

Early Intervention Program

Effective date: 1/1/13

Pursuant to the authority vested in the New York State Department of Health by Public Health Law Section 2559-b, Part 69-4 of Chapter II of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended to be effective January 1, 2013, to read as follows:

A new paragraph (7)(ii) is added to subdivision (a) of section 69-4.11 to read as follows:

(7) If the early intervention official and the parent agree on the initial or subsequent IFSPs, the IFSP shall be deemed final and the ongoing service coordinator shall be authorized to implement the plan.

(i) The early intervention official shall request, and the parent shall supply, the parent's social security number and the social security number for their child at the time of the IFSP meeting; provided, however that if the parent refuses to furnish such information to the early intervention official, early intervention services contained within the IFSP must still be provided and such refusal by the parent shall be documented in the child's record.

(ii)(a) For children referred to the early intervention program on or after January 1, 2013, or for children referred to the early intervention program prior to January 1, 2013 for whom an additional evaluation or partial evaluation is requested on or after January 1, 2013 for the purpose of adding a new service, neither the evaluator which conducts an evaluation of a child, an approved agency which employs or contracts with the evaluator, nor a relative or business associate of the evaluator, shall provide early intervention services to such child unless

authorized by the commissioner, after consultation with the early intervention official, due to special circumstances related to the evaluator's qualifications or availability or other extraordinary circumstances in which there is a clear showing that the child will not be able to access needed services absent such authorization.

(1) For purposes of this paragraph, the following terms shall have the following meanings:

- (i) "business associate" shall mean a person joined or united with one or more individuals in a business or enterprise; and
- (ii) "relative" shall mean any person living in the same household as an individual or the individual's spouse, child, stepchild, stepparent, or any person who is a direct descendant of that individual's grandparents or the spouse of such descendant.

(b) Any request for such authorization shall be made by the child's service coordinator, which shall fully document the basis for the request in a manner and format prescribed by the commissioner. Requests for authorization shall be made no later than twenty days after the child's IFSP meeting; provided, however, that any request for authorization shall not delay the timely delivery of early intervention services authorized in the child's IFSP. The commissioner shall issue a determination upon such a request within ten calendar days after the request is received.

(c) If the commissioner finds there is a shortage of evaluators or approved providers in certain disciplines in a particular region of the state, the commissioner may issue a standing authorization, on such terms or conditions as he or she deems appropriate, which shall remain in

effect in such region until such time as the commissioner determines that such shortage no longer exists.

(d) A service coordinator shall not assign as a service provider, a business associate of the service coordinator, a relative of such service coordinator or an agency provider which employs or contracts with such relative, who is not otherwise prohibited from serving as the provider for a child pursuant to subparagraph (a) of this paragraph, unless such relationship is disclosed to the parent and the parent does not object to the assignment.

A new paragraph (6) is added to subdivision (a) of section 69-4.5 to read as follows:

(6) Commencing on and after January 1, 2013, individuals shall not be approved to deliver both service coordination and evaluations in the early intervention program. Individuals approved prior to January 1, 2013 to deliver both service coordination and evaluations shall notify the department regarding which of these services the individual wishes to continue providing after January 1, 2013, and approval to deliver the service not selected by the individual in accordance with this paragraph shall terminate on January 1, 2013.

New paragraphs (i), (ii) and (iii) are added to subdivision (e) of section 69-4.5 to read as follows:

(e) (i) Approved providers shall not disseminate, or cause to be disseminated on their behalf, marketing materials that are false, deceptive, or misleading. Upon the Department's request, providers shall periodically submit copies of marketing materials for review. Marketing materials that do not comply with the provisions of this subdivision may be a basis for action against the

provider's approval in accordance with the provisions of section 69-4.24 of this subpart. The Department shall develop standards on appropriate marketing materials and shall require that marketing materials that seek to promote or advertise early intervention program evaluations or services adequately inform parents or guardians of potentially eligible or at-risk children less than three years of age about the early intervention program. Marketing materials that seek to promote or advertise early intervention program evaluations or services shall include the following statements or their equivalent:

- (1) Clear identification that the early intervention program and early intervention services available through the early intervention program are for children less than three years of age who have or are suspected of having a developmental delay and/or disability.
- (2) A statement that the early intervention program is a public program funded by New York State and county governments.
- (3) A statement that all children must be referred to the municipality to access early intervention program services, and including the municipal agency's telephone number.
- (4) Clear identification of the provider referenced in the marketing and advertising materials, and an accurate statement that the provider is approved as a provider of early intervention program services and under contract with the municipality to deliver early intervention program services.
- (5) A statement that all services provided under the early intervention program are provided at no out-of-pocket cost to parents, but that health insurance may be accessed for reimbursement for early intervention services provided to eligible children and their families.
- (6) A statement that eligibility for the early intervention program can be determined only by State-approved evaluators under contract with the municipality.
- (7) A statement that if a child is found eligible for the early intervention program, all needed

early intervention services are identified in collaboration with the parent and must be authorized by the municipality.

(8) A statement that the municipality will arrange for service providers, considering the individual needs of the child and family, to deliver services authorized by the municipality.

(9) A statement that when early intervention services are delivered in child care settings or community locations that require a fee, the parent is responsible for paying any associated costs with such access to child care or community locations.

(ii) Service coordinators, evaluators and approved providers, and any individual or entity which performs paid or unpaid marketing activities related to early intervention program services on their behalf, shall not engage in any marketing and advertising practices that offer incentives, or could be construed or appear to offer incentives of any kind to the parents or relatives of an eligible or potentially eligible child, or to the service coordinator, evaluator, or other approved providers authorized to deliver services to an eligible or potentially eligible child, that attempts to or would appear to influence selection of a service coordinator, evaluator or provider of services.

(iii) Approved agency providers shall not offer incentives or appear to offer incentives to its employees or subcontractors in the form of payment, performance evaluations, or other awards or benefits that are based on the number of referrals and/or services authorized under the early intervention program.

Revised Regulatory Impact Statement

Due to the impact of Hurricane Sandy, a minor revision was made delaying the effective date to January 1, 2013.

Statutory Authority:

The Early Intervention Program is established in Title II-A of Article 25 of the Public Health Law (PHL) and implements Part C of the federal Individuals with Disabilities Education Act (IDEA). PHL § 2550(1) establishes the Department of Health (Department) as the lead agency responsible for the general administration and supervision of programs under the Early Intervention Program. PHL § 2550(2) authorizes the Department to establish standards for evaluators, service coordinators and providers of early intervention services and requires the Department to monitor agencies, institutions and organizations providing early intervention services. In addition, PHL § 2544(4) and (5) require that the evaluation of each child be made without regard to the availability of services in the municipality or who might provide those services, and prohibits an evaluation from including a reference to any specific provider of early intervention services. PHL § 2543 sets forth the responsibilities of service coordinators. PHL § Section 2545(10) requires the service coordinator to implement the child's and family's IFSP in a timely manner. PHL § 2559-b authorizes the Commissioner of Health (Commissioner) to adopt regulations necessary to carry out the Early Intervention Program.

Legislative Objectives:

The legislative objectives of the Early Intervention Program include establishing a coordinated, comprehensive array of services; enhancing the development of infants and toddlers with disabilities and minimizing the need for special education services after infants and toddlers with disabilities become eligible for services under Part B of IDEA.

PHL § 2544 entitles a child thought to be eligible for the Early Intervention Program to a multidisciplinary evaluation. The evaluation must be made without regard to who might provide those services. If the child is found eligible, an Individualized Family Service Plan (IFSP) must be jointly developed by the Early Intervention Official, service coordinator, parent, and evaluator. 10 NYCRR §§ 69-4.11(a) (6). Once an agreement is reached on an IFSP, the service coordinator must implement the plan in a timely manner. PHL § 2545(10).

To ensure that children receive an objective multidisciplinary evaluation and to prohibit conflicts of interest that may impact the results of the evaluation, for children referred to the Early Intervention Program on or after January 1, 2013 or for children referred to the Early Intervention Program prior to January 1, 2013 for whom an additional evaluation or partial evaluation is requested on or after January 1, 2013 for the purpose of adding a new service, the proposed rule prohibits the evaluator which conducts an evaluation of a child, an approved agency which employs or contracts with the evaluator, and relatives and business associates of the evaluator from providing services to such child unless authorized by the Commissioner due to special circumstances related to the evaluator's qualifications or availability or other

extraordinary circumstances in which there is a clear showing that the child will not be able to access needed services absent such authorization. Requests for authorization must be made by the child's service coordinator within twenty days after the child's IFSP meeting. The commissioner must issue a determination within ten calendar days after the request is received. The proposed rule allows the Commissioner to issue a standing authorization if there is a shortage of evaluators or approved providers in certain disciplines in a particular region of the state. The standing order remains in effect in such region until the Commissioner determines that such shortage no longer exists.

The proposed rule also prohibits a service coordinator from assigning as a service provider, a business associate or relative of such service coordinator, or an agency provider which employs or contracts with such relative, who is not otherwise prohibited from serving as the provider for a child, unless such relationship is disclosed to the parent and the parent does not object.

Commencing on and after January 1, 2013, individuals cannot be approved to deliver both service coordination and evaluations. Individuals approved prior to January 1, 2013 to deliver both service coordination and evaluations are required to notify the Department regarding which of these services the individual wishes to continue providing after January 1, 2013. Approval to deliver the service not selected by the individual terminates on January 1, 2013.

The proposed rule incorporates into regulation existing marketing standards issued by the Department in December, 2006. Service coordinators, evaluators and approved providers, and any individual or entity which performs paid or unpaid marketing activities related to Early

Intervention Program services on their behalf, are prohibited from engaging in any marketing/advertising practices that offer or appear to offer incentives to the parents or relatives of an eligible or potentially eligible child, or to the service coordinator, evaluator, or other approved providers that attempts to or would appear to influence selection of a service coordinator, evaluator or provider of services. Approved agency providers are prohibited from offering or appearing to offer incentives to employees or subcontractors that are based on the number of referrals and/or services authorized under the Early Intervention Program.

Needs and Benefits:

As indicated, it is important that a child receive an objective multidisciplinary evaluation that provides comprehensive information about the child's developmental status, strengths and needs, and that recommendations for early intervention services are discussed at the IFSP meeting. An objective planning process that focuses on the child's strengths and needs, measurable results to be achieved through early intervention, and the frequency, intensity, duration, location, and method of early intervention services requires participation of evaluators who have no vested interest in these decisions, or in what provider is authorized to deliver those services.

In New York City, over 90 percent of evaluators provide services to children whom they evaluated, and average utilization levels and costs are higher than in the rest of the State. Outside New York City, more than 44 percent, on average, of evaluators also provide services to children whom they evaluated. One factor that potentially contributes to the difference in utilization levels is the conflict of interest created when agencies and their staff or contractors

responsible for conducting evaluations to determine eligibility for services could potentially render services included in children's IFSPs.

The proposed rule will ensure that the relationship between evaluator and provider does not encourage the inappropriate provision of services, fostering the objectivity of evaluations and decreasing costs for taxpayers. The proposed rule also recognizes that in certain circumstances, it may be appropriate for an evaluator, a business associate or relative of the evaluator, or approved agency which employs or contracts with the evaluator, to also render services to the child, and allows the Commissioner, after consultation with the Early Intervention Official, to authorize service provision in certain circumstances, as outlined above.

The proposed rule prohibiting service provision by the evaluator, business associate or relative of the evaluator, or agency which employs or contracts with the evaluator will apply only to those children referred to the Early Intervention Program on or after January 1, 2013, or for children referred prior to January 1, 2013 for whom an additional evaluation or partial evaluation is requested on or after January 1, 2013 for the purpose of adding a new service, to ensure continuity of care for children and families receiving early intervention services prior to the effective date, by allowing them to continue to receive services from their current providers.

The proposed rule also ensures that familial or business relationships between the service coordinator and the provider does not improperly influence the assignment of service providers and that service coordinators identify those providers who are most appropriately qualified to meet the child's and family's needs.

The proposed rule ensures that approved individuals may not serve as both the service coordinator and evaluator for the child, fostering the objectivity of evaluations and decreasing costs for taxpayers.

Finally, the proposed rule codifies existing marketing standards for the Early Intervention Program.

Costs to Regulated Parties:

Evaluators which conduct evaluations of children, relatives or business associates of such evaluators, and approved agency providers which employ or contract with such evaluators will be impacted by the proposed rule to the extent that they will no longer be able to render services to children evaluated by the evaluator unless authorized to do so by the Department. However, their overall participation in the Early Intervention Program will not be impacted and they will continue to be able to serve other children.

Likewise, while the new rule prohibits a service coordinator from assigning as a service provider, a person or entity which has a business or familial relationship with the service coordinator, unless such relationship is disclosed to the parent and the parent does not object to the assignment, the overall participation of providers in the Early Intervention Program who have these types of relationships with the service coordinator will not be impacted in that they will continue to be able to serve other children.

Individual providers in the program who are currently approved to deliver both evaluation services and service coordination services will be provided with adequate notice to determine which of these services they wish to continue to deliver as of January 1, 2013.

Incorporating existing marketing standards for the Early Intervention Program into regulation will result in no costs to regulated parties which are currently required to adhere to the standards.

Costs to the Agency, the State and Local Governments for the Implementation of and Continuing Compliance with the Rule:

By prohibiting evaluators from acting as service providers under the Early Intervention Program, the proposed rule will reduce inappropriate service utilization and can be expected to result in an undefined level of savings to the program. Further, the proposed rule will require the Department to consult with the Early Intervention Official to review and act upon requests for authorization for a child to receive early intervention services from an evaluator, agency that employs or contracts with the evaluator, or a business associate or relative of the evaluator, in appropriate circumstances, which is not expected to have a measurable impact on administrative resources.

Local Government Mandates:

The proposed rule does not impose any new duty upon any county, city, town, village, school district, fire district, or other special district.

Paperwork:

The proposed rule will require a minimal amount of paperwork for service coordinators that request authorization from the Department for a child to receive early intervention services from an evaluator in appropriate circumstances.

Duplication:

The proposed rule does not duplicate, overlap, or conflict with relevant rules and other legal requirements of the State and federal government.

Alternatives:

The alternative course of action is to make no change to the regulatory requirements, which would not address either the potential conflict that arises (i) when an evaluator, an agency that employs or contracts with an evaluator, or a relative or business associate of the evaluator, also acts as a service provider; or (ii) when a service coordinator seeks to assign a business associate or relative of such service coordinator, or an agency provider which employs or contracts with such relative; or (iii) when an individual provider delivers both evaluation and service coordination services.

Federal Standards:

While neither federal statute nor regulation specifically prohibit evaluators from also serving as the providers of early intervention services, Part C of the IDEA and the associated federal regulations, 34 CFR Part 303, establish broad authority for states to oversee and administer Early Intervention Programs.

There are no applicable federal standards with respect to marketing of early intervention services.

Compliance Schedule:

The Department anticipates implementing the proposed rule effective January 1, 2013, allowing sufficient time to notify early intervention evaluators, service coordinators and providers of the rule's provisions and ensuring continuity of care for children and families participating in the program prior to the effective date.

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Revised Regulatory Flexibility Analysis

Due to the impact of Hurricane Sandy, a minor revision was made delaying the effective date to January 1, 2013.

Effect of Rule:

Currently, there are approximately 600 agency and 1,100 individual qualified personnel who are approved and under contract with municipal governments to deliver early intervention services. Approved agencies are incorporated entities, partnerships, and state operated facilities. Qualified personnel are individuals approved by the Department of Health (Department) in accordance with 10 NYCRR Subpart 69-4 to provide services in the Early Intervention Program and who have appropriate licensure, certification, or registration in the area in which they are providing services (including allied health professionals, physicians, special educators, psychologists, and vision specialists).

Compliance Requirements:

For children referred to the Early Intervention Program on or after January 1, 2013, or for children referred to the Early Intervention Program prior to January 1, 2013 for whom an additional evaluation or partial evaluation is requested on or after January 1, 2013 for the purpose of adding a new service, the proposed rule prohibits the evaluator which conducts an evaluation of a child, an approved agency which employs or contracts with the evaluator, and relatives and business associates of the evaluator, from providing early intervention services to

such child unless authorized by the Commissioner of Health (Commissioner), after consultation with the early intervention official, due to special circumstances related to the evaluator or provider's qualifications or availability or other extraordinary circumstances in which there is a clear showing that the child will not be able to access needed services absent such authorization. The child's service coordinator is required to submit requests for such authorizations no later than twenty days after the child's initial IFSP meeting, and must fully document the basis for the request in a manner and format prescribed by the Commissioner. Any request for authorization cannot delay the timely delivery of early intervention services authorized in the child's IFSP. The Commissioner must issue a determination upon such a request within ten calendar days after the request is received.

The Commissioner, if he or she finds there is a shortage of evaluators or approved providers in certain disciplines in a particular region of the state, may issue a standing authorization, on such terms or conditions as he or she deems appropriate. Such authorization remains in effect in such region until such time as the Commissioner determines that such shortage no longer exists.

Effective January 1, 2013, service coordinators are prohibited from assigning as a service provider, a business associate or relative of such service coordinator or an agency provider which employs or contracts with such relative, who are not otherwise prohibited from serving as the provider for a child, unless such relationship is disclosed to the parent and the parent does not object to the assignment.

For purposes of the proposed rule, "business associate" shall mean a person joined or united with one or more individuals in a business or enterprise, and "relative" shall mean any person living

in the same household as an individual or the individual's spouse, child, stepchild, stepparent, or any person who is a direct descendant of that individual's grandparents or the spouse of such descendant.

Commencing on and after January 1, 2013, individuals shall no longer be approved to deliver both service coordination and evaluations in the Early Intervention Program. Individuals approved prior to January 1, 2013 to deliver both service coordination and evaluations will be required to notify the department regarding which of these services the individual wishes to continue providing after January 1, 2013. Approval to deliver the service not selected by the individual shall terminate on January 1, 2013.

Service coordinators, evaluators and approved providers, and any individual or entity which performs paid or unpaid marketing activities related to Early Intervention Program services on their behalf, are prohibited from engaging in any marketing and advertising practices that offer incentives, or could be construed or appear to offer incentives of any kind to the parents or relatives of an eligible or potentially eligible child, or to the service coordinator, evaluator, or other approved providers authorized to deliver services to an eligible or potentially eligible child, that attempts to or would appear to influence selection of a service coordinator, evaluator or provider of services.

Approved agency providers are prohibited from offering incentives or appearing to offer incentives to employees or subcontractors in the form of payment, performance evaluations, or

other awards or benefits that are based on the number of referrals and/or services authorized under the Early Intervention Program.

Professional Services:

It is not anticipated that evaluators, service coordinators or providers will require additional professional services to comply with proposed rule.

Compliance Costs:

There are no anticipated initial capital costs that will be incurred by a regulated business or industry or local government for compliance with the proposed rule.

Economic and Technological Feasibility:

There are no economically or technologically challenging aspects to the requirements of the proposed rule that do not already exist in current requirements for the Early Intervention Program.

Minimizing Adverse Impact:

The proposed rule prohibiting the evaluator which conducts an evaluation of a child, an approved agency which employs or contracts with the evaluator, and relatives and businesses associates of the evaluators from also rendering early intervention services to the child, unless authorized by the Commissioner, applies only to those children referred to the Early Intervention Program on or after January 1, 2013, and to children referred prior to January 1, 2013 for whom an additional evaluation or partial evaluation is requested after that date for the purpose of adding a new service. This phase-in of the new requirements will ensure continuity of care for children and families receiving early intervention services prior to the effective date.

There will be no adverse impact as a result of the proposed rule on local governments. The proposed rule allows the Commissioner, after consultation with the Early Intervention Official, to authorize service provision by the evaluator, approved agency, or relative or business associate of the evaluator in certain circumstances, as outlined above. Maintaining sufficient capacity to deliver appropriate and timely evaluations and early intervention services in rural areas is a high priority for the Department.

Individual providers in the program who are currently approved to deliver both evaluation services and service coordination services will be provided with adequate notice to determine which of these services they wish to continue to deliver as of January 1, 2013.

Under the proposed rule, service coordinators, evaluators and approved providers, and any individual or entity which performs paid or unpaid marketing activities related to Early

Intervention Program services on their behalf, are prohibited from engaging in any marketing and advertising practices that offer incentives, or could be construed or appear to offer incentives of any kind to the parents or relatives of an eligible or potentially eligible child, or to the service coordinator, evaluator, or other approved providers authorized to deliver services to an eligible or potentially eligible child, that attempts to or would appear to influence selection of a service coordinator, evaluator or provider of services. Approved agency providers are prohibited from offering incentives or appearing to offer incentives to employees or subcontractors in the form of payment, performance evaluations, or other awards or benefits that are based on the number of referrals and/or services authorized under the Early Intervention Program. The proposed rule incorporates into regulation existing marketing standards issued by the Department, and which have had no adverse impact on jobs since their issuance in December, 2006.

Small Business and Local Government Participation:

A copy of this notice of proposed rulemaking will be posted on the Department's website and submitted to the electronic mail listserv for the Early Intervention Program. The notice will invite public comments on the proposal and include instructions for anyone interested in submitting comments, including small businesses and local governments. The proposed rule will also be submitted to the Early Intervention Coordination Council (EICC), which is charged in statute with reviewing all proposed rules and regulations related to the Early Intervention Program and offering any comment thereon prior to the Commissioner's approval of the final rule.

Revised Rural Area Flexibility Analysis

Due to the impact of Hurricane Sandy, a minor revision was made delaying the effective date to January 1, 2013.

Types and Estimated Numbers of Rural Areas:

The proposed rule applies to all municipalities, evaluators, service coordinators, and providers in the Early Intervention Program, including those in rural areas of the State. The proposed rule prohibiting the evaluator which conducts an evaluation of a child, an approved agency which employs or contracts with the evaluator, and relatives and businesses associates of the evaluator from providing early intervention services to the child, unless authorized by the Commissioner of Health (Commissioner), applies only to those children referred to the Early Intervention Program on or after January 1, 2013, and to children referred prior to January 1, 2013 for whom an additional evaluation or partial evaluation is requested after that date for the purpose of adding a new service. The proposed rule prohibiting individuals from being approved to deliver both service coordination and evaluations is effective on and after January 1, 2013. Individual providers who are currently approved to deliver both evaluation services and service coordination services will be provided with adequate notice to determine which of these services they wish to continue to deliver after January 1, 2013. Approval to deliver the service not selected by the individual provider will terminate on January 1, 2013.

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

Municipalities and providers in the Early Intervention Program in rural areas of the State will have no additional reporting or record-keeping requirements associated with the proposed rule, except that a minimal amount of paperwork will be required of service coordinators that request authorization from the Commissioner for a child to receive early intervention services from an evaluator, and others associated with the evaluator, in appropriate circumstances.

It is not anticipated that municipalities and providers will require additional professional services to comply with the proposed rule.

Costs:

Evaluators which conduct evaluations of children, approved agency providers which employ or contract with such evaluators, and relatives and business associates of evaluators, will be impacted by the proposed rule to the extent that they will no longer be able to render services to children evaluated by the evaluator unless authorized to do so by the Commissioner. However, their overall participation in the Early Intervention Program will not be impacted and they will continue to be able to serve other children.

Likewise, while the new rule prohibits a service coordinator from assigning as a service provider, a business associate or relative of such service coordinator, or an agency provider which employs or contracts with such relative, who are not otherwise prohibited from serving as the provider for a child, unless such relationship is disclosed to the parent and the parent does not object to the assignment, the overall participation of providers in the Early Intervention Program who have these types of relationships with the service coordinator will not be impacted in that they will continue to be able to serve other children.

Individual providers who are currently approved to deliver both evaluation services and service coordination services will be provided with adequate notice to determine which of these services they wish to continue to deliver after January 1, 2013. Approval to deliver the service not selected shall terminate on January 1, 2013.

Incorporating existing marketing standards for the Early Intervention Program into regulation will result in no costs to regulated parties which adhere to the standards.

There are no costs for municipalities and providers in rural areas associated with the proposed rule. By prohibiting evaluators from acting as service providers under the Early Intervention Program, the proposed rule will reduce inappropriate service utilization and can be expected to result in an undefined level of savings to the program which is funded with both state and local funds.

Minimizing Adverse Impact:

It is not anticipated that the proposed rule will result in any adverse impact in rural areas. The proposed rule prohibiting the evaluator which conducts an evaluation of a child, an approved agency which employs or contracts with the evaluator, and relatives and businesses associates of the evaluators from provide early intervention services to the child, unless authorized by the Commissioner, applies only to those children referred to the Early Intervention Program on or after January 1, 2013, and to children referred prior to January 1, 2013 for whom an additional evaluation or partial evaluation is requested after that date for the purpose of adding a new service. This will ensure continuity of care for children and families receiving early intervention services prior to the effective date, by allowing them to continue to receive services from their current providers.

The proposed rule ensures sufficient capacity will be maintained to provide appropriate evaluation services and early intervention services to children in rural areas, by allowing the Commissioner, after consultation with the Early Intervention Official, to authorize the evaluator, approved agency which employs or contracts with the evaluator, or a business associate or relative of the evaluator, to also serve as the provider due to special circumstances related to the evaluators qualifications or availability or other extraordinary circumstances in which there is a clear showing that the child will not be able to access needed services absent such authorization. The proposed rule also allows the Commissioner to issue a standing authorization, on terms or conditions he or she deems appropriate, upon finding there is a shortage of evaluators or approved providers in certain disciplines in a particular region of the State.

The proposed rule prohibiting individuals from being approved to deliver both service coordination and evaluations is effective on and after January 1, 2013. Individual providers in the program who are currently approved to deliver both evaluation services and service coordination services will be provided with adequate notice to determine which of these services they wish to continue to deliver as of January 1, 2013.

Rural Area Participation:

A copy of this notice of proposed rulemaking will be posted on the Department of Health's website and submitted to the electronic mail listserv for the Early Intervention Program. The notice will invite public comment on the proposal and include instructions for anyone interested in submitting comments, including small businesses and local governments. The proposed rule will also be reviewed by the Early Intervention Coordination Council (EICC), which is charged in statute with reviewing all proposed rules and regulations related to the Early Intervention Program and offering any comment thereon prior to the Commissioner's approval of the final rule. The EICC includes in its membership municipal and provider representatives located in rural areas.

Revised Job Impact Statement

Due to the impact of Hurricane Sandy, a minor revision was made delaying the effective date to January 1, 2013.

Nature of Impact:

The proposed rule will have minimal or no impact on jobs. While an evaluator which conducts an evaluation of a child, approved agency providers which employ or contract with such evaluator, and relatives and business associates of the evaluators may be impacted by the proposed rule to the extent that they will no longer be able to render services to the child unless authorized to do so by the Department of Health (Department), their overall participation in the Early Intervention Program will not be impacted and they will continue to be able to serve other children. Likewise, the proposed rule prohibits a service coordinator from assigning as a service provider, a business associate of the service coordinator, a relative of such service coordinator, or an agency provider which employs or contracts with such relative, who are not otherwise prohibited from serving as the provider for a child, unless such relationship is disclosed to the parent and the parent does not object to the assignment, the overall participation of providers in the Early Intervention Program who have these types of relationships with the service coordinator will not be impacted in that they will continue to be able to serve other children.

The proposed rule prohibiting individuals from being approved by the Department to deliver both service coordination and evaluations in the Early Intervention Program after January 1,

2013 will not impact the overall participation of individual providers in the Early Intervention Program.

The proposed rule maintains adequate capacity to provide evaluations and services, by allowing the Department, after consultation with the Early Intervention Official, to authorize the provision of services to a child by the evaluator which conducted the child's evaluation, the approved agency which employs or contracts with the evaluator, or a relative or business associate of the evaluator, due to special circumstances related to the evaluator's qualifications or availability or other extraordinary circumstances in which there is a clear showing that the child will not be able to access needed services absent such authorization. The proposed rule also allows the Commissioner of Health (Commissioner) to issue a standing authorization, on such terms and conditions as he or she deems appropriate, if he or she finds there is a shortage of evaluators or approved providers in certain disciplines in a particular region of the state. The standing order will remain in effect in such region until such time as the Commissioner determines that such shortage no longer exists.

Under the proposed rule, service coordinators, evaluators and approved providers, and any individual or entity which performs paid or unpaid marketing activities related to Early Intervention Program services on their behalf, are prohibited from engaging in any marketing and advertising practices that offer incentives, or could be construed or appear to offer incentives of any kind to the parents or relatives of an eligible or potentially eligible child, or to the service coordinator, evaluator, or other approved providers authorized to deliver services to an eligible or potentially eligible child, that attempts to or would appear to influence selection of a service

coordinator, evaluator or provider of services. Approved agency providers are prohibited from offering incentives or appearing to offer incentives to employees or subcontractors in the form of payment, performance evaluations, or other awards or benefits that are based on the number of referrals and/or services provided under the early intervention program. The proposed rule incorporates into regulation existing marketing standards issued by the Department, and which have had no adverse impact on jobs since their issuance in December, 2006.

Categories and Numbers Affected:

Currently, there are approximately 600 agency and 1,100 individual qualified personnel who are approved and under contract with municipal governments to deliver early intervention services. Approved agencies are incorporated entities, partnerships, and state operated facilities. Qualified personnel are individuals approved by the Department in accordance with 10 NYCRR 69-4 to provide services in the Early Intervention Program and who have appropriate licensure, certification, or registration in the area in which they are providing services (including allied health professionals, physicians, special educators, psychologists, and vision specialists).

The type of business entities includes a mix of business corporations, professional corporations, professional limited liability corporations, not-for-profit organizations and local governmental agencies.

Regions of Adverse Impact:

It is anticipated that New York City will be the most heavily impacted by the proposed rule. In New York City, over 90 percent of children receive early intervention services from providers who conducted their evaluations, and average utilization levels and costs are higher than in the rest of the State. Outside New York City, more than 44 percent, on average, of children receive services from providers who also act as evaluators. One factor that potentially contributes to the difference in utilization levels is the conflict of interest created when agencies and their staff or contractors responsible for conducting evaluations to determine eligibility for services and level of need could potentially render services included in children's IFSPs.

In addition, New York City contracts with agency providers to deliver service coordination services and the majority of these agencies also provide early intervention evaluations and services. Most county governments outside New York City are approved to deliver service coordination services and deliver initial service coordination services and/or ongoing service coordination services using county employees.

Rural areas with fewer providers may also be more heavily impacted.

Minimizing Adverse Impact:

The proposed rule prohibiting service provision by the evaluator, business associate or relative of the evaluator, or agency which employs or contracts with the evaluator will apply only to those children referred to the Early Intervention Program on or after January 1, 2013, and to children referred prior to January 1, 2013 for whom an additional evaluation or partial evaluation is requested after that date for the purpose of adding a new service. This phase-in of the new requirements will ensure continuity of care for children and families receiving early intervention services prior to the effective date.

Likewise, individual providers in the program who are currently approved to deliver both evaluation services and service coordination services will be provided with adequate notice to determine which of these services they wish to continue to deliver after January 1, 2013.

The proposed rule provides the Department with sufficient authority to minimize adverse impact on children and families and on employment opportunities within the program by allowing the Department, after consultation with the Early Intervention Official, to authorize service provision by the evaluator, approved agency, or relative or business associate of the evaluator in certain circumstances, as outlined above. Maintaining sufficient capacity to deliver appropriate and timely evaluations and early intervention services in rural areas is a high priority for the Department.

Under the proposed rule, service coordinators, evaluators and approved providers, and any individual or entity which performs paid or unpaid marketing activities related to Early Intervention Program services on their behalf, are prohibited from engaging in any marketing and advertising practices that offer incentives, or could be construed or appear to offer incentives of any kind to the parents or relatives of an eligible or potentially eligible child, or to the service coordinator, evaluator, or other approved providers authorized to deliver services to an eligible or potentially eligible child, that attempts to or would appear to influence selection of a service coordinator, evaluator or provider of services. Approved agency providers are prohibited from offering incentives or appearing to offer incentives to employees or subcontractors in the form of payment, performance evaluations, or other awards or benefits that are based on the number of referrals and/or services authorized under the Early Intervention Program. The proposed rule incorporates into regulation existing marketing standards issued by the Department, and which have had no adverse impact on jobs since their issuance in December, 2006.

SUMMARY OF ASSESSMENT OF PUBLIC COMMENT

A Notice of Proposed Rulemaking was published in the *State Register* on September 5, 2012. All comments were reviewed and evaluated. Due to the impact of Hurricane Sandy, a minor revision was made delaying the effective date to January 1, 2013. The issues raised by commenters, significant alternatives suggested and statements of reasons why additional revisions were not made are summarized below.

Comments were received from over 3,500 commenters, including 11 members of the Assembly. The majority of commenters were opposed to the proposed rule.

Commenters opposed to the proposed rule were concerned about adverse affects on families by eliminating parents' choice of evaluator, and on the interruption of the continuity of care. Statutory provisions in the Public Health Law (PHL) continue to allow parents to select an evaluator to conduct an evaluation of a child. The Department understands there are special circumstances related to individual children that may necessitate continuous specialty care from evaluation through service provision and has incorporated an authorization process in the proposed rule for these circumstances. Due to the impact of Hurricane Sandy, a minor revision has been made to the proposed rule delaying the effective date to January 1, 2013. The proposed rule applies only to those children referred to the Early Intervention Program (EIP) on or after January 1, 2013 and to children referred prior to January 1, 2013 for whom an additional evaluation or partial evaluation is requested for the purpose of adding a new service, to ensure continuity of care for children and families receiving services prior to this date.

Commenters suggested that licensed professionals are bound by ethical standards and the proposed rule will limit the professional's scope of practice. Commenters also noted that the New York State Education Department (SED) has authority to monitor and protect against conflicts of interest. The proposed rule does not impact a professionals' scope of practice as professionals will maintain their ability to both evaluate and treat children in the EIP. The professional is only prohibited from both evaluating and treating the same child unless the Department grants authorization or issues a standing waiver. The Department is authorized to establish standards to prevent against conflicts of interest in the EIP. A provider must meet program standards set forth in 10 NYCRR 69-4.5 to participate in the EIP.

Commenters stated that there are existing procedural safeguards and controls in place to address conflicts of interest and those existing safeguards should be strengthened in lieu of implementation of the proposed rule. The Department will continue to monitor and audit providers to ensure services are provided to children in compliance with laws and regulations and take appropriate action when necessary. However, the proposed rule furthers the Department's goal of prohibiting conflicts of interest in the first instance.

Commenters were concerned that the proposed rule would create capacity issues and a lack of access for families to providers that have a unique skill set. The proposed rule addresses this concern in that it allows the Commissioner to authorize service provision by the evaluator, approved agency, or relative or business associate of the evaluator in certain circumstances, including the evaluator's qualifications or provider availability. It also allows the issuance of

standing waivers if there is a shortage of evaluators or approved providers in certain disciplines or regions of the State. The Department is working to analyze existing capacity and issue standing waivers in advance of the effective date of the proposed rule.

Commenters expressed concern with the administrative burden and impact the authorization process will have on the timely provision of services. Commenters suggested that the authorization should be provided by the Early Intervention Official, and that the time period to request an authorization should be shortened. The proposed rule furthers the Department's goal of reducing the administrative burden on localities by placing the responsibility of authorization determinations on the Department. The Department will establish administrative procedures and provide training to service coordinators to ensure requests for authorizations are submitted immediately upon the detected need, with a maximum allowance of twenty days. The Department will expeditiously render determinations on the authorization and continue to monitor timely service provision.

Commenters expressed concern with the fiscal impact of the proposed rule resulting from a decrease on their scope of activities, and that the fiscal impact will be directed at small agencies. All providers, with the exception of individuals who are approved to deliver both service coordination services and evaluations, will continue to have the ability to deliver all lines of business in the EIP that they are approved to render. With respect to those individuals who will no longer be approved to deliver both service coordination, or case management, services, and evaluations, these individuals will continue to be able to provide both evaluations and early

intervention services. The Department believes that the proposed rule would not impact these individuals' overall participation in the EIP.

Commenters expressed concern that the Department did not present sufficient evidence to indicate that conflicts of interest are occurring in the EIP. Commenters suggested that the proposed rule was a statewide solution to a perceived issue isolated to New York City (NYC). The Department has conducted data analysis on evaluation and service provision patterns and has concerns about the high percentage of evaluators who go on to render services to children for whom they evaluated. While the percentage of providers who serve as both evaluator and provider for a child is high in NYC (over 90%), the percentage of providers who serve as both evaluator and provider to the same child is also of concern in the remainder of the State, as almost 45% of evaluators are providing services to children whom they evaluated. The Department feels that a statewide approach furthers the goals of the proposed rule.

Commenters argued that the proposed rule is similar to a proposal included in the New York State 2012-13 Executive Budget Proposal, which was rejected by the New York State Legislature. The fact that the proposal referenced in the comments was not included in the enacted budget does not preclude the Department from proposing and adopting this rule in accordance with the State Administrative Procedure Act.

Commenters expressed concern that the Department did not publish along with the Notice of Proposed Rulemaking, the motion passed by the State Early Intervention Coordinating Council (EICC) on September 6, 2012 requesting that the Department consider withdrawing the proposed

rules and pursue administrative controls to detect fraud and abuse. PHL §2553 provides that the EICC may require that an alternative approach to the proposed rules and regulations be published with the Notice of Proposed Rulemaking. At its September 6, 2012 meeting, the EICC passed the following motion:

That the Department publish the SEICC's recommended alternative approach and the reasons why the alternative approach was not considered, if the Department does not act in a manner consistent with the SEICC's recommendation.

Although the EICC moved to require the Department to publish the EICC's recommended alternative, it did NOT require the Department to publish it "with the Notice of Proposed Rulemaking". The EICC was well aware that the Notice of Proposed Rulemaking had already been properly published a day prior to the EICC's meeting. The EICC's awareness that the Notice of Proposed Rulemaking had already been published is clearly evidenced by its proposed alternative which asked that the Department consider "withdrawing its proposed regulatory language". In compliance with the EICC's motion, the EICC's proposed alternative, and the reasons why the Department did not choose to follow the proposed alternative is set forth below.

A commenter raised the following arguments: the Department is usurping legislative powers and the authority of the SED over professional licenses; the Department does not possess legislative authority to issue the regulations; the regulations constitute an unlawful constraint on a professional's license and acts to revoke the provider's license without an opportunity to be heard; and there were errors and omissions in the regulatory documents included in the Notice of

Proposed Rulemaking, including in the needs and benefits section of the Regulatory Impact Statement and the assessment of the job impact of the proposed regulation.

The Department believes these arguments to be without merit. The Department is authorized to promulgate regulations, and to establish standards for evaluators, service coordinators and providers of early intervention services. The proposed rule furthers the Department's goal in that it establishes standards that would eliminate the potential for conflicts of interest for evaluators, service coordinators and providers who participate in the EIP. A provider's license to practice his or her profession and scope of practice will not be impacted by the proposed rule. The proposed rule will prohibit an individual provider from rendering both service coordination, or case management, services and evaluations, but the individual may continue to provide evaluations and professional services in accordance with the individual's license, certification or registration.

The EICC and commenters provided the following alternatives to the proposed rule. On September 6, 2012, the EICC passed the following motion:

"The SEICC requests that DOH EI consider withdrawing their proposed regulatory language on conflict of interest and, rather, propose that the Bureau identify abuses including, but not limited to, determining eligibility, level of services, and identifying specific EI service providers, which constitute conflict of interest and take appropriate action as described in regulations."

The majority of comments received urged that the Department follow the EICC's alternative approach. After careful consideration, the Department feels that the alternative approach does not further the goals of the proposed rule in preventing conflicts of interest in the EIP. The Department will continue to monitor and audit providers to ensure services are provided in compliance with laws and regulations. However, the proposed rule furthers the Department's goal of prohibiting conflicts of interest in the EIP in the first instance.

Commenters proposed that the Department strengthen existing monitoring of providers and use SED authority to take action against providers when appropriate. The Department will continue to monitor providers and refer matters to the SED's Office of the Professions, as appropriate. However, the proposed rule furthers the Department's goal of taking on a more preventative approach to conflicts of interest.

Commenters suggested providing enhanced training to providers, Early Intervention Officials/Designees (EIO) and service coordinators to make appropriate service provision choices. The Department supports an extensive training contract for provision of training to all professionals engaged in the program and will continue its efforts at revising training curricula as needed to address the needs of the EIP.

It was suggested that Individualized Family Service Plan (IFSP) teams develop justifications when potential conflicts of interest are possible. The Department does not believe that this approach furthers the goals of the proposed rule. The IFSP team does not currently make determinations on who should be assigned as the provider of services.

It was recommended that the Department develop metrics to identify agencies with excessive recommended services and that the State fiscal agent conduct data analysis on these metrics. The Department has conducted data analyses on service utilization patterns in conjunction with its programmatic and fiscal monitoring efforts and will continue those efforts. However, the Department feels strongly that conflicts of interest continue to be a significant concern requiring more proactive controls.

Commenters recommended that the effective date of the proposed rule be delayed or implemented over 6 months. The Department feels that the proposed rule should be implemented expeditiously to address conflicts of interest in the EIP. However, due to the impact of Hurricane Sandy, the Department has made a minor revision to the proposed rule, delaying the effective date to January 1, 2013.

Commenters suggested that the rule be extended to include the conflict between the same individual serving as an EIO/D and a service coordinator for a child. The Department has been made aware of this issue and provided guidance to municipalities to address it. The Department will continue to monitor this issue and take appropriate action, as necessary.

ASSESSMENT OF PUBLIC COMMENT

A Notice of Proposed Rulemaking was published in the *State Register* on September 5, 2012. Public comment was received from over 3,500 commenters, including 14 municipalities, 147 early intervention (EI) providers, 3,376 family members of children who received EI services through the program and members of the public, and 11 members of the Legislature. Comments were also submitted by 13 associations on behalf of providers.

All comments received during the comment period were reviewed and assessed in accordance with the provision of the State Administrative Procedures Act (SAPA). Due to the impact of Hurricane Sandy, a minor revision was made delaying the effective date to January 1, 2013. The issues raised by these comments, significant alternatives suggested and statements of reasons why additional revisions were not made are summarized below.

I. Comments:

Of the fourteen municipal responses, six municipalities, including the New York City (NYC) Department of Health and Mental Hygiene, were in support of the proposed rule. Five municipalities were in opposition to the proposed rule. Three municipalities supported the proposed changes to subdivision (e) of section 69-4.5, which incorporates existing Department marketing standards in regulation but opposed the changes that address conflicts of interest in the Early Intervention Program (EIP).

Comments were received from 11 Assembly members. All but one expressed opposition to the proposed rule. One Assembly member submitted a request for more information prior to making a judgment in support or opposition.

Three commenters supported the proposed rule noting that it would help prevent fraud and abuse in the EIP. Many commenters supported the proposed changes to subdivision (e) of section 69-4.5 which incorporates existing marketing standards in regulation, but opposed the changes that address conflicts of interest in the EIP.

Numerous commenters opposed the proposed rule and voiced the following concerns: that the proposed rule would adversely affect families by eliminating their choice of evaluator, as mandated by New York State Public Health Law (PHL), forcing them to choose an evaluation agency not based on qualifications but because they do not want to limit their choice of service providers; the proposed rule restricts a families' choice of providers; interrupts the relationship established with the evaluator; and the inability to continue that relationship into service provision will adversely affect continuity of care.

Department's Response: PHL § 2544 allows a parent to select an evaluator to conduct a multidisciplinary evaluation of a child. Evaluators must be qualified by licensure, certification or registration to provide evaluations in the area for which they hold such license, certification or registration. Only those evaluators qualified to perform evaluations will be included on the list of evaluators used by parents. Consistent with PHL, parents will continue to choose an evaluator from the list of approved evaluators for their children. While parents and children spend time

with evaluators during the evaluation, providers assigned to provide services to the child establish close relationships with children and their families and support families long term. The Department understands that there are special circumstances related to individual children that may necessitate continuous specialty care from evaluation through service provision and has incorporated an authorization process in the proposed rule for these circumstances. In addition, a minor revision has been made to the proposed rule, revising the effective date to January 1, 2013. The proposed rule applies only to those children referred to the EIP on or after January 1, 2013 and to children referred prior to January 1, 2013 for whom an additional evaluation or partial evaluation is requested after that date for the purpose of adding a new service, to ensure continuity of care for children and families currently receiving services in the EIP. With respect to choice of providers, although the parent is authorized to select an evaluator and an ongoing service coordinator, there is nothing within the Individuals with Disabilities Education Act or PHL which grants parents the right to choose the service providers who will deliver services to children.

Commenters voiced concerns that the licensed professionals are bound by ethical standards, and the proposed rule will limit the professionals' scope of practice. Commenters also noted that the New York State Education Department (SED) licenses professionals and has the authority to monitor and protect against conflicts of interest.

Department's Response: The proposed rule does not prohibit professionals from practicing within their scope of practice. Professionals will maintain their ability to both evaluate and treat children in the EIP. The professional is only prohibited from both evaluating and treating the

same child unless the Department grants authorization or issues a standing waiver. Pursuant to PHL § 2550 (1) and (2), the Department, as lead agency responsible for administering the EIP, is authorized to establish standards for the provision of evaluations, service coordination and program services and is responsible for monitoring and oversight. Therefore, the Department has authority to establish standards to protect against conflicts of interest with respect to service provision in the EIP. The proposed rule furthers the important goal of the Department to eliminate potential conflicts of interest in the EIP and ensures children receive comprehensive, objective evaluations based on individual child and family needs, and services that are tailored to meet those needs. Furthermore, possessing an appropriate license from SED alone is not sufficient to allow providers to deliver services in the EIP. Additional standards under 10NYCRR 69-4.5 are required to be met for participation in the EIP.

Many commenters stated that there are existing procedural safeguards and controls in place to address potential conflicts of interest and those existing safeguards should be strengthened in lieu of implementation of the proposed rule. Procedural safeguards and controls noted include: programmatic and fiscal audits; monitoring of providers through the Department's contractor; the Early Intervention Official's (EIO) authority, as part of the Individualized Family Service Plan (IFSP) team, to determine the appropriate levels of service; current statutory language which prohibits an evaluator from including reference to a specific provider of services in the evaluation; and the Department's authority to approve and reapprove evaluators, providers and service coordinators.

Department's Response: The Department will continue to monitor and audit providers to ensure services are provided to children in compliance with laws and regulations, and take appropriate action when necessary. However, the proposed rule furthers the Department's goal of prohibiting conflicts of interest in the EIP in the first instance, rather than seeking to address fraud and abuse after it is found upon monitoring or audit. The Department will use all tools at its disposal to ensure that services are provided to children who need them and that such services are appropriate to child's needs.

The majority of the commenters across groups were concerned that the proposed rule would create capacity issues and a lack of access for families to providers that provide services to specialized populations or have a unique skill set. Commenters argued that many specialized providers who conduct both evaluations and provide ongoing services do so because there is insufficient capacity for specialized skills.

Department's Response: The proposed rule allows the Commissioner, after consultation with the EIO, to authorize service provision by the evaluator, approved agency, or relative or business associate of the evaluator in certain circumstances related to the evaluator's qualifications or provider availability or other extraordinary circumstances. The proposed rule sets forth a fixed timeline within which requests for and decisions concerning authorizations are to be made, to ensure timely provision of services. The proposed rule also allows the Commissioner to issue a standing waiver, upon finding there is a shortage of evaluators or approved providers in certain disciplines or regions of the State. The Department is proactively working to analyze existing

professional capacity and issue standing waivers expeditiously where appropriate, in advance of the effective date of the new rule.

Many commenters expressed concern with the administrative burden and impact the authorization process will have on the timely provision of services. It was recommended that the municipalities process requests for authorizations as opposed to the Department. Commenters also recommended that the authorization process be shortened.

Department's Response: The proposed rule furthers the Department's goal of reducing the administrative burden on localities by placing the responsibility of authorization determinations on the Department. In addition, commencing on April 1, 2012, municipalities will no longer be responsible for entering into contracts with providers. The Department will be entering into agreements with providers for participation in the EIP. By taking on the responsibility for authorization determinations and waivers, the Department will be able to better monitor capacity and will take any capacity issues into account when entering into agreements with providers. The Department will establish administrative procedures and provide training to service coordinators to ensure requests for authorizations are submitted immediately upon a detected need, with a maximum allowance of twenty days. The Department will expeditiously render determinations on the authorization requests to ensure that services continue to be provided to children in a timely manner. The Department will continue its diligent efforts at monitoring timely service provision and ensure that service coordinators are complying with timeliness standards.

The majority of providers were concerned with the fiscal impact of the proposed rule. These concerns centered on the thought that the proposed rule would require providers to decrease their scope of activities. In addition, concerns were expressed that the fiscal impact will be significantly directed at small agencies that will be required to select a restricted model of service provision.

Department's Response: All providers, with the exception of individuals who are approved to deliver both service coordination services and evaluations, will continue to have the ability to deliver all lines of business in the EIP that they are approved to render. Providers approved to deliver evaluations and services will still be authorized to do so, however, they may not render evaluations and services to the same child unless the Department grants authorization or issues a standing waiver. As noted, when concerns arise with ability to meet the needs of children and families, authorization and waiver provisions are provided. Individuals who are approved to deliver both evaluations and service coordination services will be impacted in that the individual may no longer be approved to deliver both evaluations and service coordination services; however the individual may continue to deliver both evaluations and early intervention services. The Department believes that the proposed rule would not impact these individuals' overall participation in the EIP.

Many commenters expressed concern that the Department did not present sufficient evidence to indicate that conflicts of interest are actually occurring in the EIP. One commenter noted that the costs of service delivery in NYC were higher due to a higher cost of living index in this area. Several commenters suggested that the proposed rule was a statewide solution to a perceived

local issue that is isolated to NYC. Many commenters felt that the conflict of interest concern would be more accurately addressed if applied only to NYC.

Department's Response: The goal of the proposed rule is to ensure that children receive an objective multidisciplinary evaluation and that recommendations for early intervention services are made based on the needs of children with the participation of evaluators who have no vested financial interest in the decisions made at the IFSP meeting. The Department has conducted data analysis on evaluation and service provision patterns and has concerns about the high percentage of evaluators who go on to render services to children for whom they evaluated. While the percentage of providers who serve as both evaluator and provider for a child is high in NYC (over 90%), the percentage of providers who serve as both evaluator and provider to the same child is also of concern in the remainder of the State, as almost 45% of evaluators are providing services to children whom they evaluated. The Department feels that a statewide approach to the conflict of interest issue furthers the goals of the proposed rule.

Commenters argued that the regulations are similar to a proposal included in the New York State Governor's 2012-13 Executive Budget Proposal, which was rejected by the New York State Legislature.

Department's Response: The fact that the proposal referenced in the comments was not included in the enacted budget does not preclude the Department from proposing and adopting this rule in accordance with the State Administrative Procedure Act.

Commenters expressed concern that the Department did not publish along with the Notice of Proposed Rulemaking, the motion passed by the New York State Early Intervention Coordinating Council (EICC) on September 6, 2012 requesting that the Department consider withdrawing the proposed regulations and pursue administrative controls to detect fraud and abuse.

Department's Response: The EICC's alternative is reflective of the alternative already included and considered in the Regulatory Impact Statement that was filed with the Notice of Proposed Rulemaking. Revising the Notice of Proposed Rulemaking to include the EICC's proposed alternative would be duplicative of the alternative already included therein. Furthermore, PHL §2553 provides that the EICC may require that an alternative approach to the proposed rules and regulations be published with the Notice of Proposed Rulemaking. At its September 6, 2012 meeting, the EICC passed the following motion:

That the Department publish the SEICC's recommended alternative approach and the reasons why the alternative approach was not considered, if the Department does not act in a manner consistent with the SEICC's recommendation.

Although the EICC moved to require the Department to publish the EICC's recommended alternative, it did NOT require the Department to publish it "with the Notice of Proposed Rulemaking". The EICC's motion did not include a requirement that the alternative be published with the Notice of Proposed Rulemaking because the EICC was well aware that the Notice of Proposed Rulemaking had already been properly published a day prior to the EICC's

meeting wherein they reviewed and commented on the proposed rules. The EICC’s awareness that the Notice of Proposed Rulemaking had already been published is clearly evidenced by its proposed alternative which asked that the Department consider “withdrawing its proposed regulatory language”. In compliance with the EICC’s motion that the Department publish its proposed alternative, the EICC’s proposed alternative, and the reasons why the Department did not choose to follow the proposed alternative are fully set forth in this document under “Alternatives”.

Finally, a commenter raised the following arguments: the Department is usurping legislative powers and the authority of the SED over professional licenses; the Department does not possess legislative authority to issue the regulations; the regulations constitute an unlawful constraint on a professional’s license and requiring an individual provider to choose whether he or she wishes to provide service coordination services or evaluations is in effect revoking the provider’s license without an opportunity to be heard; and that there were errors and omissions in the regulatory documents filed with the Notice of Proposed Rulemaking, including in the needs and benefits section of the Regulatory Impact Statement and the assessment of the job impact of the proposed regulation.

Department’s Response: The Department believes these arguments to be without merit. Public Health Law § 2559-b grants the Department authority to promulgate regulations to implement the provisions of the law. PHL § 2550 sets forth the responsibilities of the Department, as lead agency in the administration of the program and monitoring of programs and activities used by the state to carry out the requirements of the program. PHL §2550 (2)(a) provides the

Department with authority to establish standards for evaluators, service coordinators and providers of early intervention services. The proposed rule furthers the Departments goal in that it establishes standards that would eliminate the potential for conflicts of interest for evaluators, service coordinators and providers who participate in the EIP. A provider's license to practice his or her profession is not impacted by the proposed rule. The provider may still render services within the scope of such license to children within the EIP, or may provide professional services outside of the EIP. Nor is a provider's scope of practice limited, in that the provider may render the full array of services that is within the provider's scope of practice as authorized by the provider's licensure, certification or registration, but may not render services in the EIP to the same child that the provider evaluated unless the Department grants authorization or issues a standing waiver. The proposed rule will prohibit an individual provider from rendering both service coordination (or case management) services and evaluations, but the individual may continue to provide both evaluations and early intervention services in accordance with the individual's license, certification or registration. The Department believes that the rule does not impact these individuals' overall participation in the EIP and believes that the regulatory documents submitted with the Notice of Proposed Rulemaking accurately reflect the impact of the proposed rule.

II. Alternatives:

On September 6, 2012, the EICC passed the following motion:

“The SEICC requests that DOH EI consider withdrawing their proposed regulatory language on conflict of interest and, rather, propose that the Bureau of Early Intervention identify abuses including, but not limited to, determining eligibility, level of services, and identifying specific EI service providers, which constitute conflict of interest and take appropriate action as described in regulations.”

The majority of comments received urged that the Department follow the EICC’s alternative approach. After careful consideration, the Department feels that the alternative approach does not further the goals of the proposed rule in prohibiting conflicts of interest in the EIP. The Department will continue to monitor and audit providers to ensure services are provided to children in compliance with laws and regulations, and take appropriate action when necessary. However, the proposed rule furthers the Department’s goal of prohibiting conflicts of interest in the EIP in the first instance, rather than seeking to address fraud and abuse after it is found upon monitoring or audit. The Department will use all tools at its disposal to ensure that services are provided to children who need them and that such services are appropriate to a child’s needs.

In addition to supporting the EICC’s alternative, many commenters proposed that the Department strengthen existing monitoring of providers and use existing SED authority to take action against providers when appropriate. The Department will continue to monitor providers and refer matters to the SED’s Office of the Professions as appropriate. However, the proposed rule furthers the Department’s goal of taking on a more preventative approach to conflicts of interest.

Commenters also suggested providing enhanced training to providers, enhanced training to Early Intervention Officials/Designees and to service coordinators to make appropriate service provision choices. The Department supports an extensive training contract for provision of training to all professionals engaged in the EIP and will continue its efforts at revising training curricula as needed to address the needs of the program.

It was suggested that IFSP teams develop justifications when potential conflicts of interest are possible. The Department does not believe that this approach furthers the goals of the proposed rule. The IFSP team does not currently make determinations on who should be assigned as the provider of services. The Department believes this responsibility should be properly placed on the service coordinator responsible for implementing the IFSP.

It was recommended that the Department develop metrics to identify agencies with excessive recommended services and that the future State Fiscal Agent conduct data analysis on these metrics. At a certain threshold, a Departmental review would be undertaken and if necessary conflict resolution imposed. The Department has conducted data analyses on service utilization patterns in conjunction with its programmatic and fiscal monitoring efforts and will continue those efforts. However, the Department feels strongly that conflicts of interest continue to be a significant concern requiring more proactive controls.

Commenters recommended that the effective date of the proposed rule be delayed. Some requested that the effective date should be changed to April 1, 2012 to coincide with the effective date of major revisions made to the Early Intervention Program in the 2012-2013 enacted budget.

Another commenter suggested a six month implementation schedule. The Department feels that the proposed rule should be implemented expeditiously to address conflicts of interest in the program. However, due to the impact of Hurricane Sandy, the Department has made a minor revision to the proposed rule and has delayed the effective date to January 1, 2013.

Several commenters also suggested that the rule be extended to include the conflict between the same individual serving as an EIO designee and a service coordinator for a child. The Department has been made aware of this issue and provided guidance to municipalities to address the same. The Department will continue to monitor this issue to determine what additional action, if any, should be taken to further address this concern.