters expressed frustration and concerns that the regulation will result in unlimited meal charges and an increase in unpaid meal account balances. Many commenters stated that unpaid meal charges have significantly increased since the statute and regulation became effective.

DEPARTMENT RESPONSE:

While the Department is sympathetic to the commenters' concerns, the rulemaking implements the statutory requirements and expressly requires a school to develop a plan that includes a clear explanation of the procedure to handle unpaid meal charges and specifically states that nothing is intended to allow for the unlimited accrual of debt. The Department has issued guidance and best practices for this initiative and anticipates updating such guidance and best practices in the future, as necessary. The rulemaking implements the requirements of the statute and is necessary to conform the Regulations of the Commissioner to Education Law § 908. Thus, no revisions are necessary at this time.

5. COMMENT:

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

DEPARTMENT RESPONSE:

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

6. COMMENT:

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

DEPARTMENT RESPONSE:

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

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

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

7. COMMENT:

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

DEPARTMENT RESPONSE:

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

8. COMMENT:

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

DEPARTMENT RESPONSE:

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

NOTICE OF ADOPTION

Administration of Certain Vaccines by Pharmacists

I.D. No. EDU-26-18-00009-A

Filing No. 1139

Filing Date: 2018-12-11

Effective Date: 2018-12-26

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

Action taken: Amendment of section 63.9 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6504(not subdivided), 6507(2), 6527(7), 6801(2), (4), 6802(22), 6902(1), 6909(7); L. 2018, ch. 57, part DD

Subject: Administration of certain vaccines by pharmacists.

Purpose: To implement the provisions of part DD of chapter 57 of the Laws of 2018.

Text or summary was published in the June 27, 2018 issue of the Register, I.D. No. EDU-26-18-00009-EP.

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

Revised rule making(s) were previously published in the State Register on November 21, 2018.

Text of rule and any required statements and analyses may be obtained from: Kirti Goswami, New York State Education Department, 89 Washington Avenue, Room 148, Albany, NY 12204, (518) 474-6400, email: legal@nysed.gov

Initial Review of Rule

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

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

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

I.D. No. EDU-52-18-00004-P

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

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

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

Subject: Student teaching requirements for teacher certification and the registration of teacher preparation programs.

Purpose: To revise the student teaching requirements for teacher certification and the registration of teacher preparation programs.

Substance of proposed rule (Full text is posted at the following State website: http://www.counsel.nysed.gov /rules/full-text-indices): Proposed amendments to section 52.21.

The proposed changes to teacher preparation programs include:

• Strengthening the Department's expectations for collaboration between teacher preparation programs and their partner schools and districts by requiring them to establish, maintain, and review Memoranda of Understanding or similar collaborative agreements to systematically improve teacher preparation and the teaching and learning for all involved in collaborative clinical experiences;

• Requiring the student teaching experience to be at least a full semester (at least 14 weeks), full time, and in alignment with the daily schedule and annual school calendar. Candidates pursuing more than one certificate title, may complete two placements each of at least 7 weeks. The student teaching experience must be designed to provide candidates with opportunities to hone their practices in alignment with the New York State Teaching Standards and shall carry the number of semester hours required to obtain full-time status at the institution to ensure qualification for financial aid.

• Exempting certain experienced teachers from the 100 clock hour field experience requirement and the full-semester student teaching experience, and requiring that they instead complete at least 50 clock hours of student teaching. This exemption would apply to candidates who have previously completed an approved New York State teacher preparation program, those who hold a National Board certificate, and those with at least one year of effective teaching experience under a valid New York State or out-of-state teaching certificate. This change streamlines the regulations for already-certified teachers, which currently require different amounts of hours for field experiences and student teaching, depending on the certificate title.

• Strengthening the Department's expectations for both school-based educators (cooperating teachers) and university-based teacher educators (supervisors) who work with teacher candidates during clinical experiences.

Proposed Amendments to Section 80-3.7

Section 80-3.7 of the Commissioner's Regulations outlines the requirements for certification through the individual evaluation pathway. Currently, the coursework requirements for the individual evaluation pathway for certification are based on the educational study requirements for New York State approved teacher preparation programs, including student teaching. As a result, the student teaching requirement for the individual evaluation pathway for certification in Section 80-3.7 needs to change to align with the student teaching experience requirement proposed in Section 52.21.

The proposed changes to Section 80-3.7 would require candidates who apply for a certificate through the individual evaluation pathway to satisfactorily complete a 14- week, full-time, college-supervised student teaching experience. They could satisfactorily complete 70 full-time school days or 140 half-time school days as an employed teacher, provided that the employment must include at least one continuous period of no fewer than 35 days.

Text of proposed rule and any required statements and analyses may be obtained from: Kirti Goswami, NYS Education Department, Office of Higher Education, 89 Washington Avenue, Room 138, Albany, NY 12234, (518) 474-2138, email: legal@nysed.gov

Data, views or arguments may be submitted to: Allison Armour-Garb, NYS Education Department, Office of Higher Education, 89 Washington Avenue, Room 975 EBA, Albany, NY 12234, (518) 474-1385, email: regcomments@nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

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

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

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

2. LEGISLATIVE OBJECTIVES:

The purpose of the proposed amendments to Sections 52.21 and 80-3.7 of the Regulations of the Commissioner of Education relating to student teaching requirements for teacher certification and the registration of teacher preparation programs is to create greater coherence with other statutory and Department initiatives related to ensuring that all educators have the knowledge and skills necessary to meet the needs of all students. Specifically, the amendments further align the Commissioner's Regulations with requirements related to the Department's federally approved Every Student Succeeds Act (ESSA) plan.

3. NEEDS AND BENEFITS:

The quality of the preparatory experience of aspiring teachers in New York State can vary significantly. In developing our plan under the Every Student Succeeds Act (ESSA) to ensure that all students have equitable access to effective instruction, the Department relied on recent research which shows that the quality of the preparation that aspiring teachers receive is a key factor in determining whether those educators enter and remain in the profession[1]. There is also an important relationship between educator preparation and positive effects on student outcomes[2].

New York's current field experience and student teaching requirements have been in effect since January 2000. (Currently, each candidate must do, at a minimum, two 20-day placements or a single 40-day placement.) Since then, there has been a national trend to increase clinical practice in teacher preparation programs. In 2010, the National Council for Accreditation of Teacher Education Blue Ribbon Panel report placed clinical practice at the center of teacher preparation, providing teacher candidates with the opportunity to connect theory with practice[3]. The U.S. Department of Education, Council of Chief State School Officers, and American Federation of Teachers joined the call for high quality clinical practice in teacher preparation programs[4]. The American Association of Colleges for Teacher Education Clinical Practice Commission recently released a report to help the field develop a common understanding of clinical practice and stated that, "clinical practice serves as the central framework through which all teacher preparation programming is conceptualized and designed.[5]"

As a result, states are following the guiding principle that more clinical experiences—intentionally constructed in partnership between P-12 and higher education, and with a focus on quality in addition to quantity—are better in teacher preparation programs. For example, as of July 2018, Louisiana requires a one-year residency, with 180 hours of clinical experiences prior to it. Effective September 2018, New Jersey is requiring 50 hours of clinical experiences and 175 hours of clinical practice (225 hours total) prior to the full-time semester of student teaching. By 2015, 34 states had moved to require a clinical practice placement of 10 weeks or longer, including all of New York's neighboring states[6].

Accordingly, building on the recommendations of the TeachNY Advisory Council and the edTPA Task Force, the Department convened a Clinical Practice Work Group in June 2017 to explore current practice and make recommendations for changes if deemed appropriate. The Work Group was composed of members from the P-12 and higher education communities from across the state (Attachment A) and met eight times from June 2017 through March 2018 to develop recommendations for updating the regulations.

The Work Group developed recommendations, which were presented to the Higher Education Committee of the Board of Regents in May of 2018 (Attachment B). The proposed regulation amendments are based, in part, on those recommendations.

The proposed changes to teacher preparation programs include:

• Strengthening the Department's expectations for collaboration between teacher preparation programs and their partner schools and districts by requiring them to establish, maintain, and review Memoranda of Understanding or similar collaborative agreements to systematically improve teacher preparation and the teaching and learning for all involved in collaborative clinical experiences;

• Requiring the student teaching experience to be at least a full semester (at least 14 weeks), full time, and in alignment with the daily schedule and annual school calendar. Candidates pursuing more than one certificate title, may complete two placements each of at least 7 weeks. The student teaching experience must be designed to provide candidates with opportunities to hone their practices in alignment with the New York State Teaching Standards and shall carry the number of semester hours required to obtain full-time status at the institution to ensure qualification for financial aid.

• Exempting certain experienced teachers from the 100 clock hour field experience requirement and the full-semester student teaching experience, and requiring that they instead complete at least 50 clock hours of student teaching. This exemption would apply to candidates who have previously completed an approved New York State teacher preparation program, those who hold a National Board certificate, and those with at least one year of effective teaching experience under a valid New York State or out-of-state

teaching certificate. This change streamlines the regulations for already-certified teachers, which currently require different amounts of hours for field experiences and student teaching, depending on the certificate title.

• Strengthening the Department's expectations for both school-based educators (cooperating teachers) and university-based teacher educators (supervisors) who work with teacher candidates during clinical experiences.

Section 80-3.7 of the Commissioner's Regulations outlines the requirements for certification through the individual evaluation pathway. Currently, the coursework requirements for the individual evaluation pathway for certification are based on the educational study requirements for New York State approved teacher preparation programs, including student teaching. As a result, the student teaching requirement for the individual evaluation pathway for certification in Section 80-3.7 needs to change to align with the student teaching experience requirement proposed in Section 52.21.

The proposed changes to Section 80-3.7 would require candidates who apply for a certificate through the individual evaluation pathway to satisfactorily complete a 14- week, full-time, college-supervised student teaching experience. They could satisfactorily complete 70 full-time school days or 140 at least half-time school days as an employed teacher, provided that the employment must include at least one continuous period of no fewer than 35 days.

4. COSTS:

a. Costs to State government: The amendments impose minimal additional costs on State government, including the State Education Department.

b. Costs to local government: The amendments impose minimal additional costs on local government, including New York State school districts and BOCES. Participation by school districts and BOCES in the clinical preparation of teacher candidates is voluntary.

c. Costs to private regulated parties: The amendment impose minimal additional costs on private regulated parties. Since 2002, State University of New York teacher preparation programs have required the student teaching experience to be at least 75 days in length, which is equivalent to the full-semester student teaching experience in the proposed regulation. The Department expects the additional clinical experience days to be embedded within the EPP's revised program, without necessarily increasing the number of course credits, which means that tuition would not increase as a result of the additional days. Increases to program administration costs for institutions that do not already require a full semester of student teaching may include, e.g., salary and travel costs for university supervisors to spend more days in the field and additional stipends/honoraria for cooperating teachers.

d. Costs to regulating agency for implementation and continued administration: See above.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility upon any local government.

6. PAPERWORK:

The proposed amendment does not impose any additional paperwork requirements.

7. DUPLICATION:

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

8. ALTERNATIVES:

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

9. FEDERAL STANDARDS:

There are no applicable Federal standards.

10. COMPLIANCE SCHEDULE:

It is anticipated that the proposed amendment will be permanently adopted by the Board of Regents at its April 2019 meeting. If adopted at the April 2019 meeting, the proposed amendment will become effective on April 24, 2019.

---

[1] See, e.g., Ingersoll, R., Merrill, L., and May, H., "What are the effects of teacher education and preparation on beginning teacher attrition?" Research Report (#RR-82) (Philadelphia: Consortium for Policy Research in Education, University of Pennsylvania, 2014) (teacher candidates who complete programs that emphasize clinical practice are less likely to leave the profession after their first year in the classroom) http://www.cpre.org/prep-effects; Guha, R., Hyler, M.E., and Darling-Hammond, L., "The Teacher Residency: An Innovative Model for Preparing Teachers" (Palo Alto, CA: Learning Policy Institute, 2016) https://learningpolicyinstitute.org/product/ teacher-residency; Carver-Thomas, D., Diversifying the teaching profession: How to recruit and retain teachers of color (Palo Alto, CA: Learning Policy Institute, 2018) (Increased access to high-quality preparation, including at least a semester of student teaching, can improve the chances of teachers of color feeling successful in the classroom and continuing to teach long term) https://learningpolicyinstitute.org/sites/default/files/product - files/Diversifying_Teaching_Profession_REPORT_0.pdf.

[2] Boyd, D., Grossman, P.L., Lankford, H., Loeb, S., & Wyckoff, J., "Teacher Preparation and Student Achievement," Educational Evaluation and Policy Analysis 31(4), 416-440 (2009) (teacher candidates who complete programs that emphasize clinical practice are more effective during their first year of teaching) http://journals.sagepub.com/doi/abs/10.3102/0162373709353129. See also Fraser, James W. and Audra M. Watson, "Why Clinical Experience and Mentoring are Replacing Student Teaching on the Best Campuses" (Princeton: Woodrow Wilson National Fellowship Foundation, 2014) (positing "short stays in classrooms intensify the unacknowledged stereotypes and biases that many student teachers bring to their work with students of color" and "provide superficial, rather than deep, understandings of students' lives, communities, and cultures"), retrieved from https://eric.ed.gov/?id=ED562067.

[3] National Council for Accreditation of Teacher Education, Transforming teacher education through clinical practice: A national strategy to prepare effective teachers (2010), retrieved from https://eric.ed.gov/?id=ED512807

[4] United States Department of Education, Our future, our teachers (2011), retrieved from http://www.ed.gov/sites/default/files/ our-future-our-teachers.pdf; Council of Chief State School Officers, Our responsibility, our promise: Transforming educator preparation and entry into the profession (2012), retrieved from https://www.ccsso.org/sites/default/files/2017- 10/Our%20Responsibility% 20Our%20Promise_ 2012.pdf; American Federation of Teachers, "Raising the bar: Aligning and elevating teacher preparation and the teaching profession" (2013) (survey reveals top problem experienced by teachers in their own training program is a failure to prepare them for the challenges of teaching in the "real world"; quality, depth, and duration of clinical experience is key) http://www.highered.nysed.gov/pdf/ raisingthebar2012.pdf.

[5] American Association of Colleges for Teacher Education, A pivot toward clinical practice, its lexicon, and the renewal of educator preparation (2018), p. 14. Retrieved from https://aacte.org/professional-development-and-events/clinical-practice-commission-press-conference

[6] National Council for Teacher Quality, Student Teaching national results, State Teacher Policy Database. [Data set] (2015), retrieved from https://www.nctq.org/yearbook/national/Student-Teaching-69.

Regulatory Flexibility Analysis

The purpose of the proposed amendments to Sections 52.21 and 80-3.7 of the Regulations of the Commissioner of Education relating to student teaching requirements for teacher certification and the registration of teacher preparation programs is to create greater coherence with other statutory and Department initiatives related to ensuring that all educators have the knowledge and skills necessary to meet the needs of all students. Specifically, the amendments further align the Commissioner's Regulations with requirements related to the Department's federally approved Every Student Succeeds Act (ESSA) plan.

The proposed changes to teacher preparation programs include:

• Strengthening the Department's expectations for collaboration between teacher preparation programs and their partner schools and districts by requiring them to establish, maintain, and review Memoranda of Understanding or similar collaborative agreements to systematically improve teacher preparation and the teaching and learning for all involved in collaborative clinical experiences;

• Requiring the student teaching experience to be at least a full semester (at least 14 weeks), full time, and in alignment with the daily schedule and annual school calendar. Candidates pursuing more than one certificate title, may complete two placements each of at least 7 weeks. The student teaching experience must be designed to provide candidates with opportunities to hone their practices in alignment with the New York State Teaching Standards and shall carry the number of semester hours required to obtain full-time status at the institution to ensure qualification for financial aid.

• Exempting certain experienced teachers from the 100 clock hour field experience requirement and the full-semester student teaching experience, and requiring that they instead complete at least 50 clock hours of student teaching. This exemption would apply to candidates who have previously completed an approved New York State teacher preparation program, those who hold a National Board certificate, and those with at least one year of effective teaching experience under a valid New York State or out-of-state teaching certificate. This change streamlines the regulations for already-certified teachers, which currently require different amounts of hours for field experiences and student teaching, depending on the certificate title.

• Strengthening the Department's expectations for both school-based educators (cooperating teachers) and university-based teacher educators (supervisors) who work with teacher candidates during clinical experiences.

Section 80-3.7 of the Commissioner's Regulations outlines the requirements for certification through the individual evaluation pathway. Currently, the coursework requirements for the individual evaluation pathway for certification are based on the educational study requirements for New York State approved teacher preparation programs, including student teaching. As a result, the student teaching requirement for the individual evaluation pathway for certification in Section 80-3.7 needs to change to align with the student teaching experience requirement proposed in Section 52.21.

The proposed changes to Section 80-3.7 would require candidates who apply for a certificate through the individual evaluation pathway to satisfactorily complete a 14- week, full-time, college-supervised student teaching experience. They could satisfactorily complete 70 full-time school days or 140 half-time school days as an employed teacher, provided that the employment must include at least one continuous period of no fewer than 35 days.

The amendments do not impose any new recordkeeping or other compliance requirements, and will not have an adverse economic impact on small businesses or local governments. Participation by school districts and BOCES in the clinical preparation of teacher candidates is voluntary. Because it is evident from the nature of the proposed amendments that they do not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

This proposed amendment applies to educator preparation providers (EPPs) and certain candidates for teacher certification in New York State, including those located in the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

The purpose of the proposed amendments to Sections 52.21 and 80-3.7 of the Regulations of the Commissioner of Education relating to student teaching requirements for teacher certification and the registration of teacher preparation programs is to create greater coherence with other statutory and Department initiatives related to ensuring that all educators have the knowledge and skills necessary to meet the needs of all students. Specifically, the amendments further align the Commissioner's Regulations with requirements related to the Department's federally approved Every Student Succeeds Act (ESSA) plan.

The proposed changes to teacher preparation programs include:

• Strengthening the Department's expectations for collaboration between teacher preparation programs and their partner schools and districts by requiring them to establish, maintain, and review Memoranda of Understanding or similar collaborative agreements to systematically improve teacher preparation and the teaching and learning for all involved in collaborative clinical experiences;

• Requiring the student teaching experience to be at least a full semester (at least 14 weeks), full time, and in alignment with the daily schedule and annual school calendar. Candidates pursuing more than one certificate title, may complete two placements each of at least 7 weeks. The student teaching experience must be designed to provide candidates with opportunities to hone their practices in alignment with the New York State Teaching Standards and shall carry the number of semester hours required to obtain full-time status at the institution to ensure qualification for financial aid.

• Exempting certain experienced teachers from the 100 clock hour field experience requirement and the full-semester student teaching experience, and requiring that they instead complete at least 50 clock hours of student teaching. This exemption would apply to candidates who have previously completed an approved New York State teacher preparation program, those who hold a National Board certificate, and those with at least one year of effective teaching experience under a valid New York State or out-of-state teaching certificate. This change streamlines the regulations for already-certified teachers, which currently require different amounts of hours for field experiences and student teaching, depending on the certificate title.

• Strengthening the Department's expectations for both school-based educators (cooperating teachers) and university-based teacher educators (supervisors) who work with teacher candidates during clinical experiences.

Section 80-3.7 of the Commissioner's Regulations outlines the requirements for certification through the individual evaluation pathway. Currently, the coursework requirements for the individual evaluation pathway for certification are based on the educational study requirements for New York State approved teacher preparation programs, including student teaching. As a result, the student teaching requirement for the individual evaluation pathway for certification in Section 80-3.7 needs to change to align with the student teaching experience requirement proposed in Section 52.21.

The proposed changes to Section 80-3.7 would require candidates who apply for a certificate through the individual evaluation pathway to satisfactorily complete a 14- week, full-time, college-supervised student teaching experience. They could satisfactorily complete 70 full-time school days or 140 at least half-time school days as an employed teacher, provided that the employment must include at least one continuous period of no fewer than 35 days.

3. COSTS:

The proposed amendment imposes minimal additional costs on educator preparation providers, teacher certification candidates, and/or the New York State school districts/BOCES who wish to hire them. Since 2002, State University of New York teacher preparation programs have required the student teaching experience to be at least 75 days in length, which is equivalent to the full-semester student teaching experience in the proposed regulation. The Department expects the additional clinical experience days to be embedded within the EPP's revised program, without necessarily increasing the number of course credits, which means that tuition would not increase as a result of the additional days. Increases to program administration costs for institutions that do not already require a full semester of student teaching may include, e.g., salary and travel costs for university supervisors to spend more days in the field and additional stipends/honoraria for cooperating teachers. Participation by school districts and BOCES in the clinical preparation of teacher candidates is voluntary.

4. MINIMIZING ADVERSE IMPACT:

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

5. RURAL AREA PARTICIPATION:

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

Job Impact Statement

The purpose of the proposed amendments to Sections 52.21 and 80-3.7 of the Regulations of the Commissioner of Education relating to student teaching requirements for teacher certification and the registration of teacher preparation programs is to create greater coherence with other statutory and Department initiatives related to ensuring that all educators have the knowledge and skills necessary to meet the needs of all students. Specifically, the amendments further align the Commissioner's Regulations with requirements related to the Department's federally approved Every Student Succeeds Act (ESSA) plan.

The proposed changes to teacher preparation programs include:

• Strengthening the Department's expectations for collaboration between teacher preparation programs and their partner schools and districts by requiring them to establish, maintain, and review Memoranda of Understanding or similar collaborative agreements to systematically improve teacher preparation and the teaching and learning for all involved in collaborative clinical experiences.

• Requiring the student teaching experience to be at least a full semester (at least 14 weeks), full time, and in alignment with the daily schedule and annual school calendar. Candidates pursuing more than one certificate title, may complete two placements each of at least 7 weeks. The student teaching experience must be designed to provide candidates with opportunities to hone their practices in alignment with the New York State Teaching Standards and shall carry the number of semester hours required to obtain full-time status at the institution to ensure qualification for financial aid.

• Exempting certain experienced teachers from the 100 clock hour field experience requirement and the full-semester student teaching experience, and requiring that they instead complete at least 50 clock hours of student teaching. This exemption would apply to candidates who have previously completed an approved New York State teacher preparation program, those who hold a National Board certificate, and those with at least one year of effective teaching experience under a valid New York State or out-of-state teaching certificate. This change streamlines the regulations for already-certified teachers, which currently require different amounts of hours for field experiences and student teaching, depending on the certificate title.

• Strengthening the Department's expectations for both school-based educators (cooperating teachers) and university-based teacher educators (supervisors) who work with teacher candidates during clinical experiences.

Section 80-3.7 of the Commissioner's Regulations outlines the requirements for certification through the individual evaluation pathway. Currently, the coursework requirements for the individual evaluation pathway

for certification are based on the educational study requirements for New York State approved teacher preparation programs, including student teaching. As a result, the student teaching requirement for the individual evaluation pathway for certification in Section 80-3.7 needs to change to align with the student teaching experience requirement proposed in Section 52.21.

The proposed changes to Section 80-3.7 would require candidates who apply for a certificate through the individual evaluation pathway to satisfactorily complete a 14- week, full-time, college-supervised student teaching experience. They could satisfactorily complete 70 full-time school days or 140 half-time school days as an employed teacher, provided that the employment must include at least one continuous period of no fewer than 35 days.

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

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Annual Professional Performance Reviews

I.D. No. EDU-52-18-00005-P

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

Proposed Action: Amendment of section 30-3.17 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101, 207, 305 and 3012-d

Subject: Annual professional performance reviews.

Purpose: To extend the transition period for an additional year (until 2019-2020).

Text of proposed rule: Section 30-3.17 of the Rules of the Board of Regents shall be amended to read as follows:

§ 30-3.17. Annual Professional Performance Review Ratings for the 2015-2016 through the [2018-2019] *2019-2020* school years for Annual Professional Performance Reviews Conducted Pursuant to Education Law § 3012-d and this Subpart, During a Transition to Higher Learning Standards.

(a) …

(b) Notwithstanding any other provision of this Subpart to the contrary, the Commissioner shall establish procedures in guidance for determining transition scores and ratings for teachers and principals whose annual professional performance reviews conducted pursuant to Education Law § 3012-d and this Subpart for the 2015-2016 through the [2018-2019] *2019-2020* school years are based, in whole or in part, on State assessments and/or State-provided growth scores on Regents examinations, while the State completes the transition to higher learning standards through new State assessments aligned to higher learning standards, and a revised State-provided growth model.

(1) …
(2) …
(3) ..
(i) …
(ii) …
(b) …
(c) …

Text of proposed rule and any required statements and analyses may be obtained from: Kirti Goswami, NYS Education Department, Office of Counsel, 89 Washington Avenue, Room 138, Albany, NY 12234, (518) 473-2183, email: kgoswami@nysed.gov

Data, views or arguments may be submitted to: Alexander Trikalinos, NYS Education Department, Office of Higher Education, 89 Washington Avenue, Room 1071 EBA, Albany, New York 12234, (518) 486-2855, email: regcomments@nysed.gov

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

This rule was not under consideration at the time this agency submitted its Regulatory Agenda for publication in the Register.

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law 101 (not subdivided) charges the Department with the general management and supervision of all public schools and all of the educational work of the state.

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

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

Education Law 3012-d establishes uniform standards for teacher and principal annual professional performance reviews (APPR) across New York State.

2. LEGISLATIVE OBJECTIVES:

The purpose of the proposed amendment is to extend the APPR transition period for an additional year to provide the Department with adequate time to fully implement the Governor's Common Core Task Force's recommendations while the Department works with stakeholders to develop recommendations to revise the current evaluation system in order to create an evaluation system that better supports teaching and learning.

3. NEEDS AND BENEFITS:

In September 2015, Governor Andrew Cuomo formed the Common Core Task Force to undertake a comprehensive review of the current status and use of the Common Core State Standards and assessments in New York and to recommend potential reforms to the system.

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

"…until the transition to a new system is complete, i.e. New York State-specific standards are fully developed along with corresponding curriculum and tests, State administered standardized ELA and Mathematics assessments for grades three through eight aligned to the Common Core or updated standards shall not have consequences for individual students or teachers. Further, any growth model based on these Common Core tests or other state assessments shall not have consequences and shall only be used on an advisory basis for teachers."

In an effort to implement the Task Force's recommendation, two new sections, 30-2.14[1] and 30-3.17, of the Rules of the Board of Regents were added in December of 2015 to provide for a four-year transition period for annual professional performance reviews (APPRs). During the transition period, the Commissioner will determine transition scores and ratings that will replace the original scores and HEDI ratings computed under the existing provisions of Subpart 30-2 and 30-3 of the Regents Rules for evaluation of teachers and principals whose APPRs are based, in whole or in part, on State assessments in grades 3-8 ELA and mathematics assessments and/or State-provided growth scores. Under the current regulations, the transition period will end with the 2018-2019 school year.

Pursuant to Section 30-3.17 of the Rules of the Board of Regents, transition scores and ratings for the student performance category and the overall transition rating are determined using the scores/ratings in the subcomponents of the student performance category that are not based on the grade 3-8 ELA or mathematics State assessments and/or a State-provided growth score.

- State provided growth scores will continue to be computed for advisory purposes only and overall HEDI ratings will continue to be provided to teachers and principals based on such growth scores. However, during the transition period, only the transition score and rating will be used for purposes of Education Law § 3012-d and Subparts 30-3, and for purposes of employment decisions, including tenure determinations and for purposes of proceedings under Education Law § § 3020-a and 3020-b and teacher and principal improvement plans.
- However, for purposes of public reporting of aggregate data, the original composite score and rating and the transition composite score and rating must be reported with an explanation of such transition composite score and rating.

Although the Department has undertaken a number of actions over the past three years to revise the State's ELA and math Learning Standards and assessment system, that work is not yet complete and the Department has not yet completed its review of the current evaluation system.

4. COSTS:

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

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

c. Costs to private regulated parties: The amendments do not impose any costs on private regulated parties.

d. Costs to regulating agency for implementation and continued administration: The amendments do not impose any costs on the regulating agency for implementation and continued administration.

5. LOCAL GOVERNMENT MANDATES:

See Needs and Benefits Section.

6. PAPERWORK:

The proposed amendment does not impose any additional paperwork requirements beyond what was currently required in regulation.

7. DUPLICATION:

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

8. ALTERNATIVES:

No alternatives were considered.

9. FEDERAL STANDARDS:

There are no applicable Federal standards.

10. COMPLIANCE SCHEDULE:

Following the 60-day public comment period required under the State Administrative Procedure Act, it is anticipated that the proposed amendments will be presented to the Board of Regents for adoption at its April 2019 meeting. If adopted at the April 2019 meeting, the proposed amendments will become effective on April 24, 2019.

---

[1] Section 30-2.14 of the Rules of the Board of Regents is applicable to APPRs conducted pursuant to Education Law § 3012-c. Since the 2016-17 school year, all school districts have implemented APPR plans pursuant to Education Law § 3012-d. Therefore, the proposed amendments relate only to Section 30-3.17 of the Rules of the Board of Regents.

Regulatory Flexibility Analysis

(a) Small businesses:

The proposed amendment relates to annual professional performance reviews (APPR) of teachers and principals, as further described below. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

(b) Local governments:

1. EFFECT OF RULE:

The proposed amendment applies to all teachers and principals of public school districts and BOCES.

2. COMPLIANCE REQUIREMENTS:

The proposed amendments to Section 30-3.17 of the Rules of the Board of Regents would keep the APPR Transition Period for APPRs completed pursuant to Education Law § 3012-d in place for an additional school year (i.e., through the 2019-20 school year). This additional year is necessary for the Department to fully implement the Common Core Task Force's recommendations while the Department works with stakeholders to develop recommendations to revise the current evaluation system in order to create an evaluation system that better supports teaching and learning.

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

The proposed amendment does not impose any additional costs on regulated parties beyond the current regulations.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

6. MINIMIZING ADVERSE IMPACT:

Education Law § 3012-d requires that uniform standards for teachers and principals must be established across the State. Therefore, no alternatives were considered for those located in rural areas of the State.

7. LOCAL GOVERNMENT PARTICIPATION:

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

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

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

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

The proposed amendments to Section 30-3.17 of the Rules of the Board of Regents would keep the APPR Transition Period for APPRs completed pursuant to Education Law § 3012-d in place for an additional school year (i.e., through the 2019-20 school year). This additional year is necessary for the Department to fully implement the Common Core Task Force's recommendations while the Department works with stakeholders to develop recommendations to revise the current evaluation system in order to create an evaluation system that better supports teaching and learning.

3. COSTS:

The proposed amendment imposes no additional costs on any regulated parties.

4. MINIMIZING ADVERSE IMPACT:

Education Law § 3012-d requires that uniform standards for teacher and principal evaluations must be established across the State. Therefore, no alternatives were considered for those located in rural areas of the State.

5. RURAL AREA PARTICIPATION:

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

Job Impact Statement

The purpose of the proposed amendment is to extend the APPR transition period for school districts and BOCES through the 2019-20 school year. During the transition period, the Commissioner will determine transition scores and ratings that will replace the original scores and HEDI ratings computed under the existing provisions of Subpart 30-2 and 30-3 of the Regents Rules for evaluation of teachers and principals whose APPRs are based, in whole or in part, on State assessments in grades 3-8 ELA and mathematics assessments and/or State-provided growth scores.

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

REVISED RULE MAKING
NO HEARING(S) SCHEDULED

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

I.D. No. EDU-19-18-00006-RP

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

Proposed Action: Amendment of sections 100.2(ff), (m), 100.18, 100.19 and Part 120 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101, 112(1), 207, 210, 215, 305(1), (2), (20), 309, 3713(1), (2); The Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT. 1802)

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

Purpose: To implement New York's approved ESSA plan and to comply with the provisions of the Every Student Succeeds Act.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Revised rule compared with proposed rule: Substantive revisions were made in sections 100.21(b)(2), (4), (f)(1), (2), (3), (i)(1) and (l)(5).

Text of revised proposed rule and any required statements and analyses may be obtained from Kirti Goswami, New York State Education Department, 89 Washington Avenue, Room 148, Albany, NY 12238, (518) 474-6400, email: legal@nysed.gov

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

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

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

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

Principal Support Report and Principal Needs Assessment (§ 100.21(b)(4)(xii) and (xiii))

• The name of the report and the needs assessment has been changed to "Leadership Team Support Report" and "Leadership Team Needs Assessment" to reflect that the focus of these documents should be the district and school leadership teams, not just the principal.

Basis for Districts to petition the Commissioner to revise MIPs. (§ 100.21(b)(2)(vi))

• Revised to allow districts to be able to petition the Commissioner to revise MIPs if the district seeks to correct an error in the data used to establish a MIP for a school or district. Would allow the Commissioner to revise MIPs to reflect the administration of new assessments or changes in state standards.

Computation of Combined Composite Performance and Growth Level (§ 100.21(f)(1)(i)(c))

• In a small percentage of cases, the current methodology results in a Combined Composite Performance and Growth Level that is lower than the unweighted average (rounded down) of the Composite Performance Level and Student Growth Level. For example, in a small percentage of cases, a subgroup with a Composite Performance Level of 2 and a Student Growth Level of 4 would be assigned a Combined Composite Performance and Growth Level of 2. This revision would result in the subgroup receiving a Combined Composite Performance and Growth Level of 3.

Computation of Academic Progress Level, ELP level and Student Growth Level (§ 100.21(f)(1)(i)(b), § 100.21(f)(1)(i)(d), § 100.21(f)(1)(i)(e), § 100.21(f)(2)(i)(d), § 100.21(f)(2)(i)(e))

• As the regulations currently allow the Commissioner to do for the graduation rate indicator; chronic absenteeism indicator; and college,

career, and civic readiness indicator, the Commissioner would be able assign an Academic Progress Level 1 in ELA or math to a subgroup whose Performance Index is below a Performance Index established by the Commissioner and the Commissioner may assign an Academic Progress Level 2 in ELA or math to a subgroup whose Performance Index is at or above a Performance Index established by the Commissioner. Similar provisions would also be added for the ELP and Student Growth Indicators. These provisions would allow the Commissioner to take into account changes to the assessments and standards that have taken place.

Computation of Combined Composite Performance and Graduation Rate Level (§ 100.21(f)(2)(i)(c))

• In a small percentage of cases, the current methodology results in a Combined Composite Performance and Graduation Rate Level that is lower than the unweighted average of the Composite Performance Level and Graduation Rate Level. For example, in a small percentage of cases, a subgroup with Composite Performance Level of 2 and a Graduation Rate Level of 4 would be assigned a Combined Composite Performance and Graduation Rate Level of 2. This revision would result in the subgroup receiving a Combined Composite Performance and Graduation Rate Level of 3.

Identification of Target Districts (§ 100.21(f)(3)(iii))

• Clarifies that a school district must meet the criteria for identification for the all students group for two consecutive years in order to be identified as a Target District, except for Focus Districts, which may be identified based on 2017-18 school year data only.

Assignment of teachers to schools identified for Comprehensive Support and Improvement (§ 100.21(i)(1)(i)(c))

• When a school is identified for Comprehensive Support and Improvement, teacher transfers are limited to teachers rated effective or highly effective pursuant to Education Law § 3012-d by a school district in the previous school year, to the extent possible and subject to collective bargaining as required under article 14 of the Civil Service Law, and may require that any successor collective bargaining agreement authorize such transfers to the extent possible and unless otherwise prohibited by law.

Identification and appointment of leadership and staff of a new school that a district seeks to register to replace a SURR or receivership school that is phasing out or closing (§ 100.21(l)(5)(iv))

• District must establish a process for identifying and appointing the leadership and staff of the new school, which must result in the selection of school leaders with a track record of success as school leaders and a staff that consists primarily of experienced teachers (i.e., at least three years of teaching experience) who are certified in the subject area(s) they will teach, have been rated Effective or Highly Effective pursuant to Education Law § 3012-d in each of the past three years, and are not currently assigned to the school to be closed or phased out, unless approval has been granted by the Commissioner to waive any of these requirements, to the extent possible and subject to collective bargaining as required under article 14 of the Civil Service Law, and may require that any successor collective bargaining agreement authorize such appointments, to the extent possible, unless otherwise prohibited by law.

The above changes require that the NEEDS AND BENEFITS section of the previously published Regulatory Impact Statement be revised. For the complete Revised Regulatory Impact Statement please visit the following website: http://www.counsel.nysed.gov/rulesandregs

Revised Regulatory Flexibility Analysis

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

Revised Rural Area Flexibility Analysis

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

Revised Job Impact Statement

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

Assessment of Public Comment

*Note: A Notice of Emergency Adoption and Revised Rulemaking was published in the State Register on October 3, 2018. A Notice of Emergency Adoption was also published in the State Register on November 21, 2018 and included an Assessment of Public Comment received until October 25, 2018. This Assessment of Public Comment includes comments received from October 3, 2018 through November 2, 2018 along with comments received after the end of the previous public comment period which concluded on August 17th.

1. COMMENT:

Commenter, an education software company, sought information related to the ability of school districts to use ESSA funds to purchase a particular product.

DEPARTMENT RESPONSE:

No response necessary as the comment is outside the scope of the proposed rulemaking.

2. COMMENT:

Commenter, a parent, wrote to express his frustration about the learning and environmental conditions of a particular school, which was designated as a priority school under the previous accountability system required for compliance with No Child Left Behind. Commenter noted that his older child received a transfer to a better performing school as a result of the school's designation as a priority school and is pleased with that child's current school placement.

DEPARTMENT RESPONSE:

As evidenced by New York's federally approved ESSA plan and this proposed rulemaking, the Department aims to implement an accountability system that will support the education of all students in New York. However, this particular comment is outside the scope of the proposed rulemaking and, as such, no changes are necessary.

3. COMMENT:

Several commenters echoed previously received comments and expressed concern relating to participation rate, parental rights, and the value of the assessments.

DEPARTMENT RESPONSE:

Please see response to Comment #8 in the previously published Assessment of Public Comment, published in the State Register on October 3, 2018.

4. COMMENT:

Several commenters expressed previously received concerns regarding the provisions that permit the Commissioner to impose a financial penalty by requiring districts to set aside Title I funds to implement the recommendations of a participation rate audit if a school has failed to improve the participation rate for an identified group in the subject for which the group was identified for three years following first implementation of a participation rate improvement plan.

DEPARTMENT RESPONSE:

Please see response to Comment #13 in the previously published Assessment of Public Comment, published in the State Register on October 3, 2018.

5. COMMENT:

Several commenters expressed frustration with the overall system of state assessments and the common core learning standards.

DEPARTMENT RESPONSE:

Please see response to Comment #39 in the previously published Assessment of Public Comment, published in the State Register on October 3, 2018.

6. COMMENT:

Several commenters noted that while the revisions were a step in the right direction, commenters expressed a desire to go farther to reduce or eliminate the need for certain schools to develop participation rate improvement plans. A number of commenters felt it was unfair that schools that had a Weighted Average Achievement average of Level 3 or 4 would not have to do a participation rate improvement plan, while lower performing schools, which might be educating higher need students, with similar participation rates would still be required to develop plans.

DEPARTMENT RESPONSE:

The Department appreciates the feedback received from stakeholders, and has attempted to balance the needs of New York State students and schools with the requirements of the federal law and the State's approved ESSA plan. While no revisions are necessary at this time, the Department will continue to work with stakeholders and issue further clarifying guidance in the future to the extent possible within the statutory requirements.

7. COMMENT:

Commenter commended the Department for previous revisions but

sought additional revisions including: changing the name of the Principal Support Report and Principal Needs Assessment to Leadership Team Report and Needs Assessment and including the superintendent in those covered by the report.

DEPARTMENT RESPONSE:

The proposed rulemaking has been revised to change the name of the report and the needs assessment to the "Leadership Team Support Report" and "Leadership Team Needs Assessment" to reflect that the focus of these documents should be the district and school leadership teams, not just the principal.

8. COMMENT:

Commenter recommends delaying the implementation of the chronic absenteeism indicator for one year and to include prekindergarten and kindergarten into the chronic absenteeism performance indicator.

DEPARTMENT RESPONSE:

As it relates to the grade levels of students to be included in the chronic absenteeism rate, please see response to Comment #85 in the previously published Assessment of Public Comment, published in the State Register on October 3, 2018. The Department does not believe any revisions are necessary for the timeline for the chronic absenteeism indicator at this time.

9. COMMENT:

Commenter also sought revision of the definition of continuous enrollment so that it is based on a student enrolled on BEDS day through the test administration period.

DEPARTMENT RESPONSE:

Please see the response to Comment #80 in the previously published Assessment of Public Comment, published in the State Register on October 3, 2018.

10. COMMENT:

Several commenters expressed their appreciation for revisions that the Regents made to the regulations which included stronger provisions to ensure parental involvement in the creation of school improvement plans; strengthening language on the importance of translation of parent notices; adopting an explicit timeline and methodology to incorporate the new indicator holding schools accountable for reducing out-of-school suspensions; requiring improvement on both the Core Subject Performance Index and Weighted Average Achievement Index as part of the annual achievement progression; and acknowledging that participatory budgeting is just one of several ways a school can increase parent and student engagement.

Commenters also noted that the Board and Department have worked hard to strike a reasonable balance regarding test participation and commended the Board and Department for improving teacher equity by limiting new teacher transfers into schools identified for Comprehensive Support & Improvement to teachers rated Effective or Highly Effective, subject to applicable collective bargaining agreements and for identifying "Target Districts" as part of the Department's school improvement strategy.

DEPARTMENT RESPONSE:

No response necessary as the comment is supportive. However, please note that revisions have been made to the rulemaking relative to the transfer of teachers.

11. COMMENT:

Commenter expressed several concerns with the proposed rulemaking and asserts that requiring a participation rate improvement plan is inconsistent with both NYS's approved plan and is not permitted under ESSA. Commenter argues that the statutory history which led to the inclusion of the 95% participation rate in the No Child Left Behind Act ("NCLB") prohibits requiring schools to develop participation rate plans when failure to meet the 95% is the result of parental choice, and not systemic or institutional exclusion of certain subgroups of students. The commenter therefore asserts that any consequences for failing to meet the participation rate because of parental choice are not permissible under ESSA.

Commenter further states that including such requirement in the proposed rulemaking amounts to a breach of fiduciary duty by requiring financially vulnerable school districts to expend resources to increase participation. Additionally, the commenter states that there is no research-based evidence relating to the validity of participation rate plans, and that using participation rate data from the 17-18 school year without having previously warned parents of their right to opt-out amounts to a retroactive penalty.

DEPARTMENT RESPONSE:

The Department does not believe that requiring certain schools to implement a participation rate improvement plan and/or expending funds to implement such a plan in order to assist schools in meeting the participation rates required by ESSA is outside the scope of the statute and no revisions are necessary at this time. Furthermore, the Department notes that the statutory requirement regarding participation in state assessments predates this rulemaking and therefore disagrees that the rulemaking constitutes a "retroactive penalty."

Please see the responses to Comment #8 and Comment #32 in the previously published Assessment of Public Comment, published in the State Register on October 3, 2018.

12. COMMENT:

Commenter suggests that the Department and the Board of Regents changed course when the accountability calculations were amended to no longer compare the Core Subject Performance Index with the Weighted Average Achievement Index, and take the higher of the two.

DEPARTMENT RESPONSE:

Commenter is correct that changes were made to the ESSA plan initially submitted to the United States Department of Education in order to secure final approval of the State's plan. See also the response Comment #88 in the previously published Assessment of Public Comment, published in the State Register on October 3, 2018.

13. COMMENT:

Commenter adopted the various arguments put forth by New York State United Teachers in its letter to Commissioner Elia, dated July 19, 2018.

DEPARTMENT RESPONSE:

See the responses to Comments #7, #8, #9, #13, #14 and #15 in the previously published Assessment of Public Comment, published in the State Register on October 3, 2018.

14. COMMENT:

Commenter expressed concern that the accountability calculations in the proposed rulemaking will result in unintended consequences. Commenter also expressed that the Department can and should make additional changes to the approved ESSA plan and revise the rulemaking consistent with such amendments.

DEPARTMENT RESPONSE:

As the Department implements the ESSA plan and implementing regulations, if the Department believes that any additional changes to the plan or the regulations are necessary, the Department may propose any such changes.

15. COMMENT:

Some commenters expressed concern relating to the role of state assessments in teacher evaluations.

DEPARTMENT RESPONSE:

These comments are outside the scope of the regulations. Therefore, no response is necessary.

Department of Financial Services

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Principle-Based Reserving

I.D. No. DFS-52-18-00001-EP

Filing No. 1134

Filing Date: 2018-12-07

Effective Date: 2018-12-07

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

Proposed Action: Addition of Part 103 (Regulation 213) to Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 102, 201, 202, 301, 302; Insurance Law, sections 301, 4217 and 4517

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

Specific reasons underlying the finding of necessity: The Legislature added a new Insurance Law § 4217(g) to allow principle-based reserving ("PBR") for certain individual and group life insurance policies and annuity contracts beginning in 2019. This rule is necessary to make clear that the Superintendent of Financial Services ("Superintendent") may require a life insurance company or fraternal benefit society (collectively, "life insurer") to change an assumption or method that in the Superintendent's opinion is necessary to comply with the valuation manual adopted by the Superintendent and § 4217(g), and that the life insurer must adjust the reserves as the Superintendent requires.

Since the bill that enacted Insurance Law § 4217(g) took effect immediately, it is imperative that this rule be promulgated on an emergency basis for the public's general welfare.

Subject: Principle-Based Reserving.

Purpose: To allow principal-based reserving for certain individual and group life insurance policies and annuity contracts.

Text of emergency/proposed rule: *§ 103.1 Applicability.*

This part shall apply to individual and group life insurance policies and annuity contracts issued on or after the operative date of the valuation manual as prescribed by the superintendent by regulation.

§ 103.2 Superintendent's authority to require reserve adjustments.

(a) The superintendent may require a life insurance company to change an assumption or method that in the superintendent's opinion is necessary to comply with the requirements of the valuation manual or Insurance Law section 4217(g), and the life insurance company shall adjust the reserves as required by the superintendent. The superintendent may take other disciplinary action as permitted by the Insurance Law, Financial Services Law, and any other applicable laws and regulations.

(b) For purposes of this Part, "valuation manual" shall have the meaning set forth in Insurance Law section 4217(g)(5).[1]

[1] The 2018 Valuation Manual, published by the National Association of Insurance Commissioners, is hereby incorporated by reference in this Part. The 2018 Valuation Manual is readily available without charge at the following internet address: https://www.naic.org/documents/prod_serv_2018_valuation_manual.pdf. The 2018 Valuation Manual is also available for public inspection and copying at the New York State Department of Financial Services, One State Street, New York, NY 10004.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire March 6, 2019.

Text of rule and any required statements and analyses may be obtained from: Joana Lucashuk, NYS Department of Financial Services, One State Street, New York, NY 10004, (212) 480-2125, email: Joana.Lucashuk@dfs.ny.gov

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

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

This rule was not under consideration at the time this agency submitted its Regulatory Agenda for publication in the Register.

Regulatory Impact Statement

1. Statutory authority: Financial Services Law §§ 102, 201, 202, 301 and 302 and Insurance Law §§ 301, 4217, and 4517.

Financial Services Law § 102 establishes the Department of Financial Services ("DFS") and sets forth goals for DFS to accomplish.

Financial Services Law § 201 sets forth a declaration of policy, Financial Services Law § 202 establishes the office of the Superintendent of Financial Services ("Superintendent"), and Financial Services Law § 301 sets forth the Superintendent's powers.

Financial Services Law § 302 and Insurance Law § 301, in material part, authorize the Superintendent to effectuate any power accorded to the Superintendent by the Financial Services Law, Insurance Law, or any other law, and to prescribe regulations interpreting the Insurance Law.

Insurance Law § 4217 sets forth rules for the valuation of insurance policies and contracts. Insurance Law § 4217(g) requires authorized life insurance companies and fraternal benefit societies (collectively, "life insurers") to use principle-based reserving ("PBR") for certain individual and group life insurance policies and annuity contracts upon the Superintendent's approval of the National Association of Insurance Commissioners' ("NAIC's") valuation manual (the "Manual"), subject to the Superintendent adopting any amendment to the Manual by regulation.

Insurance Law § 4517 makes Insurance Law § 4217 applicable to the valuation of life insurance and annuity certificates issued by fraternal benefit societies.

2. Legislative objectives: Insurance Law § 4217 sets forth rules for the valuation of insurance policies and contracts. In December 2018, Governor Andrew M. Cuomo signed into law a bill that added a new Insurance Law § 4217(g) to allow PBR for certain individual and group life insurance policies and annuity contracts beginning in 2019.

This rule accords with the public policy objectives that the Legislature sought to advance in Insurance Law § 4217(g) when it adopted PBR for life insurers, by making clear that the Superintendent may require a life insurer to change an assumption or method that in the Superintendent's opinion is necessary to comply with the valuation manual adopted by the Superintendent and § 4217(g), and that the life insurer must adjust the reserves as the Superintendent requires.

3. Needs and benefits: Life insurers set aside funds (called "reserves") to pay insurance claims when they become due. Insurance Law § 4217 and regulations promulgated thereunder set forth rules surrounding the setting aside of reserves. Insurance Law § 4517 makes Insurance Law § 4217 applicable to the valuation of life insurance and annuity certificates issued by fraternal benefit societies. The NAIC revised its model Standard Valuation Law in 2009 to establish PBR. PBR is designed to allow life insurers to hold reserves based on credible experience that is more closely tailored to the insurers' particular products, within certain strict guidelines. According to the NAIC, as of October 31, 2017, 47 states representing 85.9% of premium have enacted legislation implementing PBR.

Beginning January 1, 2020, the 2009 revisions to the NAIC's Standard Valuation Law will become an accreditation standard. NAIC accreditation is a certification that a state receives once it demonstrates that it has met and continues to meet certain legal, financial, and organizational standards. The purpose of the NAIC accreditation program is to ensure effective insurer financial solvency regulation across the United States.

Insurance Law § 4217(g) authorizes the Superintendent to replace the existing formulaic rules for calculating life insurer reserves with the PBR paradigm established by the NAIC. Section 4217(g) was modeled, in part, on the NAIC's Standard Valuation Law. Although § 4217(g) does not contain every provision that appears in the Standard Valuation Law, the bill grants the Department and the Superintendent the same or greater authority than if it had included all of the provisions included in the Standard Valuation Law. Section 11(G) of the Standard Valuation Law is one of the provisions not included in § 4217(g). Newly enacted § 4217(g)(8)(B) – which authorizes the Superintendent to deviate "from the reserve standards, valuation methods, assumptions, and related requirements in the valuation manual, including for individual companies" – provides the same substantive authority as § 11(G).

Recognizing that a state's enactment of a satisfactory PBR law will become an NAIC accreditation standard starting January 1, 2020 and that new Insurance Law § 4217(g) does not reduce the Superintendent's authority to adjust reserves, both the Life Insurance Council of New York and the Superintendent believe that the language in § 11(G) of the Standard Valuation Law should be included in a stand-alone rule.

4. Costs: This rule may impose compliance costs on life insurers because an insurer must adjust its reserves as the Superintendent requires if necessary to comply with the Manual and Insurance Law § 4217(g). This is a consequence of new Insurance Law § 4217(g), which requires that the minimum standard for the valuation of certain life insurance policies and annuity contracts will be the standard prescribed in the Manual as adopted by the Superintendent. However, under the law, a domestic insurance company and a fraternal benefit society that only writes business in New York may, with the Superintendent's approval, obtain an exemption for specific product forms or product lines.

DFS also may incur costs for the implementation and continuation of this rule, because DFS will need to monitor reserves to ensure conformance with the Manual and Insurance Law § 4217(g). However, any additional costs incurred should be minimal and DFS should be able to absorb the costs in its ordinary budget.

This rule does not impose compliance costs on any local government.

5. Local government mandates: This rule does not impose any program, service, duty, or responsibility upon a county, city, town, village, school district, fire district, or other special district.

6. Paperwork: This rule does not impose any reporting requirements, including forms and other paperwork.

7. Duplication: This rule does not duplicate, overlap, or conflict with any existing state or federal rules or other legal requirements.

8. Alternatives: There were no significant alternative proposals to consider.

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

10. Compliance schedule: A life insurer must comply with the rule upon publication of the Notice of Adoption in the State Register.

Regulatory Flexibility Analysis

The Department of Financial Services ("DFS") finds that this new part will not impose any adverse economic impact or compliance requirements on small businesses or local governments. The basis for this finding is that this rule is directed at life insurance companies and fraternal benefit societies (collectively, "life insurers"), none of which are local governments or come within the definition of "small business" as defined in State Administrative Procedure Act § 102(8). DFS reviewed filed reports on examination and annual statements of such life insurers and concluded that none of these life insurers come within the definition of "small business" because there are none that are both independently owned and have fewer than 100 employees.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Life insurance companies and fraternal benefit societies (collectively, "life insurers") affected by this rule operate in every county in this state, including rural areas as defined by State Administrative Procedure Act § 102(10).

2. Reporting, recordkeeping and other compliance requirements; and professional services: The rule does not impose additional reporting, recordkeeping, or other compliance requirements. A life insurer in a rural

area may need to retain professional services, such actuaries, to comply with this rule.

3. Costs: This rule may impose compliance costs on life insurers, including life insurers in rural areas, because a life insurer must adjust its reserves as the Superintendent of Financial Services ("Superintendent") requires if necessary to company with the National Association of Insurance Commissioners' valuation manual (the "Manual") and Insurance Law § 4217(g). This is a consequence of new Insurance Law § 4217(g), which requires that the minimum standard for the valuation of certain life insurance policies and annuity contracts will be the standard prescribed in the Manual as adopted by the Superintendent. However, under the law, a domestic insurance company and a fraternal benefit society that only writes business in New York may, with the Superintendent's approval, obtain an exemption for specific product forms or product lines.

4. Minimizing adverse impact: This rule uniformly affects life insurers that are located in both rural and non-rural areas of New York State. The rule should not have an adverse impact on rural areas.

5. Rural area participation: Life insurers in rural areas will have an opportunity to participate in the rule-making process when the notice of proposed rule-making is published in the State Register and posted on the Department of Financial Services' website.

Job Impact Statement

This rule should not adversely impact jobs or employment opportunities in New York State. The rule merely implements Insurance Law § 4217(g) by making clear that the Superintendent of Financial Services ("Superintendent") may require a life insurance company or fraternal benefit society to change an assumption or method that in the Superintendent's opinion is necessary to comply with the valuation manual adopted by the Superintendent and § 4217(g), and that the life insurance company or fraternal benefit society must adjust the reserves as the Superintendent requires.

Department of Health

EMERGENCY RULE MAKING

Medical Use of Marihuana

I.D. No. HLT-31-18-00005-E
Filing No. 1133
Filing Date: 2018-12-07
Effective Date: 2018-12-07

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

Action taken: Amendment of section 1004.2 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 3369-a

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

Specific reasons underlying the finding of necessity: In New York State, the number of overdose deaths involving opioids has increased from over 1,000 deaths in 2010, to over 3,000 deaths in 2016. The opioid epidemic is an unprecedented crisis and practitioners should have as many treatment options available to them as possible.

Medical marihuana has been demonstrated to be an effective treatment option for pain, thereby reducing the chance of dependence and the risk of fatal overdose as compared to opioid-based medications. Studies of some states with medical marihuana programs have found notable associations of reductions in opioid deaths and opioid prescribing with the availability of cannabis products. States with medical marihuana programs have also been found to have less opioid overdose deaths than other states by as much as 25 percent. Studies of opioid prescribing in some states with medical marihuana programs have noted a 5.88 percent lower rate of opioid prescribing.

The regulations are necessary to immediately conform the regulations to recent amendments to Section 3360(7) of the PHL that added post-traumatic stress disorder, pain that degrades health and functional capability where the use of medical marihuana is an alternative to opioid use, and substance use disorder, as serious conditions for which patients may be certified to use medical marihuana. In doing so, the regulations will help prevent patients from relying on prescription opioids for severe pain that is not expected to last more than three months. In addition, adding opioid use disorder as a clinically associated condition will allow individuals with substance use disorder, but who don't suffer from severe or chronic pain, to use medical marihuana as a part of their treatment program.

Subject: Medical Use of Marihuana.

Purpose: To add additional serious conditions for which patients may be certified to use medical marihuana.

Text of emergency rule: Pursuant to the authority vested in the Commissioner of Health by section 3369-a of the Public Health Law (PHL), Section 1004.2 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby amended, to be effective upon filing with the Secretary of State, to read as follows:

Section 1004.2 Practitioner issuance of certification.

(a) Requirements for Patient Certification. A practitioner who is registered pursuant to 1004.1 of this part may issue a certification for the use of an approved medical marihuana product by a qualifying patient subject to completion of subdivision (e) of this section. Such certification shall contain:

* * *

(8) the patient's diagnosis, limited solely to the specific severe debilitating or life-threatening condition(s) listed below;

* * *

(xi) any severe debilitating pain that the practitioner determines degrades health and functional capability; where the patient has contraindications, has experienced intolerable side effects, or has experienced failure of one or more previously tried therapeutic options; and where there is documented medical evidence of such pain having lasted three months or more beyond onset, or the practitioner reasonably anticipates such pain to last three months or more beyond onset; [or]

(xii) post-traumatic stress disorder;

(xiii) pain that degrades health and functional capability where the use of medical marihuana is an alternative to opioid use, provided that the precise underlying condition is expressly stated on the patient's certification; or

(xiv) substance use disorder; or

([xii]*xv*) any other condition added by the commissioner.

(9) The condition or symptom that is clinically associated with, or is a complication of the severe debilitating or life-threatening condition listed in paragraph (8) of this subdivision. Clinically associated conditions, symptoms or complications, as defined in subdivision seven of section thirty-three hundred sixty of the public health law are limited solely to:

(i) Cachexia or wasting syndrome;

(ii) severe or chronic pain resulting in substantial limitation of function;

(iii) severe nausea;

(iv) seizures;

(v) severe or persistent muscle spasms; [or]

(vi) post-traumatic stress disorder;

(vii) opioid use disorder, but only if enrolled in a treatment program certified pursuant to Article 32 of the Mental Hygiene Law; or

([vi]*viii*) such other conditions, symptoms or complications as added by the commissioner.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. HLT-31-18-00005-P, Issue of August 1, 2018. The emergency rule will expire February 4, 2019.

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

Regulatory Impact Statement

Statutory Authority:

The Commissioner of Health is authorized pursuant to Section 3369-a of the Public Health Law (PHL) to promulgate rules and regulations necessary to effectuate the provisions of Title V-A of Article 33 of the PHL. The Commissioner of Health is also authorized pursuant to Section 3360(7) of the PHL to add serious conditions under which patients may qualify for the use of medical marihuana.

Legislative Objectives:

The legislative objective of Title V-A is to comprehensively regulate the manufacture, sale and use of medical marihuana, by striking a balance between potentially relieving the pain and suffering of those individuals with serious conditions, as defined in Section 3360(7) of the PHL, and protecting the public against risks to its health and safety.

Needs and Benefits:

The regulatory amendments are necessary to conform the regulations to recent amendments to Section 3360(7) of the PHL that added post-

traumatic stress disorder, pain that degrades health and functional capability where the use of medical marihuana is an alternative to opioid use, and substance use disorder, as serious conditions for which patients may be certified to use medical marihuana. This regulatory amendment will particularly benefit patients with these conditions as medical marihuana will now be an available treatment option. Requiring practitioners to expressly state the precise underlying condition will help the Department to better understand how medical marihuana can be used as an alternative or adjunctive therapy to prescription opioids. In addition, adding substance use disorder as a severe debilitating or life-threatening condition and opioid use disorder as a clinically associated condition will allow individuals who are addicted to opioids to use medical marihuana as part of their treatment.

Costs:

Costs to the Regulated Entity:

Patients certified by their practitioner for the medical use of marihuana will have to pay a $50 non-refundable application fee to obtain a registry identification card to register with the Medical Marihuana Program. However, the Department may waive or reduce this fee in cases of financial hardship, and is currently waiving this fee for all patients and caregivers. Patients will also have a cost associated with the fees charged by registered organizations for the purchase of medical marihuana products.

Costs to Local Government:

This amendment to the regulation does not require local governments to perform any additional tasks; therefore, it is not anticipated to have an adverse fiscal impact.

Costs to the Department of Health:

With the inclusion of these new serious conditions, additional patient registrations will need to be processed by the Department. In addition, there may be an increase in the number of practitioners who register with the program to certify patients who may benefit from the use of medical marihuana for these new serious conditions. This regulatory amendment may result in an increased cost to the Department for additional staffing to provide registration support for patients and practitioners as well as certification support for registered practitioners. However, any resulting cost of additional staffing is greatly outweighed by the benefit of making another treatment option available to practitioners who are treating patients suffering from severe pain or opioid use disorder.

Local Government Mandates:

This amendment does not impose any new programs, services, duties or responsibilities on local government.

Paperwork:

Registered practitioners who certify patients for the program will be required to maintain a copy of the patient's certification in the patient's medical record.

Duplication:

No relevant rules or legal requirements of the Federal and State governments duplicate, overlap or conflict with this rule.

Alternatives:

An alternative would be to not amend the regulation to align with Section 3360(7) of the PHL. However, this was not considered a viable alternative, as it would create confusion for registered practitioners and patients seeking to be certified for the medical use of marihuana.

Federal Standards:

Federal requirements do not include provisions for a medical marihuana program.

Compliance Schedule:

There is no compliance schedule imposed by these amendments, which shall be effective upon filing with the Secretary of State.

Regulatory Flexibility Analysis

No regulatory flexibility analysis is required pursuant to section 202-b(3)(a) of the State Administrative Procedure Act. The amendment does not impose an adverse economic impact on small businesses or local governments, and it does not impose reporting, record keeping or other compliance requirements on small businesses or local governments.

Cure Period:

Chapter 524 of the Laws of 2011 requires agencies to include a "cure period" or other opportunity for ameliorative action to prevent the imposition of penalties on the party or parties subject to enforcement under the regulation. The regulatory amendment authorizing the addition of this serious condition does not mandate that a practitioner register with the program. This amendment does not mandate that a registered practitioner issue a certification to a patient who qualifies for this new serious condition. Hence, no cure period is necessary.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for these amendments is not being submitted because amendments will not impose any adverse impact or significant reporting, record keeping or other compliance requirements on public or private entities in rural areas. There are no other compliance costs imposed on public or private entities in rural areas as a result of the amendments.

Job Impact Statement

No job impact statement is required pursuant to section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the amendment, that it will not have an adverse impact on jobs and employment opportunities.

Assessment of Public Comment

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

Higher Education Services Corporation

EMERGENCY RULE MAKING

New York State Masters-in-Education Teacher Incentive Scholarship Program

I.D. No. ESC-52-18-00002-E
Filing No. 1136
Filing Date: 2018-12-10
Effective Date: 2018-12-10

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

Action taken: Addition of section 2201.17 to Title 8 NYCRR.

Statutory authority: Education Law, sections 653, 655 and 669-f

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

Specific reasons underlying the finding of necessity: This statement is being submitted pursuant to subdivision (6) of section 202 of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation's ("HESC") Emergency Rule Making seeking to add a new section 2201.17 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

This regulation implements a statutory student financial aid program providing for awards to be made to students beginning with the fall 2016 term, which generally starts in August. Emergency adoption is necessary to avoid an adverse impact on the processing of awards to eligible scholarship applicants. The statute provides for tuition benefits to college-going students attending a New York State public institution of higher education who pursue a graduate program of study in an education program leading to a career as a teacher in public elementary or secondary education. Decisions on applications for this Program are made prior to the beginning of the term. Therefore, it is critical that the terms of the program as provided in the regulation be effective immediately so that students can make informed choices and in order for HESC to process scholarship applications in a timely manner. To accomplish this mandate, the statute further provides for HESC to promulgate emergency regulations to implement the program. For these reasons, compliance with section 202(1) of the State Administrative Procedure Act would be contrary to the public interest.

Subject: New York State Masters-in-Education Teacher Incentive Scholarship Program.

Purpose: To implement the New York State Masters-in-Education Teacher Incentive Scholarship Program.

Text of emergency rule: New section 2201.17 is added to Title 8 of the New York Code, Rules and Regulations to read as follows:

Section 2201.17 New York State Masters-in-Education Teacher Incentive Scholarship Program.

(a) Definitions. As used in section 669-f of the Education Law and this section, the following terms shall have the following meanings:

(1) Academic excellence shall mean the attainment of a cumulative grade point average of 3.5 or higher upon completion of an undergraduate program of study from a college or university located within New York State.

(2) Approved master's degree in education program shall mean a program registered at a New York State public institution of higher education pursuant to Part 52 of the Regulations of the Commissioner of Education.

(3) Award shall mean a New York State Masters-in-Education Teacher Incentive Scholarship Program award pursuant to section 669-f of the New York State education law.

(4) Classroom instruction shall mean elementary and secondary education instruction, as required by the New York State Education Department, including enrichment and supplemental instruction that may be offered to a subset of students. Classroom instruction shall not include support services, such as counseling, speech therapy or occupational therapy services.

(5) Elementary and secondary education shall mean pre-kindergarten through grade 12 in a public school recognized by the board of regents or the university of the state of New York, including charter schools authorized pursuant to article fifty-six of the education law.

(6) Full-time study shall mean the number of credits required by the institution in each term of the approved master's degree in education program. A recipient may complete fewer credits than required for full-time study if he or she is in their last term and fewer credit hours are necessary to complete their degree program. In this case, the award amount shall be based on the tuition reported by the institution.

(7) Initial certification shall mean any certification issued pursuant to part 80 of this title which allows the recipient to teach in a classroom setting on a full-time basis.

(8) Interruption in graduate study or employment shall mean an allowable temporary period of leave for a definitive length of time due to circumstances approved by the corporation, including, but not limited to, maternity/paternity leave, death of a family member, or military duty.

(9) Program shall mean the New York State Masters-in-Education Teacher Incentive Scholarship Program codified in section 669-f of the education law.

(10) Public institution of higher education shall mean the state university of New York, as defined in subdivision 3 of section 352 of the education law, or the city university of New York as defined in subdivision 2 of section 6202 of the education law.

(11) Rank shall mean an applicant's position, relative to all other applicants, based on cumulative grade point average upon completion of an undergraduate program of study from a college or university located within New York State.

(12) School year shall mean the period commencing on the first day of July in each year and ending on the thirtieth day of June next following.

(13) Successful completion of a term shall mean that at the end of any academic term, the recipient: (i) met the eligibility requirements for the award pursuant to sections 661 and 669-f of the Education Law; (ii) maintained full-time status as defined in this section; and (iii) possessed a cumulative grade point average of 3.5 or higher as of the date of the certification by the institution.

(14) Teach in a classroom setting on a full-time basis shall mean continuous employment providing classroom instruction in a public elementary or secondary school, including charter schools, Boards of Cooperative Educational Services (BOCES) and public pre-kindergarten programs, located within New York State, for at least 10 continuous months, each school year, for a number of hours to be determined by the labor contract between the teacher and employer, or if none of the above apply, the chief administrator of the school.

(b) Eligibility. An applicant must satisfy the eligibility requirements contained in both sections 669-f and 661 of the education law, provided however that an applicant for this Program must meet the good academic standing requirements contained in section 669-f of the education law.

(c) Priorities. If there are more applicants than available funds, the following provisions shall apply:

(1) First priority shall be given to applicants who have received payment of an award pursuant to section 669-f of the education law for the academic year immediately preceding the academic year for which payment is sought and have successfully completed the academic term for which payment is sought. First priority shall include applicants who received payment of an award pursuant to section 669-f of the education law, were subsequently granted an interruption in graduate study by the corporation for the academic year immediately preceding the academic year for which payment is sought and have successfully completed the academic term for which payment is sought. If there are more applicants than available funds, recipients shall be chosen by lottery.

(2) Second priority shall be given to up to five hundred new applicants, within the remaining funds available for the Program, if any. If there are more applicants than available funds, recipients shall be chosen by rank, starting at the applicant with the highest cumulative grade point average beginning in the 2016-17 academic year. In the event of a tie, distribution of any remaining funds shall be done by lottery.

(d) Administration.

(1) Applicants for an award shall apply for program eligibility at such times, on forms and in a manner prescribed by the corporation. The corporation may require applicants to provide additional documentation evidencing eligibility.

(2) Recipients of an award shall:

(i) execute a service contract prescribed by the corporation;

(ii) request payment at such times, on forms and in a manner specified by the corporation;

(iii) receive such awards for not more than four academic terms, or its equivalent, of full-time graduate study leading to certification as a public elementary or secondary classroom teacher, including charter schools, excluding any allowable interruption of study;

(iv) facilitate the submission of information from their employer attesting to the recipient's job title, the full-time work status of the recipient, and any other information necessary for the corporation to determine compliance with the program's employment requirements on forms and in a manner prescribed by the corporation; and

(v) provide any other information necessary for the corporation to determine compliance with the program's requirements.

(e) Amounts.

(1) The amount of the award shall be determined in accordance with section 669-f of the education law.

(2) Disbursements shall be made each term to institutions, on behalf of recipients, within a reasonable time upon successful completion of the term subject to the verification and certification by the institution of the recipient's grade point average and other eligibility requirements.

(3) Awards shall be reduced by the value of other educational grants and scholarships limited to tuition, as authorized by section 669-f of the education law.

(f) Failure to comply.

(1) All award monies received shall be converted to a 10-year student loan plus interest for recipients who fail to meet the statutory, regulatory, contractual, administrative or other requirement of this program.

(2) The interest rate for the life of the loan shall be fixed and equal to that published annually by the U.S. Department of Education for undergraduate unsubsidized Stafford loans at the time the recipient signed the service contract with the corporation.

(3) Interest shall begin to accrue on the day each award payment is disbursed to the institution.

(4) Interest shall be capitalized on the day the award recipient violates any term of the service contract or the date the corporation deems the recipient was no longer able or willing to perform the terms of the service contract. Interest on this capitalized amount shall continue to accrue and be calculated using simple interest until the amount is paid in full.

(5) Where a recipient has demonstrated extreme hardship as a result of a disability, labor market conditions, or other such circumstances, the corporation may, in its discretion, postpone converting the award to a student loan, temporarily suspend repayment of the amount owed, prorate the amount owed commensurate with service completed, discharge the amount owed, or take such other appropriate action.

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 March 9, 2019.

Text of rule and any required statements and analyses may be obtained from: Cheryl B. Fisher, NYS Higher Education Services Corporation, 99 Washington Avenue, Room 1325, Albany, New York 12255, (518) 474-5592, email: regcomments@hesc.ny.gov

Regulatory Impact Statement

Statutory authority:

The New York State Higher Education Services Corporation's ("HESC") statutory authority to promulgate regulations and administer the New York State Masters-in-Education Teacher Incentive Scholarship Program ("Program") is codified within Article 14 of the Education Law. In particular, Subpart A of Chapter 56 of the Laws of 2015 created the Program by adding a new section 669-f to the Education Law. Subdivision 6 of section 669-f of the Education Law authorizes HESC to promulgate emergency regulations for the purpose of administering this Program.

Pursuant to Education Law § 652(2), HESC was established for the purpose of improving the post-secondary educational opportunities of eligible students through the centralized administration of New York State financial aid programs and coordinating the State's administrative effort in student financial aid programs with those of other levels of government.

In addition, Education Law § 653(9) empowers HESC's Board of Trustees to perform such other acts as may be necessary or appropriate to carry out the objectives and purposes of the corporation including the promulgation of rules and regulations.

HESC's President is authorized, under Education Law § 655(4), to propose rules and regulations, subject to approval by the Board of Trustees, governing, among other things, the application for and the granting and administration of student aid and loan programs, the repayment of loans or the guarantee of loans made by HESC; and administrative functions in support of state student aid programs. Also, consistent with Educa-

tion Law § 655(9), HESC's President is authorized to receive assistance from any Division, Department or Agency of the State in order to properly carry out his or her powers, duties and functions. Finally, Education Law § 655(12) provides HESC's President with the authority to perform such other acts as may be necessary or appropriate to carry out effectively the general objects and purposes of HESC.

Legislative objectives:

The Education Law was amended to add a new section 669-f to create the "New York State Masters-in-Education Teacher Incentive Scholarship Program" (Program). The objective of this Program is to incent New York's highest-achieving undergraduate students to pursue teaching as a profession.

Needs and benefits:

According to a recent Wall Street Journal article, many experts call teacher quality the most important school-based factor affecting learning. Studies underscore the impact of highly effective teachers and the need to put them in classrooms with struggling students to help them catch up. To improve teacher quality, New York State has significantly raised the bar by modifying the three required exams and adding the Educative Teacher Performance Assessment, known as edTPA, as part of the licensing requirement for all teachers. To supplement this effort, this Program aims to incentivize top undergraduate students to pursue their master's degree in New York State and teach in public elementary and secondary schools (including charter schools) across the State.

The Program provides for annual tuition awards to students enrolled full-time, at a New York State public institution of higher education, in a master's degree in education program leading to a career as a classroom teacher in elementary or secondary education. Eligible recipients may receive annual awards for not more than two academic years of full-time graduate study. The maximum amount of the award is equal to the annual tuition charged to New York State resident students attending a graduate program full-time at the State University of New York (SUNY). Payments will be made directly to schools on behalf of students upon certification of their successful completion of the academic term.

Students receiving a New York State Masters-in-Education Teacher Incentive Scholarship Program award must sign a service agreement and agree to teach in the classroom at a New York State public elementary or secondary school, which includes charter schools, for five years following completion of their master's degree. Recipients who do not fulfill their service obligation will have the value of their awards converted to a student loan and be responsible for interest.

Costs:

a. There are no application fees, processing fees, or other costs to the applicants of this Program.

b. It is anticipated that there will be no costs to the agency for the implementation of, or continuing compliance with this rule.

c. The maximum cost of the Program to the State is $1.5 million in the first year, based upon budget estimates.

d. It is anticipated that there will be no costs to Local Governments for the implementation of, or continuing compliance with, this rule.

e. The source of the cost data in (c) above is derived from the New York State Division of the Budget.

Local government mandates:

No program, service, duty or responsibility will be imposed by this rule upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

This proposal will require applicants to file an electronic application, together with supporting documentation, for eligibility. Each year recipients will file an electronic request for payment together with supporting documentation for up to two years of award payments. Recipients are required to sign a contract for services in exchange for an award. Recipients must submit annual status reports until a final disposition is reached in accordance with the written contract.

Duplication:

No relevant rules or other relevant requirements duplicating, overlapping, or conflicting with this rule were identified.

Alternatives:

The proposed regulation is the result of HESC's outreach efforts to the State Education Department, the State University of New York and the City University of New York with regard to this Program. Several alternatives were considered in the drafting of this regulation. For example, several alternatives were considered in defining terms used in the regulation as well as the administration of the Program. Given the statutory language as set forth in section 679-g of the Education Law, a "no action" alternative was not an option.

Federal standards:

This proposal does not exceed any minimum standards of the Federal Government and efforts were made to align it with similar federal subject areas as evidenced by the adoption of the federal undergraduate unsubsidized Stafford loan rate in the event that the award is converted to a student loan.

Compliance schedule:

The agency will be able to comply with the regulation immediately upon its adoption.

Regulatory Flexibility Analysis

This statement is being submitted pursuant to subdivision (3) of section 202-b of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation's ("HESC") Emergency Rule Making, seeking to add a new section 2201.17 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will not impose an adverse economic impact on small businesses or local governments. HESC finds that this rule will not impose any compliance requirement or adverse economic impact on small businesses or local governments. Rather, it has potential positive economic impacts inasmuch as it implements a statutory student financial aid program that provides tuition benefits to students attending a New York State public institution of higher education who pursue their master's degree in an education program leading to a career as a teacher in public elementary or secondary education. Students will be rewarded for remaining and working in New York, which will provide an economic benefit to the State's small businesses and local governments as well.

Rural Area Flexibility Analysis

This statement is being submitted pursuant to subdivision (4) of section 202-bb of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation's Emergency Rule Making, seeking to add a new section 2201.17 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will not impose an adverse impact on rural areas. Rather, it has potential positive impacts inasmuch as it implements a statutory student financial aid program that provides tuition benefits to students attending a New York State public institution of higher education who pursue their master's degree in an education program leading to a career as a teacher in public elementary or secondary education. Students will be rewarded for remaining and working in New York, which benefits rural areas around the State as well.

This agency finds that this rule will not impose any reporting, record keeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

This statement is being submitted pursuant to subdivision (2) of section 201-a of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation's Emergency Rule Making seeking to add a new section 2201.17 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will not have any negative impact on jobs or employment opportunities. Rather, it has potential positive economic impacts inasmuch as it implements a statutory student financial aid program that provides tuition benefits to students attending a New York State public institution of higher education who pursue their master's degree in an education program leading to a career as a teacher in public elementary or secondary education. Students will be rewarded for remaining and working in New York, which will benefit the State as well.

EMERGENCY RULE MAKING

NYS Part-Time Scholarship (PTS) Award Program

I.D. No. ESC-52-18-00003-E
Filing No. 1137
Filing Date: 2018-12-10
Effective Date: 2018-12-10

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

Action taken: Addition of section 2201.20 to Title 8 NYCRR.

Statutory authority: Education Law, sections 653, 655 and 667-c-1

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

Specific reasons underlying the finding of necessity: This statement is being submitted pursuant to subdivision (6) of section 202 of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation's (HESC) Emergency Rule Making seek-

ing to add a new section 2201.20 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

This regulation implements a statutory student financial aid program providing for awards to be made to students beginning with the 2017-18 academic year, which generally starts in August. Emergency adoption is necessary to avoid an adverse impact on the processing of awards to eligible scholarship applicants. The statute provides for tuition benefits to college-going students pursuing their undergraduate studies at a community college at the State University of New York or the City University of New York. Decisions on applications for student financial aid programs are customarily made prior to the beginning of the term. Therefore, it is critical that the terms of the Program as provided in the regulation be effective immediately in order for HESC to begin processing scholarship applications. To accomplish this mandate, the statute further provides for HESC to promulgate emergency regulations to implement the Program. For these reasons, compliance with section 202(1) of the State Administrative Procedure Act would be contrary to the public interest.

Subject: NYS Part-time Scholarship (PTS) Award Program.

Purpose: To implement the NYS Part-time Scholarship (PTS) Award Program.

Text of emergency rule: New section 2201.20 is added to Title 8 of the New York Code, Rules and Regulations to read as follows:

Section 2201.20 New York State Part-time Scholarship (PTS) Award Program.

(a) Definitions. As used in Education Law, section 667-c-1 and this section, the following terms shall have the following meanings:

(1) Good academic standing shall mean having a minimum cumulative grade point average of 2.0.

(2) Interruption of study shall mean a temporary period of leave for a definitive length of time due to circumstances as determined by the corporation, including, but not limited to, death of a family member, medical leave, military service, service in the Peace Corps or parental leave.

(3) Program shall mean the New York State Part-time Scholarship (PTS) Award Program codified in Education Law, section 667-c-1.

(b) Eligibility. An applicant must satisfy the requirements of Education Law, section 667-c-1 and the general eligibility requirements provided in Education Law, section 661.

(c) Administration.

(1) Applicants for an award shall apply for program eligibility at such times, on forms and in a manner prescribed by the corporation. The corporation may require applicants to provide additional documentation evidencing eligibility.

(2) For purposes of determining priority, financial need shall be established based on the federal expected family contribution reflected on the applicant's federal student aid report, with the lowest expected family contribution evidencing the greatest financial need.

(3) Recipients of an award shall:

(i) request payment annually at such times, on forms and in a manner specified by the corporation;

(ii) provide any information necessary for the corporation to determine compliance with the program's requirements.

(4) The corporation shall maintain data relating to the performance of award recipients including, but not limited to, degree completion rates. All such data shall be deemed confidential and the corporation shall only disclose aggregate data unless otherwise required by law.

(d) Awards.

(1) The amount of the award shall be determined in accordance with section 667-c-1 of the education law.

(2) A recipient of an award must remain in good academic standing, as defined in this section, and remain continuously enrolled (excluding summer and winter terms) to be eligible for payment of future awards, excluding any allowable interruption of study.

(3) Disbursements shall be made each term to institutions, on behalf of recipients, within a reasonable time after verification and certification by the institution of the recipient's grade point average and other eligibility requirements.

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 March 9, 2019.

Text of rule and any required statements and analyses may be obtained from: Cheryl B. Fisher, NYS Higher Education Services Corporation, 99 Washington Avenue, Room 1325, Albany, New York 12255, (518) 474-5592, email: regcomments@hesc.ny.gov

Regulatory Impact Statement

Statutory authority:

The New York State Higher Education Services Corporation's (HESC) statutory authority to promulgate regulations and administer the NYS Part-time Scholarship (PTS) Award Program (Program) is codified within Article 14 of the Education Law. In particular, Part KKK of Chapter 59 of the Laws of 2017 created the Program by adding a new section 667-c-1 to the Education Law. Subdivision 6 of section 667-c-1 of the Education Law authorizes HESC to promulgate emergency regulations for the purpose of administering this Program.

Pursuant to Education Law § 652(2), HESC was established for the purpose of improving the post-secondary educational opportunities of eligible students through the centralized administration of New York State financial aid programs and coordinating the State's administrative effort in student financial aid programs with those of other levels of government.

In addition, Education Law § 653(9) empowers HESC's Board of Trustees to perform such other acts as may be necessary or appropriate to carry out the objects and purposes of the corporation including the promulgation of rules and regulations.

HESC's President is authorized, under Education Law § 655(4), to propose rules and regulations, subject to approval by the Board of Trustees, governing, among other things, the application for and the granting and administration of student aid and loan programs, the repayment of loans or the guarantee of loans made by HESC, and administrative functions in support of state student aid programs. Also, consistent with Education Law § 655(9), HESC's President is authorized to receive assistance from any Division, Department or Agency of the State in order to properly carry out his or her powers, duties and functions. Finally, Education Law § 655(12) provides HESC's President with the authority to perform such other acts as may be necessary or appropriate to carry out effectively the general objects and purposes of HESC.

Legislative objectives:

The Education Law was amended to add a new section 667-c-1 to create the Program, which is aimed at reducing tuition expenses for students who attend a State University of New York (SUNY) or City University of New York (CUNY) community college.

Needs and benefits:

Many studies have underscored the necessity of a college degree in today's global economy. The Center on Education and the Workforce (CEW) at Georgetown University found that by 2020, 65 percent of all jobs will require some form of postsecondary education or training, compared to 59 percent of jobs in 2010. The CEW report finds that having a skilled workforce is critical if the United States is to "remain competitive, attract the right type of industry, and engage the right type of talent in a knowledge-based and innovative economy." At the current pace, the United States will fall short of its skilled workforce needs by 5 million workers. Furthermore, the disparity in earning potential between high school graduates and college graduates has never been greater, nor has the student loan debt – which stands at $1.3 trillion – being carried by those who have pursued a postsecondary education.

Recognizing the growing need for workers with postsecondary education and training, the wage earnings benefits for those with training beyond a high school diploma, the rapidly rising college costs and mounting student loan debt, this Program awards students attending a public community college up to $1,500 per semester to offset their tuition costs. To be eligible for a Program award, students must be enrolled in at least six but less than 12 credits per semester at a SUNY or CUNY community college and maintain a grade point average of 2.0. Payments will be made directly to colleges on behalf of students upon certification of their eligibility at the end of the academic term.

Costs:

a. The estimated cost to the agency for the implementation of, or continuing compliance with this rule is $719,344.

b. The maximum cost of the program to the State is $3,129,000 in the first year based upon budget estimates.

d. It is anticipated that there will be no costs to Local Governments for the implementation of, or continuing compliance with, this rule.

e. The source of the cost data in (b) above is derived from the New York State Division of the Budget.

Local government mandates:

No program, service, duty or responsibility will be imposed by this rule upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

This proposal will require applicants to file an electronic application together with supporting documentation for each year they wish to receive an award up to and including two consecutive years of eligibility.

Duplication:

No relevant rules or other relevant requirements duplicating, overlapping, or conflicting with this rule were identified.

Alternatives:

The proposed regulation is the result of HESC's outreach efforts to financial aid professionals at SUNY and CUNY with regard to this Program. Several alternatives were considered in the drafting of this regulation, such as the definition of financial need. Given the statutory

language as set forth in section 667-c-1 of the Education Law, a "no action" alternative was not an option.

Federal standards:

This proposal does not exceed any minimum standards of the Federal Government.

Compliance schedule:

The agency will be able to comply with the regulation immediately upon its adoption.

Regulatory Flexibility Analysis

This statement is being submitted pursuant to subdivision (3) of section 202-b of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation's (HESC) Emergency Rule Making, seeking to add a new section 2201.20 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

This rule implements a statutory student financial aid program that provides tuition benefits to college students who pursue their undergraduate studies at a community college at the State University of New York or City University of the State of New York. HESC finds that this rule will not impose any compliance requirement or adverse economic impact on small businesses or local governments. Rather, it has potential positive impacts by providing community college students with additional tuition award benefits. Providing students with direct financial assistance will encourage them to attend college in New York State, which will provide an economic benefit to the State's small businesses and local governments as well.

Rural Area Flexibility Analysis

This statement is being submitted pursuant to subdivision (4) of section 202-bb of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation's Emergency Rule Making, seeking to add a new section 2201.20 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will not impose an adverse impact on rural areas. Rather, it has potential positive impacts by providing community college students with additional tuition award benefits. Providing students with direct financial assistance will encourage them to attend college in New York State, which benefits rural areas around the State as well.

This agency finds that this rule will not impose any reporting, record keeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

This statement is being submitted pursuant to subdivision (2) of section 201-a of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation's Emergency Rule Making seeking to add a new section 2201.20 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will not have any negative impact on jobs or employment opportunities. Rather, it has potential positive impacts by providing community college students with additional tuition award benefits. Providing students with direct financial assistance will encourage them to attend college in New York State and possibly seek employment opportunities in the State as well, which will benefit the State.

Niagara Frontier Transportation Authority

NOTICE OF ADOPTION

Transportation Network Operators ("TNCs") Providing Commercial Ground Transportation Services at NFTA Airports

I.D. No. NFT-37-18-00020-A

Filing No. 1130

Filing Date: 2018-12-05

Effective Date: 2018-12-26

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

Action taken: Amendment of Part 1160 of Title 21 NYCRR.

Statutory authority: Public Authorities Law, section 1299-e(5), (14); Vehicle and Traffic Law, section 1700(4)

Subject: Transportation Network Operators ("TNCs") providing commercial ground transportation services at NFTA airports.

Purpose: To provide cohesive operating procedures and practices for TNCs operating at NFTA airports.

Text or summary was published in the September 12, 2018 issue of the Register, I.D. No. NFT-37-18-00020-P.

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

Text of rule and any required statements and analyses may be obtained from: Mary E. Perla, Esq., Niagara Frontier Transportation Authority, 4200 Genesee Street, Buffalo, New York 14225, (716) 630-6034, email: Mary_Perla@nfta.com

Initial Review of Rule

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

Assessment of Public Comment

On October 23, 2018, Rasier-NY, LLC, an affiliate of Uber Technologies, Inc. ("Rasier") submitted comments to the Niagara Frontier Transportation Authority ("NFTA") concerning the proposed amendment to 21 NYCRR Part 1160 ("Regulations") carried out through the rulemaking process. The proposed amendment relates to Transportation Network Company ("TNC") operators who provide commercial ground transportation services at the NFTA airports ("Airports"). The Regulations as proposed have been promulgated by the NFTA and are contained in NFT-37-18-00020-P as published in the State Register. A summary of Rasier's comments and the NFTA's analysis of the same follow.

Section 1160.22(b) Operations

A. Section 1160.22(b)(5)

Summary of Comment: The proposed Regulations under Section 1160.22(b)(5) require that a "TNC Operator must provide the NFTA with the unique identifier for each TNC Driver that operates on the Airports." Rasier notes that the proposed Regulations codify the existing framework as described in the amendment to an agreement between Rasier and the NFTA dated June 28, 2018 ("Agreement") and Rasier supports that effort. Moreover, Rasier recognizes that by using the state-assigned numbers for TNC Drivers would satisfy the NTFA's needs while also avoiding administrative burdens as well as potential confusion with new numbers.

Response: The NFTA recognizes that while Rasier appears to support this section of the Regulations generally, Rasier appears to not support the creation of an additional identifier for TNC Drivers and recommends the use of the state-assigned number or license plate. Nothing in the Regulations necessarily requires the assignment of a new identifying number. Rather, the Regulations require that each TNC Operator provide the NFTA with a unique identifier for each TNC Driver operating on the Airports. The use of the TNC Driver's license plate, even just the four digits of the license plate, would not be sufficiently unique. Additionally, use of the license plate in any form would be problematic because another driver could use the same car with the same license plate. The point of the identifying number is to ensure that it is exclusive to a single TNC Driver. Doing so ensures compliance with the Regulations as well as the safety and security of those traveling to and from the Airport. While the NFTA does not want to create administrative burdens or confusion, relying on license plate numbers in any form would not be compliant with the Regulations. Since the unique identifier is to be used for the NFTA's purposes, there is no genuine risk of confusion. Furthermore, there is no risk to privacy or proprietary information by using a unique identifier that is separate from a driver's license plate number. This is all the more because the Regulations are consistent with the Agreement Rasier has been operating under since June 29, 2018 ("Agreement"). Having considered Rasier's comments, the Regulations are not overly burdensome or unworkable. The NFTA determines that no revisions are necessary to this section of the Regulations.

B. Section 1160.22(b)(7)

Summary of Comment: The proposed Regulations under Section 1160.22(b)(7) require TNC vehicles' drop-off and pick-up trips to be tracked. Rasier notes that NFTA's interest in providing real-time data is not unusual and the technological solutions described in this section of the Regulations have existed for some time. Though, Rasier asks the NFTA to adopt broader "agreed upon field" language for the ultimate reporting Requirements in place of the tracking triggers that are described in this section of the Regulations. Rasier contends that the "agreed upon field" language as it proposes would allow for greater flexibility to establish and periodically adjust reporting requirements.

Response: As a preliminary matter, Rasier requests the NFTA use broader "agreed upon field" language, but fails to provide any proposed language. Moreover, Raiser does not explain why broader language would be necessary. All Raiser notes is that broader language would allow for greater flexibility, but Raiser does not articulate how or why greater flex-

ibility is beneficial. All Raiser notes is that broader language would allow for greater flexibility and simply suggests that future changes in technology merit such flexibility in the proposed Regulations.

Raiser acknowledges that the NFTA's tracking as provided for in this section of the Regulations is not unusual. Indeed, the purpose of the tracking is to ensure compliance with the Regulations. For instance, tracking is necessary to ensure a TNC Driver is not improperly seeking rides by circling the Airport or operating in "black out" zones. The tracking triggers provided for in this section of the Regulations are vital to safeguarding the Airport and carrying out the purposes of the Regulations, which allows for uniformity and fairness among all TNC Operators.

Concerning the comment about flexibility, any changes in technology, to the extent those changes would be relevant to this section of the Regulations, can be evaluated at such an appropriate time. The contention raised by Rasier is premature and is more appropriate to be addressed if and when any such technological changes occur. The NFTA finds no need to adjust the benchmarks for reporting and finds that more flexibility would hinder the purpose and intent of the Regulations. Requiring specific information and set points in time ensures compliance with the Regulations.

Having considered Rasier's comments, the Regulations are not overly burdensome or unworkable. This is all the more because the Regulations are consistent with the Agreement Rasier has been operating under since June 29, 2018. The NFTA determines that no revisions are necessary to this section of the Regulations.

Section 1160.22(c) Reporting and Recordkeeping

Summary of Comment: The proposed Regulations under Section 1160.22(c) require monthly reporting, detailed books and records, the TNC to allow the NFTA to audit and examine its books and records related to its operations at the Airport, and insurance. Raiser notes that the NFTA's record keeping requirements are robust and are workable with Raiser's systems. However, Raiser contends that the specifics of this section of the Regulations hinder the flexibility and therefore asks the NFTA to adopt broader "agreed upon field" language for this section.

Response: As a preliminary matter, Rasier requests the NFTA use broader "agreed upon field" language, but fails to provide any proposed language. Moreover, Raiser does not explain why broader language would be necessary. All Raiser notes is that broader language would allow for greater flexibility and simply suggests that future changes in technology merit such flexibility in the proposed Regulations.

The recordkeeping requirements of this section of the Regulation are necessary for carrying out the Regulations and ensuring compliance. Raiser admits that the requirements are workable. Any changes in technology, to the extent those changes would be relevant to this section of the Regulations, can be evaluated at such an appropriate time. The contention raised by Rasier is premature and is more appropriate to be addressed if and when any such technological changes occur.

Having considered Rasier's comments, the Regulations are not overly burdensome or unworkable. This is all the more because the Regulations are consistent with the Agreement Rasier has been operating under since June 29, 2018. The NFTA determines that no revisions are necessary to this section of the Regulations.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Standby Service Rates and Buyback Service Rates

I.D. No. PSC-52-18-00006-P

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

Proposed Action: The Commission is considering the recommendations modifying and improving Standby Service Rates and Buyback Service Rates described in the December 12, 2018 Staff Whitepaper.

Statutory authority: Public Service Law, sections 5(1)(b), (2), 65(1), (2), (3), 66(2) and (5)

Subject: Standby Service Rates and Buyback Service Rates.

Purpose: To ensure just and reasonable rates, including compensation, for distributed energy resources.

Substance of proposed rule: The Public Service Commission is considering the recommendations in the Staff Whitepaper on Standby and Buyback Service Rate Design and Residential Voluntary Demand Rates (the Whitepaper), filed by the Department of Public Service Staff (Staff) on December 12, 2018.

The Whitepaper recommends reforms to Standby and Buyback Rates including: (a) the development of voluntary, opt-in Standby Rates for small customers at all utilities; (b) expansion of eligibility for opt-in Standby Rates to customers without onsite generation; (c) utility performance of Allocated Embedded Cost of Service studies to update Standby Rate elements; (d) increased granularity of As-Used Demand Charges in Standby Rates; (e) modification of the Reliability Credit to avoid double compensation; (f) expansion of the campus multi-party offset tariff option; (g) addition of Customer and Contract Demand Charges to Buyback Rates at utilities that don't currently have them; (h) increased consistency of Buyback Rates across utilities; and (i) adoption of a proposed modification to ConEd's Buyback Contract Demand Charge.

The full text of the Whitepaper and the full record of the proceeding may be reviewed online at the Department of Public Service web page: www.dps.ny.gov. The Commission may adopt, reject, or modify, in whole or in part, the action proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: john.pitucci@dps.ny.gov

Data, views or arguments may be submitted to: Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(15-E-0751SP18)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Transfer of Certain Street Lighting Facilities

I.D. No. PSC-52-18-00007-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 a petition filed by Rochester Gas and Electric Corporation (RG&E) for authority to transfer its street lighting facilities located in the City of Canandaigua, to the City of Canandaigua.

Statutory authority: Public Service Law, section 70

Subject: Transfer of certain street lighting facilities.

Purpose: To consider the transfer of certain street lighting facilities located in the City of Canandaigua.

Substance of proposed rule: The Public Service Commission (Commission) is considering a petition filed on October 23, 2018 by Rochester Gas and Electric Corporation (RG&E), requesting authority to sell certain street lighting facilities located in the City of Canandaigua, New York to the City of Canandaigua.

The original total cost of the lighting facilities is approximately $632,778 and the netbook value is $95,359, based on plant records as of January 31, 2018. The total purchase price for the facilities is approximately $196,134.

The full text of the petition and the full record of the proceeding may be viewed online at the Department of Public Service web page: www.dps.ny.gov. The Commission may adopt, reject, or modify, in whole or in part, the action proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: john.pitucci@dps.ny.gov

Data, views or arguments may be submitted to: Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement
Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(18-E-0668SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Minor Rate Filing

I.D. No. PSC-52-18-00008-P

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

Proposed Action: The Commission is considering proposed tariff amendments filed by Hamilton Municipal Utilities Commission, to P.S.C. No. 1, to increase its annual electric revenues by approximately $213,484 or 7.0%.

Statutory authority: Public Service Law, sections 65 and 66

Subject: Minor rate filing.

Purpose: To ensure safe and adequate service at just and reasonable rates charged to customers without undue preferences.

Substance of proposed rule: The Commission is considering a proposal, filed by Hamilton Municipal Utilities Commission (Hamilton) on November 20, 2018, to amend its electric tariff, P.S.C. No. 1 — Electricity, to increase its total annual electric revenues by approximately $213,484, or 7.0%.

Under the proposal, the monthly bill of a residential customer using approximately 2,058 kWh of electricity per month during the winter would increase from $102.59 to $106.01 or 6.6%. For a small commercial customer with an annual average usage of 1,624 kWh per month the monthly bill would increase from $87.19 to $93.65 or 7.4%. Hamilton states the need for the increase is driven by increased labor costs, health insurance, and depreciation expense on new investments, since rates were last set in 2013.

In addition, Hamilton proposes a Revenue Decoupling Mechanism, which would reconcile actual billed delivery revenues to delivery revenue targets that are established by the Commission in this rate proceeding. The proposed amendments have an effective date of June 1, 2019.

The full text of the proposal and the full record of the proceeding may be reviewed online at the Department of Public Service web page: www.dps.ny.gov. The Commission may adopt, reject or modify, in whole or in part, the action proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: john.pitucci@dps.ny.gov

Data, views or arguments may be submitted to: Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement
Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(18-E-0722SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Compensation of Distributed Energy Resources

I.D. No. PSC-52-18-00009-P

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

Proposed Action: The Commission is considering the recommendations and options for Capacity Value Compensation under the Value Stack discussed in the December 14, 2018 Staff Whitepaper.

Statutory authority: Public Service Law, sections 5(1)(b), (2), 65(1), (2), (3), 66(2) and (5)

Subject: Compensation of distributed energy resources.

Purpose: To ensure just and reasonable rates, including compensation, for distributed energy resources.

Substance of proposed rule: The Public Service Commission is considering the recommendations in the Staff Whitepaper Regarding Capacity Value Compensation (the Whitepaper), filed by the Department of Public Service Staff (Staff) on December 14, 2018.

The Whitepaper recommends modifications to the calculation of the Capacity Value portion of Value Stack compensation. The Value Stack is used to calculate compensation to eligible distributed energy resources (DERs) and is based on the calculable benefits the DERs create. The Capacity Value compensates DERs for the benefit they create by offsetting the need for utility capacity purchases.

The full text of the Whitepaper and the full record of the proceeding may be reviewed online at the Department of Public Service web page: www.dps.ny.gov. The Commission may adopt, reject, or modify, in whole or in part, the action proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: john.pitucci@dps.ny.gov

Data, views or arguments may be submitted to: Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement
Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(15-E-0751SP20)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Installed Reserve Margin

I.D. No. PSC-52-18-00010-P

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

Proposed Action: The Commission is considering an Installed Reserve Margin of 17.0% established by the New York State Reliability Council for the Capability Year beginning May 1, 2019, and ending April 30, 2020.

Statutory authority: Public Service Law, sections 4(1), 5(2), 65(1), 66(1), (2), (4) and (5)

Subject: Installed Reserve Margin.

Purpose: To ensure adequate levels of Installed Capacity.

Substance of proposed rule: The Public Service Commission (Commission) is considering an Installed Reserve Margin (IRM) of 17.0% established by the New York State Reliability Council's Executive Committee on December 7, 2018, for the Capability Year beginning May 1, 2019, and ending April 30, 2020.

The IRM is based on the Technical Study Report dated December 11, 2018 and entitled "New York Control Area Installed Capacity Requirement for the Period May 2019 to April 2020." (Report).

The full text of the report is available on the internet at: http://www.nysrc.org/NYSRC_NYCA_ICR_Reports.html and the full record of the proceeding may be reviewed online at the Department of Public Service web page: www.dps.ny.gov. The Commission may adopt, reject, or modify, in whole or in part, the proposed action, and may resolve other related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: john.pitucci@dps.ny.gov

Data, views or arguments may be submitted to: Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement
Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(07-E-0088SP13)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

LED Street Lighting

I.D. No. PSC-52-18-00011-P

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

Proposed Action: The Commission is considering a proposal filed by Central Hudson Gas & Electric Corporation (Central Hudson) to modify its LED lighting options in its area lighting and street lighting service classifications in P.S.C. No. 15 — Electricity.

Statutory authority: Public Service Law, section 66(12)(b)

Subject: LED Street Lighting.

Purpose: To provide customers with more efficient, lower cost LED street lighting options.

Substance of proposed rule: The Public Service Commission (Commission) is considering a proposal filed by Central Hudson Gas & Electric Corporation (Central Hudson or the Company) to modify its electric tariff schedule, P.S.C. No. 15.

Central Hudson proposes to provide more comprehensive Light Emitting Diode (LED) options under Service Classification (SC) No. 5 – Area Lighting Service and under Rate A (Company owned and maintained) of SC No. 8 – Public Street and Highway Lighting.

The Company proposes that all SC No. 5 and SC No. 8 non-LED fixture offerings be supplemented with an LED equivalent fixture option where available including cobra head, specialty, post top, and decorative fixtures. The non-LED fixtures will be classified as non-standard and not replaced upon failure. The Company states the enhanced tariff options will satisfy municipal, residential and non-residential customer demand for higher efficiency, lower cost LED lighting. The proposed amendments have an effective date of April 1, 2019.

The full text of the proposal and the full record of the proceeding may be reviewed online at the Department of Public Service web page: www.dps.ny.gov. The Commission may adopt, reject or modify, in whole or in part, the action proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: john.pitucci@dps.ny.gov

Data, views or arguments may be submitted to: Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(18-E-0732SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Minor Rate Filing

I.D. No. PSC-52-18-00012-P

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

Proposed Action: The Commission is considering proposed tariff amendments, filed by Valley Energy, Inc., to P.S.C. No. 1 — Gas, to increase its total annual gas revenues by approximately $300,000, or 18.9%.

Statutory authority: Public Service Law, sections 65 and 66

Subject: Minor rate filing.

Purpose: To ensure safe and adequate service at just and reasonable rates charged to customers without undue preferences.

Substance of proposed rule: The Commission is considering a proposal, filed by Valley Energy Inc. (Valley Energy) on November 28, 2018, to amend its gas tariff, P.S.C. No. 1 – Gas, to increase its total annual gas revenues by approximately $300,000, or 18.9%.

Under the proposal, the monthly service charge for Service Classification (S..C). No. 1 – Residential, Commercial and Industrial would increase from $7.62 to $10.18 per month. Valley Energy proposes provisions and rates designed to increase the monthly bill of a S.C. No. 1 customer using approximately 82 ccf of gas per month from $26.72 to $35.71 or approximately 33.6% for Distribution; and 21.1% on a total bill percentage basis. Valley Energy states the need for the increase is driven by the increased operating and maintenance costs, additional regulatory requirements, and increased staff needs since rates were last set in 2005. The proposed amendments have an effective date of April 1, 2019.

The full text of the proposal and the full record of the proceeding may be reviewed online at the Department of Public Service web page: www.dps.ny.gov. The Commission may adopt, reject or modify, in whole or in part, the action proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: john.pitucci@dps.ny.gov

Data, views or arguments may be submitted to: Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(18-G-0730SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Compensation of Distributed Energy Resources

I.D. No. PSC-52-18-00013-P

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

Proposed Action: The Commission is considering the recommendations and options for future Value Stack compensation discussed in the December 12, 2018 Staff Whitepaper.

Statutory authority: Public Service Law, sections 5(1)(b), (2), 65(1), (2), (3), 66(2) and (5)

Subject: Compensation of distributed energy resources.

Purpose: To ensure just and reasonable rates, including compensation, for distributed energy resources.

Substance of proposed rule: The Public Service Commission is considering the recommendations in the Staff Whitepaper Regarding Future Value Stack Compensation (the Whitepaper), filed by the Department of Public Service Staff (Staff) on December 12, 2018.

The Whitepaper recommends modifications to the calculation of the Demand Reduction Value portion of Value Stack compensation, as well as changes to the Market Transition Credit (MTC) portion of Value Stack compensation in several utility service territories. The Value Stack is used to calculate compensation to eligible distributed energy resources (DERs) and is based on the calculable benefits the DERs create, including distribution system values such as the Demand Reduction Value. The MTC is an adder to the Value Stack for eligible DERs to support the transition from net metering to the Value Stack and recognize that some benefits are not yet included in the Value Stack.

The full text of the Whitepaper and the full record of the proceeding may be reviewed online at the Department of Public Service web page: www.dps.ny.gov. The Commission may adopt, reject, or modify, in whole or in part, the action proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: john.pitucci@dps.ny.gov

Data, views or arguments may be submitted to: Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement
Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(15-E-0751SP19)

Department of State

NOTICE OF ADOPTION

New York State Uniform Fire Prevention and Building Code (the Uniform Code)

I.D. No. DOS-36-18-00008-A
Filing No. 1138
Filing Date: 2018-12-11
Effective Date: 2019-01-01

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

Action taken: Amendment of section 1219.1; and addition of Part 1229 to Title 19 NYCRR.

Statutory authority: Executive Law, sections 377 and 378

Subject: New York State Uniform Fire Prevention and Building Code (the Uniform Code).

Purpose: To amend the existing Uniform Code to add provisions for diaper changing stations in certain buildings.

Text or summary was published in the September 5, 2018 issue of the Register, I.D. No. DOS-36-18-00008-P.

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

Text of rule and any required statements and analyses may be obtained from: Gerard Hathaway, Department of State, 99 Washington Avenue, Suite 1160, Albany, NY 12231, (518) 474-4073, email: Gerard.Hathaway@dos.ny.gov

Additional matter required by statute: 1. EFFECTIVE DATE

Part LL of Chapter 58 of the Laws of 2018 adds subdivisions sixteen and seventeen to section 378 of the Executive Law, effective January 1, 2019. Part LL of Chapter 58 of the Laws of 2018 provides that the addition, amendment, and/or repeal of any rules or regulations by the Secretary of State and/or by the State Fire Prevention and Building Code Council (the Code Council) necessary for the implementation of said subdivisions sixteen and seventeen on the January 1, 2019 effective date are authorized and directed to be made and completed on or before such effective date.

This rule amends the New York State Uniform Fire Prevention and Building Code (the Uniform Code) to include provisions addressing subdivisions sixteen and seventeen of section 378 of the Executive Law.

Section 378 (15) of the Executive Law provides that, except as otherwise provided by statute, no change to the Uniform Code shall become effective until at least 90 days after the date on which notice of such change has been published in the State Register, unless the Code Council finds that an earlier effective date is necessary to protect health, safety, and security.

This Notice of Adoption will be published prior to January 1, 2019. However, January 1, 2019 will be less than 90 days after the date of publication of this Notice of Adoption.

When the Code Council adopted this rule, the Code Council found, pursuant to section 378 (15) of the Executive Law, that making the changes to the Uniform Code made by this rule effective on January 1, 2019, rather than 90 days after publication of the Notice of Adoption of this rule, is necessary to protect health, safety, and security. (Note: Effective January 1, 2019, section 378 [15] of the Executive Law will be renumbered as section 378 [18] of the Executive Law).

Therefore, this rule will become effective on January 1, 2019.

2. APPROVAL BY SECRETARY OF STATE

Pursuant to section 377 (1) of the Executive Law, the Secretary of State has reviewed the amendments to the New York State Uniform Fire Prevention and Building Code (the Uniform Code) made by this rule to insure that such amendments effectuate the purposes of Article 18 of the Executive Law; the Secretary of State is satisfied that the amendments to the Uniform Code made by this rule will effectuate such purposes; and the Secretary of State has approved the amendments to the Uniform Code made by this rule.

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

Assessment of Public Comment

This rule amends the New York State Uniform Fire Prevention and Building Code (the Uniform Code) by adding new provisions requiring the installation of diaper changing stations in (1) all newly constructed buildings that have one or more areas classified as Assembly Group A occupancies or Mercantile Group M occupancies and (2) all existing buildings that have one or more areas classified as Assembly Group A occupancies or Mercantile Group M occupancies and undergo a substantial renovation.

The Notice of Proposed Rule Making was published in the State Register on September 5, 2018. A public hearing was held on November 8, 2018. The public comment period ended on November 13, 2018. The Department of State (DOS) received the comments described below. The following assessment contains a summary of the comments submitted and an analysis of any issues raised by such comments.

No changes to the proposed rule have been made because of the public comments described below.

COMMENT 1: The commenter notes that this rule will (1) define the type of "substantial renovation" that will trigger the requirement to install changing stations in an existing building, and (2) require changing stations to comply with ICC A117.1-09. The commenter asks if the rule's requirements will "correlate with the accessibility provisions and exceptions" in the International Existing Building Code (the IEBC).

The commenter suggests that the requirements for providing diaper changing stations in existing buildings should be "relative to the requirements for providing handicap accessible toilet and bathing facilities, in accordance with the IEBC. . . ."

The commenter also asks if the a "substantial renovation" as defined in the rule will be an Alteration – Level 3 under the IEBC, and "how will this work with the Prescriptive and Performance Compliance Methods?"

RESPONSE TO COMMENT 1: This rule will implement the provisions of subdivisions sixteen and seventeen of section 378 of the Executive Law, as added by Chapter 58 of the Laws of 2018. The requirements imposed by this rule are in addition to the requirements of the IEBC, and the requirements imposed by the IEBC are in addition to the requirements imposed by this rule. The requirements imposed by this rule are not required to "correlate with" the accessibility provisions and exceptions in the IEBC.

This rule defines "substantial renovation" as work to an existing building that falls in any one or more of the following five categories:

(1) construction or installation of a new public family or assisted-use toilet room or a new unisex public toilet room;

(2) construction or installation of a new male public toilet room and a new female public toilet room on the same floor level;

(3) a level 2 alteration of an existing public family or assisted-use toilet room, an existing unisex public toilet room, or an existing male public toilet room and an existing female public toilet room that are both on the same floor level;

(4) a level 3 alteration of an existing building where the work area includes an existing public family or assisted-use toilet room, an existing unisex public toilet room, or an existing male public toilet room and an existing female public toilet room that are both on the same floor level; and

(5) any other work that is a level 2 or level 3 alteration of an existing building and has a work area that includes at least 50 percent of the area of an Assembly Group A occupancy or Mercantile Group M occupancy.

This rule provides that an existing building that undergoes any such substantial renovation must be provided with safe, sanitary, and convenient diaper changing station(s). While this rule does provide that diaper changing stations installed pursuant to this rule must comply with the accessibility requirements specified in ICC A117.1, the fact that certain work may be subject to an exception to the IEBC's accessibility requirements does not mean that the same work will be exempt from the requirements imposed by this rule. An existing building that undergoes a substantial renovation must be provided with diaper changing stations without regard to whether the substantial renovation is or is not subject to the IEBC's provisions relating to the provision of handicap accessible toilet and bathing facilities, and without regard to whether the substantial renovation is or is not subject to any exception to the IEBC's provisions relating the provision of handicap accessible toilet and bathing facilities.

DOS does not agree that this rule's requirements for providing diaper changing stations in existing buildings should be "relative to the requirements for providing handicap accessible toilet and bathing facilities, in accordance with the IEBC."

However, this rule does have a feature that is similar to the "technically

feasible" provisions of IEBC Section 705. Specifically, in the case of a substantial renovation that falls in work in category "(5)" above, diaper changing stations must be provided only where the Assembly Group A occupancy or Mercantile Group M occupancy is served by existing public toilet room(s), and a diaper changing station can be provided in such existing public toilet room(s) without having to reconfigure the space therein or increase the floor area thereof.

In response to the commenter's final question, the term "substantial renovation" as defined in this rule includes the five categories of work described above, not all of which will be an "Alteration – Level 3" under the IEBC.

COMMENT 2: The commenter expresses support of this rule. Specifically, the commenter states support of requiring the installation of diaper changing stations, requiring signage to indicate the location of the diaper changing station, and requiring equal availability for both male and female occupants. The commenter also suggests adding provisions regarding the frequency with which diaper changing station should be cleaned.

RESPONSE TO COMMENT 2: DOS appreciates the support expressed for this rule. Regarding the suggestion that the rule specify the frequency with which stations must be cleaned, DOS points out that this rule provides, in new Section 1229-2.7 (Maintenance), that diaper changing stations installed in any building must be "maintained in a safe, sanitary, and working condition." DOS believes that this provision, which will require changing stations be maintained in a sanitary condition, is more practicable than a provision specifying the frequency with which the changing stations must be cleaned.

COMMENT 3: The commenter states that during an inspection of a previously installed diaper changing station, he observed that the changing station was left in the lowered position, which could cause an impediment to access to the rear grab rail. The commenter states that he understood that changing stations could be provided with "loaded hinges" to allow them to return to the wall, but that he was concerned that in the future there will be more and more situations in which the tables are left in the lowered position. The commenter asks if a building owner would be in violation of the "clear access" requirement if a changing station were left in the lowered position, or if the ability to move the table to the closed position would mean that there was no violation. The commenter also expresses concern that placing a changing station at the maximum height permitted by the applicable accessibility provisions (34 inches) may interfere with rear grab bars, which must be located at a height of 33 to 36 inches.

RESPONSE TO COMMENT 3: Regarding the commenter's statement about the placement of the diaper changing station in conflict with other accessible features, DOS notes that building owners and local code enforcement officers work together to make buildings accessible. Nothing currently in the Uniform Code or this rule prohibits diaper changing stations from being in accessible locations if the clearances and areas required by the Uniform Code can be satisfied.

Regarding the commenter's question about situations in which the tables are left in the lowered position, DOS points out that this rule provides, in new Section 1229-2.7 (Maintenance), that diaper changing stations installed in any building must be "maintained in a safe, sanitary, and working condition." This includes the operable parts of a diaper changing station. Therefore, a diaper changing station that is designed to fold out of the clear access area would need to be fully operational at all times. As long as the diaper changing station is maintained in a correctly functioning condition, a building owner is not responsible if a user fails to return a diaper changing station to its closed position.

COMMENT 4: DOS received a written comment from a town code enforcement officer. The commenter points out that a new convenience store in a service station will be required by the 2015 IBC to have restrooms for employees and/or customers, and the commenter expresses concern that the extra space that will be required in the restrooms to accommodate diaper changing stations will decrease sales space and will have a negative impact on small businesses in New York State. The commenter also expresses concern that owners of existing buildings who wish to perform a "substantial renovation" may simply fail to apply for a permit to avoid the need to install the changing stations that would be required by this rule. The commenter suggests adding exceptions to this rule. The commenter argues that "at the very least" the rule should set a minimum floor area that a service station retail store must exceed before it would be required to install changing stations.

RESPONSE TO COMMENT 4: The legislation to be implemented by this rule provides that the Uniform Code must include provisions requiring diaper changing stations available for use by both male and female occupants in all newly constructed buildings in the state that have one or more areas classified as Assembly Group A occupancies or mercantile group M occupancies. DOS believes that providing exceptions for any newly constructed building would not satisfy this statutory mandate.

The legislation to be implemented by this rule also provides that the Uniform Code must include provisions requiring diaper changing stations available for use by both male and female occupants in all existing buildings in the state that have one or more areas classified as Assembly Group A occupancies or Mercantile Group M occupancies and that undergo a substantial renovation. The legislation provides that the rule shall prescribe the type of renovation that constitutes a "substantial renovation" for the purpose of triggering the requirement in existing buildings. As discussed above in the Response to Comment 1, this rule does define the term "substantial renovation." That definition includes five categories of work, the first four of which involve the construction or installation of new public toilet rooms or a "level 2" alteration of existing public toilet rooms. The fifth category does not involve the construction or installation or a new public toilet room or a level 2 alteration of an existing public toilet room, but does require a "level 3" alteration of the existing building and, even then, does not require installation of changing stations unless they can be installed in existing public toilet room(s) without having to reconfigure the space therein or increase the floor area thereof. DOS believes that the definition of "substantial renovation" in this rule will minimize the impact this rule will have on existing buildings, while still achieving the Legislative purpose of providing diaper changing stations that can be used by both male and female occupants.

Workers' Compensation Board

NOTICE OF ADOPTION

Fees for Medical Testimony

I.D. No. WCB-23-18-00004-A
Filing No. 1140
Filing Date: 2018-12-11
Effective Date: 2019-04-01

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

Action taken: Amendment of sections 301.1, 301.3; repeal of sections 301.2, 301.4, 301.5 and 301.6 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117 and 141

Subject: Fees for Medical Testimony.

Purpose: To increase fees for medical testimony and eliminate fee reductions for multiple appearances.

Text or summary was published in the June 6, 2018 issue of the Register, I.D. No. WCB-23-18-00004-P.

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

Text of rule and any required statements and analyses may be obtained from: Heather MacMaster, Workers' Compensation Board, 328 State Street, Office of General Counsel, Schenectady, NY 12305, (518) 486-9564, email: regulations@wcb.ny.gov

Initial Review of Rule

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

Assessment of Public Comment

The Chair and Board received one written comment from a physician.

The comment suggested that the rules for the payment of testimony fees should be clarified in the regulation. It is the Board's policy that "within ten days of the completion of a witness's deposition, the party responsible for such witness's fees…shall remit payment of the fee to the witness" (Matter of Kinray Inc., 2018 NY Wrk Comp G1625504). If the witness believes that a fee in excess of that set in Part 301 is warranted, they may submit a request, within ten days of the deposition, to the Workers' Compensation Law Judge, who "will review such a request and issue a subsequent decision concerning whether an additional fee is warranted" (Id.). As the Board has a clear procedure for the payment of testimony fees, no change was made.

The comment also suggested that physicians receive half of the provider fee if a deposition is cancelled without at least forty-eight hours of notice. As there is no provision in the Workers' Compensation Law allowing for payment for cancelled depositions, no change was made.

NOTICE OF ADOPTION

Medical Fee Schedules

I.D. No. WCB-23-18-00005-A
Filing No. 1141
Filing Date: 2018-12-11
Effective Date: 2019-04-01

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

Action taken: Amendment of sections 329-1.3, 333.2, 343.2 and 348.2 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 13, 117 and 141

Subject: Medical Fee Schedules.

Purpose: Update the fees paid for medical treatment in workers' compensation claims.

Text of final rule: Section 329-1.3 of Title 12 NYCRR is hereby amended to read as follows:

(a) The medical fee schedule for medical, physical therapy and occupational therapy services shall be the Official New York Workers' Compensation Medical Fee Schedule, updated [October] *December* [3]*26*, 201[2]*8,* prepared by the board and published by OptumInsight, which is herein incorporated by reference.

(b) The Official New York Workers' Compensation Medical Fee Schedule incorporated by reference herein may be examined at the office of the Department of State, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231, the Legislative Library, the libraries of the New York State Supreme Court, and the district offices of the board. Copies may be purchased from OptumInsight, by writing to Official New York Workers' Compensation Fee Schedule, PO Box 88050, Chicago, IL 60680-9920; by telephone at 1-800-464-3649, option 1; or online at www.optum*360*coding.com keyword New York or https://www.optum*360*coding.com/Product/40508/.

Section 333.2 of Title 12 NYCRR is hereby amended to read as follows:

(a) The psychology fee schedule for psychology services shall be the Official New York Workers' Compensation Psychology Fee Schedule, updated [October] *December* [3]*26*, 201[2]*8*, prepared by the board and published by OptumInsight, which is herein incorporated by reference.

(b) The Official New York Workers' Compensation Psychology Fee Schedule incorporated by reference herein may be examined at the office of the Department of State, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231, the Legislative Library, the libraries of the New York State Supreme Court, and the district offices of the board. Copies may be purchased from OptumInsight, by writing to Official New York Workers' Compensation Fee Schedule, PO Box 88050, Chicago, IL 60680-9920; by telephone at 1-800-464-3649, option 1; or online at www.optum*360*coding.com keyword New York or https://www.optum*360*coding.com/Product/40508/.

Section 343.2 of Title 12 NYCRR is hereby amended to read as follows:

(a) The podiatry fee schedule for podiatry services shall be the Official New York Workers' Compensation Podiatry Fee Schedule, updated [October] *December* [3]*26*, 201[2]*8,* prepared by the board and published by OptumInsight, which is herein incorporated by reference.

(b) The Official New York Workers' Compensation Podiatry Fee Schedule incorporated by reference herein may be examined at the office of the Department of State, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231, the Legislative Library, the libraries of the New York State Supreme Court, and the district offices of the board. Copies may be purchased from OptumInsight, by writing to Official New York Workers' Compensation Fee Schedule, PO Box 88050, Chicago, IL 60680-9920; by telephone at 1-800-464-3649, option 1; or online at www.optum*360*coding.com keyword New York or https://www.optum*360*coding.com/Product/40508/.

Section 348.2 of Title 12 NYCRR is hereby amended to read as follows:

(a) The chriopractic fee schedule for chiropractic services shall be the Official New York Workers' Compensation Chiropractic Fee Schedule, updated [October] *December* [3]*26*, 201[2]*8,* prepared by the board and published by OptumInsight, which is herein incorporated by reference.

(b) The Official New York Workers' Compensation Chiropractic Fee Schedule incorporated by reference herein may be examined at the office of the Department of State, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231, the Legislative Library, the libraries of the New York State Supreme Court, and the district offices of the board. Copies may be purchased from OptumInsight, by writing to Official New York Workers' Compensation Fee Schedule, PO Box 88050, Chicago, IL 60680-9920; by telephone at 1-800-464-3649, option 1; or online at www.optum*360*coding.com keyword New York or https://www.optum*360*coding.com/Product/40508/.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 329-1.3, 333.2, 343.2 and 348.2.

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

Text of rule and any required statements and analyses may be obtained from: Heather MacMaster, Workers' Compensation Board, 328 State Street, Schenectady, NY 12305, (518) 486-9564, email: regulations@wcb.ny.gov

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

A revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement are not required because the changes made to the last published rule do not necessitate revision to the previously published document. These changes do not affect the meaning of any statements in the document.

Initial Review of Rule

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

Assessment of Public Comment

The Board received approximately 282 unique formal written comments, approximately 226 form letters, and approximately 100 postcards. Requests for information have been responded to individually and are not summarized here. The comments received are summarized below.

Medical Fee Schedule

The Board received a comment requesting Ground Rule 10 be amended to permit a 50% testimony fee if a deposition is cancelled with less than 48 hours' notice, and another comment requesting chiropractors be paid for medical testimony at the same rate as physicians. The Board does not have authority to impose fees on carriers when no services have been rendered, and increased testimony fees for all providers by 50 dollars, so no change has been made in response to these comments.

The Board received comments about Ground Rule 11, opining that supervision of a PA or NP should be paid at 100%, not 80%. A physician is not actually providing the treatment, and because physicians are no longer required to be on-site when treatment is rendered, no change has been made. It is believed that 80% reimbursement conforms to the method of reimbursement for other types of insurance.

The Board received comments highlighting a typographical error in Physical Medicine Ground Rule 11, where CPT code 97101 should say 97010, and the Board has corrected this error.

An attorney group commented with concern about fees applying to out of state providers. The Board did not make a change to this section in the revised proposal and did not receive a comment about this in the first proposal. The comment cited a 1993 case Conn v. Kotasek (198 AD2d 600) to support its contention that the Medical Fee Schedule does not apply to out of state treatment. In that case, the Appellate Division affirmed the Board's finding that the person injured in New York but living in Florida was entitled to medical treatment in Florida and the medical provider could be paid using the Florida fee schedule. The proposal does not change this, but addresses fees that may be charged for out of state treatment when the injured worker lives in New York State, so no change has been made.

The Board received several comments concerning the changes to Ground Rule 12 to conform this Ground Rule to the requirements contained in the Board's Non-Acute Pain Medical Treatment Guidelines (NAP MTG). These commenters express concern about the sensitivity of immunoassays used for drug screening; about the urine drug test rules in the proposal generally; expressing disagreement with the limitation on confirmatory testing when there are red flags. As the in-office screening and circumstances available for confirmatory lab testing mirror the testing requirements and protocols set forth in the Board's NAP MTG, which sets forth the treatment standard for managing non-acute pain, the rules governing payment for this type of screening must conform to the NAP MTG. It is noted that contrary to some comments received, confirmatory lab testing is always available when the in-office screening reveals an unexplained positive or negative test and that immunoassay tests are available to screen for fentanyl. Finally, several commenters want the fees for such testing to increase. As these fees reflect substantial increases over Medicare Fees for the same tests, no changes have been made in response to these comments.

The Board received a comment disagreeing with removing "at least" from Ground Rule 12, citing no-fault concerns. To the extent that commenters believe that the Medical Fee Schedule ("MFS") proposal impacts No-Fault, those comments should be directed to DFS as to their application to the No-Fault system. The Board does not have jurisdiction over

No-Fault and may not make statements regarding applicability of any of its rules to the No-Fault system. No change has been made in response to this comment.

Two comments highlighted a typographical error in Physical Medicine Ground Rule 11 where an extra "is" appeared, and the Board has corrected this error.

The Board received many comments disagreeing with physical medicine Ground Rule 2 – specifically, the 12 sessions/180-day limitation. In response, the Board has decided not to implement this change, so Ground Rule 2 will read as it did previously: "Physical medicine services in excess of 12 treatments or after 45 days from the first treatment, require documentation that includes physician certification of medical necessity for continued treatment, progress notes, and treatment plans. This documentation should be submitted to the insurance carrier as part of the claim." This limitation has been removed wherever it appeared.

The Board received comments requesting the RVU cap for physical therapy be increased from 8 to 16, but the revised proposal reflects an increase to 12, and increased the available RVUs for initial evaluations and reevaluations, so no change has been made in response to these comments.

The Board received comments from insurance companies requesting a change back to 8 RVUs. The Board received over 600 comments objecting to this in the previous proposal and increased to 12 in this proposal, so no change has been made. If commenters believe the proposal impacts No-Fault, those comments should be directed to DFS, as the Board does not have jurisdiction and cannot make statements as to the applicability of any of its rules to the No-Fault system.

The Board received a comment opining that physical therapists performing acupuncture or acupuncture modalities is dangerous. The MFS only permits services for which the provider has the appropriate licensing and/or certification, and these codes have always been present in the MFS. No change has been made.

Two comments requested clarification about whether CPT codes 97161-97163 and 9716-97167 are for self-employed physical therapists and occupational therapists only. The services that may be billed remain unchanged, so no change has been made.

The Board received comments objecting to the change in CPT codes resulting in reductions in reimbursement for EMG studies and EDX testing. Needle EMG tests have received proportionate increases. Surface EMGs are not recommended under the Medical Treatment Guidelines and therefore have no fee associated. Fees for NCV reflect changes to the CPT codes themselves, as created by the American Medical Association, and the method for billing, and will be reimbursed at 200% of the Medicare level, so no change has been made.

One comment opined that EDX testing should only be allowed by neurologists and physiatrists. The MFS does not limit how treatment may be rendered under the Workers' Compensation Law ("WCL") and other relevant NYS laws and regulations, so no change has been made.

One comment requested clarification about biofeedback and whether evaluation reports are no longer required. This proposed Ground Rule was modified to reflect updates from the Medical Treatment Guidelines. The evaluation report sentence was excluded since reports are due for any medical treatment under the WCL, and no change has been made.

An insurance company requested clarification about reimbursement for co-surgeons. Under the WCL, surgeons should determine the proportion, and the MFS sets the maximum. If they cannot agree, the bill is subject to arbitration under the WCL, and this procedure is currently used rarely – no change has been made. To the extent commenters believe the MFS proposal impacts No-Fault, they should be directed to DFS as to their application to the No-Fault system. The Board does not have jurisdiction over no-fault and cannot make statements as to the applicability of any of its rules to the no-fault system.

A form letter expressed concerns about billing within a diagnostic network testing ("DTN") contract. Fees adjusted under a DTN contract are contractual – physicians do not have to join DTNs, and the terms of such contracts are not within the Board's purview, so no change has been made.

Chiropractic Fee Schedule

Several comments requested higher fees. The proposal increased fees proportionately, so no change has been made.

One comment objected to removing CPT code 97750, and that CPT code 95999 should not have an RVU of 0. This was considered in the first proposal, so no change has been made.

Many comments objected to the 180-day limitation in chiropractic Ground Rule 3 (and to physical medicine Ground Rule 2, discussed above). In response, the Board has decided not to implement this change, so the 180-day limitation has been removed.

One comment supported proposed changes to chiropractic Ground Rule 11.

Several comments objected to removal of specific CPT codes. As the Board noted previously, the Board did not decrease reimbursement rates and increased RVUs for chiropractors – to the extent fees declined, that is due to the modification of CPT codes themselves since 2012 and earlier. No change has been made.

Several comments objected to proposed changes impacting MUA and spinal decompression. These are not recommended under the Medical Treatment Guidelines, so no change has been made.

Several comments objected to chiropractic Ground Rule 10. Since this is not a new rule, but clarification of an existing one, no change has been made.

A number of comments disagreed with limitations on manual clinical muscle testing systems. Since this is included in the fee for E&M services, no change has been made.

One comment requested clarification for Ground Rule 11 about unit-limitation reviews. Under the WCL, each provider is subject to his or her own rules, so no change has been made.

Behavioral Fee Schedule

Several comments objected to the rule about supervision of non-authorized mental health professionals. As previously noted, the WCL only permits supervision of non-authorized providers by physicians, in accordance with WCL § 13-b, and there is no corollary in § 13-m permitting psychologists to supervise non-authorized providers. Because only the legislature may amend the WCL, no change has been made.

One comment objected to the use of CPT code 97127, but this is the current CPT code in use for cognitive function testing, so no change has been made.

General Comments

The Board received several comments in general support, and several comments and postcards disagreeing as with the proposal as a whole with no suggested changes. No change has been made.

One comment requested MFS be published on the website, but because they have always been published by an outside publisher and it is available for review at Board offices and Supreme Court and Legislative libraries in accordance with rules about incorporating by reference, no change has been made.

Several comments expressed concern about impact or possible conflicts on No-Fault. To the extent that commenters believe that the medical fee schedule proposal impacts No-Fault, those comments should be directed to DFS as to their application to the No-Fault system. The Board does not have jurisdiction over No-Fault and therefore may not make statements as to the applicability of any of its rules to the No-Fault system.

One comment highlighted possible errors in headings, which have been corrected.

Comments from insurance companies requested new fee schedules (acupuncture and massage therapy). Since the WCL does not permit treatment by acupuncturists or massage therapists, no fee schedules are necessary and no change has been made.

Comments from insurance companies also requested ground rules differentiate strapping and kinesio taping, and eliminate generic BR codes. The differences in these codes are in the description of the CPT codes, and WCL has ability to resolve disputes about BR codes, so no change has been made. To the extent commenters believe the MFS proposal impacts no-fault, they should direct them to DFS. The Board does not have jurisdiction over No-Fault and therefore cannot make statements as to the applicability of any of its rules to the No-Fault system.

Changes

- Fixed two typographical errors in Physical Medicine Ground Rule 11 (CPT code 97101 to 97010) and deleted "is" from "patient is may not"
- Reverted to original language of Physical Medicine Ground Rule 2
- Removed 180-day limitation in chiropractic Ground Rule 3
- Fixed errors in headings