

Category: **ADMINISTRATIVE PERSONNEL** Issued: 9/21/18 Number: **C-102**
Subject: CONTROLLED SUBSTANCE AND ALCOHOL USE BY SCHOOL TRANSPORTATION WORKERS Page: 1 of 1

SUMMARY OF CHANGES

This regulation supersedes and replaces Chancellor's Regulation C-102 dated June 25, 2009.

This regulation covers the rules, regulations, policies and procedures prohibiting the consumption or other use of controlled substances and/or alcohol by school transportation workers as well as the rules, regulations and procedures for the detection testing of controlled substances and/or alcohol use or consumption by such persons.

Changes:

- Footnote 26, which defined "Chancellor's designee(s)" as "the Deputy Chancellor for Infrastructure and Planning (or successor position), the Chief Executive for School Support Services (or successor position), the (Executive) Director of the Office of Pupil Transportation (or successor position), all OPT Investigation Unit investigators, all OPT school bus inspectors, all NYCDOE school principals, and/or all NYCDOE school transportation coordinators" has been removed. (Section IX(D)(1), p. 11 at FN 26).
- Footnotes 26 through 34 have been renumbered.

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ABSTRACT

Federal and City of New York statutes and regulations require the New York City Department of Education (“NYCDOE”) to promulgate, administer and enforce rules, regulations, policies and procedures relating to controlled substance and alcohol consumption and other use by workers who operate or otherwise work on school buses and other motor vehicles used to transport children to and from schools, pre-school sites, early intervention sites, field trip destinations, related/itinerant services destinations, after-school program destinations and other school-related destinations. The motor vehicles covered by this regulation include all types of school buses and all other types of vehicles, whether such vehicles are owned and operated by the NYCDOE, by private companies under contract to the NYCDOE, or otherwise engaged to provide such services. The persons covered by this regulation include, without limitation, school bus contractors, ambulance transportation contractors, coach bus contractors, applicable NYCDOE employees, drivers (*aka* operators), and escorts (*aka* attendants or matrons), whether such persons are employed by the NYCDOE or by private persons or companies.

The following rules, regulations, policies and procedures implement the general NYCDOE policy that school transportation workers may *not* consume, use and/or be impaired by controlled substances and/or alcohol in the performance of safety-sensitive functions or any other school transportation duties. For many years, the NYCDOE has implemented as a practice a **Zero Tolerance Policy** toward NYCDOE-certified school transportation workers who consume, use, and/or are impaired by, controlled substances and/or alcohol while performing safety-sensitive functions or other school transportation duties. This regulation formalizes the NYCDOE **Zero Tolerance Policy**. This regulation is a supplement to, or in lieu of, applicable provisions expressed in NYCDOE pupil transportation contracts, pre-kindergarten/early intervention school bus contracts, coach bus contracts, ambulance transportation contracts, and all other contracts for the transportation of pupils and/or children.

I. INTRODUCTION

At 49 C.F.R. Parts 40, 382, 386 and 390, the regulations of the United States Department of Transportation (“USDOT”) require all motor carriers¹ to implement policies and procedures to prohibit, monitor, and test for, the use of controlled substances and/or alcohol by persons in their employ or other engagement holding Commercial Driver Licenses (“CDLs”) and performing safety-sensitive functions. The New York City Administrative Code, §§ 17-601 through 17-615 contains parallel and additional requirements placing responsibilities upon the New York City Department of Education (“NYCDOE”) as well as private contractors who perform transportation services for and on behalf of the NYCDOE and the children and other people whom the NYCDOE serves. This regulation implements both the Federal and City of New York requirements, and it reflects additional policies, practices, regulations and procedures expressed in NYCDOE contracts or otherwise maintained by the NYCDOE. The purpose of this regulation is to establish

¹ Wherever used in or with reference to this regulation, the term “motor carrier” includes the terms “school bus contractor,” “ambulance transportation contractor,” “coach bus contractor,” “employee leasing subcontractor,” and all other types of contractors, providers, subcontractors and/or affiliates that furnish transportation and/or related services to the NYCDOE, its public schools and other NYCDOE functional units pursuant to formal contracts and/or less formal arrangements.

programs within the NYCDOE and among all motor carriers designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers² of commercial motor vehicles and escorts.³

II. APPLICABILITY OF REGULATION OF THE CHANCELLOR

This regulation applies to all motor carriers, drivers and other persons and entities who furnish any type of transportation services to children (inclusive of grades K-12, pre-kindergarten programs and early intervention programs) and other persons served by the NYCDOE, as such are covered and/or defined by the USDOT regulations expressed at 49 C.F.R. §§ 40.3, 382.101, 386.2 and 390.5, and the New York City Administrative Code, §§ 17-601 through 17-615. This regulation also applies to all escorts, to the extent specifically provided herein, who furnish transportation services to children and other persons served by the NYCDOE. Furthermore, this regulation applies to all persons and entities who provide services to affected motor carriers, where such services relate to the administration, policy promulgation, record-keeping, drug and/or alcohol testing, training and other similar activities in relation to controlled substances and alcohol consumption and/or other use by school transportation workers.

III. EFFECTIVE DATE OF REGULATION OF THE CHANCELLOR

This regulation is fully effective on the date specified as the “Issued” date in the header of this regulation. There shall be no retroactive application of new and/or altered requirements.

IV. DEFINITIONS

The definitions expressed in 49 C.F.R. Parts 40, 382, 386 and 390 shall apply to, and govern, the meanings of all applicable words used in this regulation. However, to the extent that they do not conflict with the Federal regulations cited in the preceding sentence, the definitions expressed in the New York City Administrative Code, §§ 17-601 through 17-615 shall also apply to, and govern, the meanings of all applicable words used in this regulation. If the definitions stated in the New York City Administrative Code set a non-conflicting higher standard or non-conflicting broader coverage than the definitions expressed in the USDOT regulations, then the definitions expressed in the New York City Administrative Code shall prevail and govern in every case and for all general and particular intents and purposes. Additional definitions of words, as expressed herein, shall apply and govern to the extent expressed.

V. AUTOMATIC UPDATES AND/OR REVISIONS OF REGULATION OF THE CHANCELLOR

Whereupon the U.S. Congress, the USDOT, the State of New York, the City of New York and/or another governmental entity with applicable jurisdiction shall enact, promulgate and/or otherwise implement added, deleted, updated, revised and/or otherwise changed statutes, rules, regulations, policies and/or other mandatory specifications affecting the area of controlled substances and/or alcohol use and/or other consumption, testing and other applicable policies covering school transportation workers, this regulation shall be deemed to be added to, deleted from, updated, revised and/or otherwise changed automatically and without any action and/or notice by the NYCDOE to reflect all such additions, deletions, updates, revisions and/or other changes. Such additions, deletions, updates, revisions and/or other changes affecting this regulation shall be effective immediately as of the effective date specified by the U.S. Congress,

² Wherever used in or with reference to this regulation, the term “driver” includes the terms “vehicle operator” and “operator,” whether such personnel work on school buses, ambulances, coach buses or other motor vehicles conveying children. The term “driver” includes motor carrier owners, management employees, administrative employees, dispatchers, mechanics and other contractor personnel who are NYCDOE-certified as drivers under any applicable NYCDOE contract. Furthermore, workers who primarily act as escorts but are cross-certified as drivers are included under the definition of “driver.”

³ Wherever used in or with reference to this regulation, the term “escort” includes the terms “attendant,” “matron,” “monitor” and “emergency medical technician” (“EMT”), whether such persons work on school buses, ambulances, coach buses or other motor vehicles that transport children. The term “escort” shall not include paraprofessionals employed by the NYCDOE who are assigned to accompany special education pupils while in transit, nor does it include teachers, parents and volunteers who chaperone pupils on field trips, etc.

the USDOT, the State of New York, the City of New York and/or another governmental entity with applicable jurisdiction. The NYCDOE shall issue updated versions of this regulation as resources permit in the NYCDOE's reasonable discretion.

VI. CONTRACTOR'S CONTROLLED SUBSTANCES & ALCOHOL POLICIES AND PRACTICES

- A. As hereinafter expressed in greater detail, every motor carrier furnishing transportation services to children and other persons served by the NYCDOE shall develop, establish and implement a written policy, program and practices to prohibit the consumption and/or other use of alcohol and/or controlled substances by drivers and escorts that is compliant with 49 C.F.R. Parts 40, 382, 386 and 390, the New York City Administrative Code, §§ 17-601 through 17-615, and this regulation.
- B. Every motor carrier furnishing transportation services to children and other persons served by the NYCDOE shall certify to the NYCDOE that it has established and implemented a controlled substances and alcohol testing program and policies as required by this regulation. Such certification shall be submitted to the NYCDOE not later than one (1) month after the effective date of this regulation and annually thereafter upon such date as shall be set by the Office of Pupil Transportation ("OPT"). The text of the said certification required by this section shall be as follows: "I, [name], [title], certify that [name of motor carrier] has established and implemented an alcohol and drug testing program and policies in accordance with the terms of Regulation of the Chancellor No. C-102. In addition, I certify that [name of motor carrier] requires all drivers used by [name of motor carrier] to submit to pre-employment drug/alcohol testing, random drug/alcohol testing, reasonable suspicion drug/alcohol testing, post-accident drug/alcohol testing and return to duty drug/alcohol testing and all escorts (*aka* attendants or matrons) used by [name of motor carrier] to submit to reasonable suspicion drug/alcohol testing and return to duty drug/alcohol testing, in accordance with the requirements of Regulation of the Chancellor No. C-102 and any rules promulgated pursuant thereto."

VII. REQUIREMENT FOR NOTICE TO SCHOOL TRANSPORTATION WORKERS

Before performing each alcohol and/or controlled substances test under this regulation, each motor carrier shall notify each affected driver and/or escort that the alcohol and/or controlled substances tests are required by this regulation. No motor carrier shall falsely represent that a test is administered under 49 C.F.R. Part 382 or this regulation. At the start of each school year, every motor carrier shall give written notice of its alcohol and controlled substances testing policy, as required and provided hereunder, to all drivers and escorts employed and/or other otherwise used by it. Each motor carrier must ensure that every affected school bus driver and escort signs and dates a receipt attesting that he/she has received the written notice of the motor carrier's alcohol and drug testing policy. The written notice must contain the following information:

- the need for drug and alcohol testing;
- the procedure for confirming an initial positive drug and/or alcohol test result;
- the right to obtain an additional drug test on the same specimen at the driver's or escort's own expense;
- the consequences pursuant to this regulation of not passing a drug and/or alcohol test or refusing to take a drug and/or alcohol test; and,
- the right to explain a positive test result.

VIII. PROHIBITIONS

A. Alcohol Concentration

No driver or escort shall report for duty or remain on duty requiring the performance of

safety-sensitive functions⁴ while having an alcohol concentration of 0.04 or greater.⁵ No motor carrier provider having actual knowledge⁶ that a driver or escort has an alcohol concentration of 0.04 or greater shall permit the driver or escort to perform or continue to perform safety-sensitive functions.

B. Alcohol Possession

No motor carrier may permit a driver or escort to operate a vehicle, continue to operate a vehicle or otherwise perform safety-sensitive functions if the motor carrier has actual knowledge that a driver or escort possesses alcohol.

C. On-Duty Alcohol Use

No driver or escort shall use alcohol while performing safety-sensitive functions. No motor carrier having actual knowledge that a driver or escort is using alcohol while performing safety-sensitive functions shall permit the driver or escort to perform or continue to perform safety-sensitive functions.

D. Pre-Duty Alcohol Use

No driver or escort shall perform safety-sensitive functions within four (4) hours after using alcohol. No motor carrier having actual knowledge that a driver or escort has used alcohol within four (4) hours shall permit a driver or escort to perform or continue to perform safety-sensitive functions.

E. Alcohol Use Following an Accident

No driver required to take a post-accident alcohol test shall use alcohol for eight (8) hours following the accident or until he/she shall have undergone a post-accident alcohol test, whichever shall occur first.

F. Refusal to Submit to a Required Alcohol or Controlled Substance Test

No driver shall refuse⁷ to submit to a post-accident alcohol or controlled substances test, a random alcohol or controlled substances test, a reasonable suspicion alcohol or controlled substances, or a follow-up alcohol or controlled substances test. No escort shall refuse to submit to a reasonable suspicion alcohol or controlled substances test or a follow-up alcohol or controlled substances test. No driver or escort⁸ shall refuse to submit to a pre-employment alcohol or controlled substances test. No motor carrier shall permit a driver or escort who refuses to submit to such tests to perform or continue to perform safety-sensitive functions.

1. Failure to Submit to a Controlled Substances Test.

The definition of "refuse to submit (to an alcohol or controlled substances test)" expressed in 29 C.F.R. § 382.107 includes, without limitation, the situation in which a

⁴ For escorts, the term "safety-sensitive function(s)" is deemed to include all applicable school transportation duties performed within the period of time specified for "safety-sensitive function" under 49 C.F.R. § 382.107.

⁵ See **Paragraph XII.C**, *infra*, for rules pertaining to alcohol concentration of at least 0.02 but not as high as 0.04, i.e., no driver or escort may perform safety-sensitive functions or other transportation duties with an alcohol concentration of at least 0.02.

⁶ In addition to the definition expressed in 49 C.F.R. § 382.107, the term "actual knowledge," as used anywhere in this regulation, includes information obtained by, or reported to, any one or more of a motor carrier's management, dispatch, safety, human resources and/or administrative staff from any credible source including, but not limited to, anonymous written or verbal communications. Upon receipt of such information, it is the motor carrier's immediate duty to make a direct observation of the driver's or escort's condition as expressed in the cited Federal definition.

⁷ The term "refuse" shall have the meaning prescribed in 49 C.F.R. § 382.107 and as further explained in **Paragraph VIII.F.1**, *infra*, and elsewhere in this regulation.

⁸ This shall apply only in NYCDOE contracts requiring escorts to undergo pre-employment alcohol and/or controlled substances testing. On the other hand, where a motor carrier requires such tests for escorts as part of its own independent policies, it shall be prohibit under this regulation for an escort to refuse to undergo such testing.

driver or escort shall “[f]ail to appear for any test (except a pre-employment test) within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer[, ...] includ[ing] the failure of an employee (including an owner-operator) to appear for a test when called by a C/TPA....” All motor carriers are required to make available at least one (1) controlled substances testing site within the borders of the City of New York that is open until 12:00 A.M. (midnight) on school days. Therefore, the phrase “within a reasonable time” to appear for, and submit to, a controlled substances test is hereby determined to be on the same day on which the motor carrier shall notify a driver or escort of the need to undergo a controlled substances test. The only reasons to excuse a driver or escort from submitting to a controlled substances test on the same day as directed by the motor carrier are the following: (a) a driver or escort experiences personally a medical or dental emergency requiring immediate, unscheduled hospital treatment or immediate, unscheduled dental surgery (or equivalent dental treatment for a serious condition); or, (b) a driver or escort is the primary care-giver to a person (e.g., child, parent, grandparent) who experiences personally a medical or dental emergency requiring immediate, unscheduled hospital treatment or immediate, unscheduled dental surgery (or equivalent dental treatment for a serious condition).⁹ If a driver or escort does not appear for, and submit to, a controlled substances test owing to one of the two reasons expressed in the preceding sentence, the driver or escort (or his/her designee) shall communicate the nature of the medical or dental emergency to his/her motor carrier or other employer within a reasonable period of time but not longer than 72 hours after the onset of the medical or dental emergency. Within a reasonable period of time but not later than three (3) school days after returning to work, the driver or escort must give his/her motor carrier or other employer reasonably satisfactory documentary proof of the medical or dental emergency that prevented the driver or escort from submitting to a controlled substances test on the same day as notified by the motor carrier. Dizziness, feelings of faintness, a cold, the flu, a stomach/intestinal virus, diarrhea, fever, migraine headache, dental pain or other lesser health complaints are **not** sufficient as reasons to justify failing to report for a controlled substances test on the same day as notified by the motor carrier. If a driver or escort is physically unwell at the time or after he/she receives notice of a controlled substances test, he/she shall notify the motor carrier of the problem immediately and request the motor carrier to provide transportation and someone to accompany the driver or escort to and from the controlled substances test site. Under such circumstances, every motor carrier shall provide transportation and accompaniment to the driver or escort.¹⁰ At the same time, it is deemed to be a disciplinary offense warranting revocation of NYCDOE certification of approval and/or employment termination upon a first instance for a worker to feign illness under the circumstances expressed heretofore in this paragraph. If a worker avails him/herself of transportation and accompaniment by the motor carrier to a controlled substances test site, the worker must give the motor carrier documentary proof of his/her treatment by a medical doctor or dentist.

G. Controlled Substances Use

1. No driver or escort shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver or escort uses any controlled substance, except when the use is pursuant to the instructions of a licensed medical practitioner,

⁹ An elective or scheduled surgery or procedure is not permitted under these reasons. If a worker knows or reasonably should know that he/she shall soon undergo an elective or scheduled surgery or procedure, he/she shall provide written notice to his/her employer. In turn, the motor carrier shall provide prompt, written notice of the surgery or procedure to OPT. A failure of communication between the motor carrier and its subcontractor or other affiliate shall not serve as an excuse to a finding of a violation of this regulation by the motor carrier.

¹⁰ A motor carrier's failure to follow this rule shall be deemed to constitute a “serious” violation of this regulation. A motor carrier's refusal to follow this rule or two or more failures to follow this rule shall be deemed to constitute “willful serious” violation of this regulation. See the New York City Administrative Code, § 17-613.

as defined in 49 C.F.R. § 382.107, who has advised the driver or escort that the substance will not adversely affect the driver's or escort's ability to safely operate a commercial motor vehicle or perform any other safety-sensitive function.

2. No motor carrier having actual knowledge that a driver or escort has used a controlled substance shall permit the driver or escort to perform or continue to perform a safety-sensitive function.
3. No motor carrier may permit a driver or escort to operate a vehicle, continue to operate a vehicle or otherwise perform safety-sensitive functions if the motor carrier has actual knowledge that a driver or escort possesses a controlled substance(s) not lawfully prescribed by a licensed medical practitioner, as defined in 49 C.F.R. § 382.107, who has advised the driver or escort that the substance will not adversely affect the driver's or escort's ability to safely operate a commercial motor vehicle or perform any other safety-sensitive function.
4. Each motor carrier may require a driver or escort to inform the motor carrier of any therapeutic use of a controlled substance(s).

H. Controlled Substances Testing

No driver or escort shall report for duty, remain on duty, or perform a safety-sensitive function, if a driver or escort tests positive or has adulterated or substituted a test specimen for controlled substances. No motor carrier having actual knowledge that a driver or escort has tested positive or has adulterated or substituted a test specimen for controlled substances shall permit a driver or escort to perform or continue to perform safety-sensitive functions.

IX. REQUIRED TESTS

A. Pre-Employment Testing

1. Before the first time a driver¹¹ performs safety-sensitive functions for a motor carrier, the driver shall undergo testing for controlled substances as a condition prior to being used, unless the motor carrier uses the exception in **Paragraph IX.A.2, *infra***. No motor carrier shall allow a driver, whom the motor carrier intends to hire or use, to perform safety-sensitive functions unless the motor carrier shall have received a controlled substances test result from the Medical Review Officer ("MRO") or Consortium/Third Party Administrator ("C/TPA") indicating a verified negative test result for that driver.
2. A motor carrier is not required to administer a controlled substances test required by **Paragraph IX.A.1, *supra***, if:
 - a. The driver has participated in a drug testing program that meets the requirements of 49 C.F.R. Part 382 within the previous thirty (30) days; and,
 - b. While participating in that program, either: (i) was tested for drugs within the past six (6) months (from the date of application with the motor carrier), or (ii) participated in the random drug testing program for the previous twelve (12) months (from the date of application with the motor carrier); and,
 - c. The motor carrier ensures that no prior employer of the driver of whom the motor carrier has knowledge has records of a violation of 49 C.F.R. Part 382 or this regulation or the controlled substances use rule of another USDOT agency within the previous six (6) months.
3. a. A motor carrier who exercises the exception in **Paragraph IX.A.2, *supra***, shall contact the controlled substances testing program(s) in which the driver

¹¹ If an NYCDOE transportation contract shall require pre-employment alcohol and/or controlled substances testing for escorts as well as drivers, then **Paragraph IX.A** of this regulation shall apply with equal force to the escorts covered by the given NYCDOE transportation contract. See **Note 8, *supra***, for a motor carrier's right to require pre-employment testing for escorts under its own independent policies and the prohibition of an escort to refuse.

participates or participated and shall obtain and retain from the testing program(s) the following information: (a) name(s) and address(es) of the program(s); (b) verification that the driver participates or participated in the program(s); (c) verification that the program(s) adheres to 49 C.F.R Part 40; (d) verification that the driver is qualified under the rules of 49 C.F.R. Part 382 and this regulation, including that the driver has not refused to be tested for controlled substances; (e) the date the driver was last tested for controlled substances; and, (f) the results of any tests taken within the previous six (6) months and any other violations of 49 C.F.R. Part 382, Subpart B.

- b. A motor carrier who uses, but does not employ a driver more than once a year to operate commercial motor vehicles must obtain the data in **Paragraph IX.A.3.a, supra**, at least once every six months. The records prepared under this paragraph shall be maintained in accordance with 49 C.F.R. § 382.401. If the motor carrier cannot verify that the driver is participating in a drug testing program compliant with 49 C.F.R. Parts 40 and 382, the motor carrier shall conduct a pre-employment controlled substances test.
4. Each motor carrier may conduct pre-employment alcohol testing of drivers. Such pre-employment alcohol testing must comply with the following requirements: (a) the motor carrier must conduct a pre-employment alcohol test before the first performance of safety-sensitive functions by every driver (whether a new employee or someone who has transferred to a position involving the performance of safety-sensitive functions); (b) the motor must treat all safety-sensitive employees¹² performing safety-sensitive functions the same for the purpose of pre-employment alcohol testing (i.e., it must not test some covered employees and not others); (c) the motor carrier must conduct the pre-employment tests after making a contingent offer of employment or transfer, subject to the employee passing the pre-employment alcohol test; (d) the motor carrier must conduct all pre-employment alcohol tests using the alcohol testing procedures of 49 C.F.R. Part 40; and, (e) the motor carrier must not allow a covered employee to begin performing safety-sensitive functions unless the result of the employee's test indicates an alcohol concentration of less than 0.04.¹³

B. Post-Accident Testing

1. As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road in commerce, each motor carrier shall test for alcohol for each of its surviving drivers:
 - a. who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or
 - b. who receives a citation within eight (8) hours of the occurrence under State or local law for a moving traffic violation arising from the accident, if the accident involved one or both of the following:
 - i. bodily injury to any person who, due to the injury, immediately receives medical treatment away from the accident scene; or,
 - ii. one or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

¹² Wherever used in or with reference to this regulation in relation to drivers, the term "employee" includes drivers whether such persons are employed directly by the motor carrier or by any subcontractor or affiliate, e.g., an employee leasing company.

¹³ In addition, motor carriers may elect to require escorts to undergo pre-employment alcohol tests. Even though the Federal and City statutes and regulations underpinning this **Paragraph IX.A.4** do not apply to escorts, this regulation applies the stated rules to escorts as well.

2. As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road in commerce, each employer shall test for controlled substances for each of its surviving drivers:
 - a. who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or,
 - b. who receives a citation within thirty-two hours of the occurrence under State or local law for a moving traffic violation arising from the accident, if the accident involved one of both of the following:
 - i. bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or,
 - ii. one or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.
3. As soon as practicable but not more than thirty-two (32) hours following a third (3rd) vehicular accident within any period of twelve (12) months regardless of the nature and/or extent of injuries and/or damage and regardless whether or not the vehicle(s) operated by the driver was a school transportation vehicle(s) each employer shall test for controlled substances for each of its surviving drivers.
4. The following table notes when a post-accident test is required to be conducted under **Paragraphs IX.B.1, IX.B.2 and IX.B.3, supra:**

Table for Paragraphs IX.B.1, IX.B.2 and IX.B.3

Type of accident involved	Citation issued to The CMV driver	Test must be performed by motor carrier
i. Human fatality	YES	YES
	NO	YES
ii. Bodily injury with immediate medical treatment away from the scene	YES	YES
	NO	YES ¹⁴

Table for Paragraphs IX.B.1, IX.B.2 and IX.B.3

iii. Disabling damage to any motor vehicle requiring tow away	YES	YES
	NO	YES ¹⁵
iv. Following third vehicular accident within any period of twelve months	YES	YES ¹⁶
	NO	YES ¹⁷

5. a. Alcohol Tests

¹⁴ Requires the administration of a non-USDOT controlled substances test.

¹⁵ Requires the administration of a non-USDOT controlled substances test.

¹⁶ Requires the administration of a non-USDOT controlled substances test.

¹⁷ Requires the administration of a non-USDOT controlled substances test.

If a test required by this section is not administered within two (2) hours following the accident, the motor carrier shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within eight (8) hours following the accident, the employer shall cease attempts to administer an alcohol test and shall prepare and maintain the same record. Records shall be submitted annually by March 31st to the OPT Director. Records shall be submitted to the Federal Motor Carrier Safety Administration ("FMCSA") upon request.

b. Controlled Substances Tests

If a test required by this section is not administered within thirty-two (32) hours following the accident, the motor carrier shall cease attempts to administer a controlled substances test, and the motor carrier shall prepare and maintain on file a record stating the reasons the test was not promptly administered. Records shall be submitted annually by March 31st to the OPT Director.

6. A driver who is subject to post-accident testing shall remain readily available for such testing or may be deemed by the motor carrier to have refused to submit to testing. Nothing in this **Paragraph IX.B** shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a driver from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.
7. A motor carrier shall provide drivers with necessary post-accident information, procedures and instructions, prior to the driver operating a commercial motor vehicle, so that drivers will be able to comply with the requirements of this **Paragraph IX.B**.
8. The results of a breath or blood test for the use of alcohol, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this **Paragraph IX.B**, provided such tests conform to applicable Federal, State or local alcohol testing requirements, and that the results of the tests are obtained by the motor carrier.
 - a. The results of a urine test for controlled substances, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this **Paragraph IX.B**, provided such tests conform to applicable Federal, State or local controlled substances testing requirements, and that the results of the tests are obtained by the motor carrier.
9. Exception: This section does not apply to the following:
 - a. An occurrence involving only boarding or alighting from a stationary motor vehicle; or,
 - b. An occurrence involving only the loading or unloading of cargo; or,
 - c. An occurrence in the course of the operation of a passenger car or a multipurpose passenger vehicle (as defined in 49 C.F.R. § 571.3) by a motor carrier unless the motor vehicle is transporting passengers for hire or hazardous materials of a type and quantity that require the motor vehicle to be marked or placarded in accordance with 49 C.F.R. § 177.823.¹⁸

C. Random Testing

1. Every motor carrier shall comply with the requirements of 49 C.F.R. § 382.305, the New York City Administrative Code, § 17-605 and this **Paragraph IX.C**. Every driver shall submit to random alcohol testing and random controlled substances testing as

¹⁸ This **Paragraph IX.B.9.c** refers only to passenger cars and multi-purpose passenger vehicles operated by the motor carrier (e.g., by a driver on behalf of the motor carrier) and not to vehicles a driver operates outside the scope of his employment with, or other engagement by, the motor carrier.

required in 49 C.F.R. § 382.305, the New York City Administrative Code, § 17-605 and this **Paragraph IX.C.**

2. a. Except as may be increased or decreased by the FMCSA under 49 C.F.R. § 382.305, the minimum annual percentage rate for random alcohol testing shall be ten percent (10%) of the average number of driver positions.¹⁹ The OPT Director shall have independent authority to increase the annual percentage rate expressed in the preceding sentence anywhere up to one hundred percent (100%) depending upon the experience of the NYCDOE regarding driver performance, numbers and types of accidents, and other relevant factors.
- b. Except as may be increased by the FMCSA under 49 C.F.R. § 382.305 or by the OPT Director in accordance with the succeeding sentence, the minimum annual percentage rate for random controlled substance testing shall be fifty percent (50%) of the average number of driver positions.²⁰ The OPT Director shall have the authority to increase the annual percentage rate expressed in the preceding sentence anywhere up to one hundred percent (100%) depending upon the experience of the NYCDOE regarding driver performance, numbers and types of accidents, and other relevant factors.
3. The selection of drivers for random alcohol and controlled substances testing shall be made by a scientifically valid method such as, but not limited to, a random number table or a computer-based random number generator that is matched with drivers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Each driver selected for random alcohol and controlled substances testing under the selection process used shall have an equal chance of being tested each time selections are made. Each driver selected for testing shall be tested during the selection period.
4. OPT management shall implement random selection procedures compliant with 49 C.F.R. Part 382 to ensure that a sufficient number of drivers shall be tested for alcohol each school year equal to or greater than the minimum percentage rate expressed in 49 C.F.R. § 382.305(b)(1) as adjusted periodically by FMCSA.²¹ OPT management shall implement random selection procedures compliant with 49 C.F.R. Part 382 and the New York City Administrative Code, § 17-605 to ensure that a sufficient number of drivers shall be tested for controlled substances each school year²² equal to or greater than the minimum percentage rate expressed in 49 C.F.R. § 382.305(b)(2) as adjusted periodically by the FMCSA, i.e., but not less than fifty percent (50%) of all drivers.²³ If OPT management shall use a consortium(s) for the conduct of random testing for alcohol and controlled substances, the numbers of drivers to be tested may be calculated for each individual motor carrier or may be based on the total number of drivers covered by a consortium or consortia at the same (or higher than the) minimum annual percentage rates under 49 C.F.R. § 382.305 and this **Paragraph IX.C.**

¹⁹ The ten percent (10%) level of testing is expressed in 49 C.F.R. § 382.305(b)(1) and represents only a minimum level of testing.

²⁰ The fifty percent (50%) level of testing is expressed in the New York City Administrative Code § 17-605(b) and represents only a minimum level of testing.

²¹ See **Paragraph IX.C.2**, *supra*.

²² Wherever used in or with reference to this regulation, the term "school year" means the twelve (12) months period equivalent to the NYCDOE school year from each September 1st through each succeeding August 31st. The definition in the preceding sentence conforms to the New York City Administrative Code, § 17-605. OPT management shall be responsible to ensure that the number and frequency of random tests in observance of the school year does not conflict with the minimum numbers of random tests necessary to comply with the specification of the calendar year from January 1st through December 31st expressed in 49 C.F.R. § 382.305.

²³ See **Paragraph IX.C.2.b**, *supra*.

5. In addition to the random selection procedures stated in **Paragraph IX.C.4, supra**, OPT management shall be responsible to select and set the dates and times for random alcohol and controlled substances tests and to communicate the said dates and times to the affected motor carriers. OPT management shall ensure that the dates for administering random alcohol and controlled substances tests conducted under this regulation are spread reasonably throughout the school year.²⁴
6. Upon receipt of each communication from OPT regarding the scheduling of each instance of random alcohol and controlled substances testing, each motor carrier shall ensure that the random tests conducted under this regulation are unannounced.
7. Each motor carrier shall require that each driver who is notified of selection for random alcohol and/or controlled substances testing proceeds to the test site immediately; provided, however, that if the driver is performing a safety-sensitive function, other than driving a commercial motor vehicle, at the time of notification, the employer shall instead ensure that the driver ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.²⁵ See **Paragraphs VIII.F and VIII.F.1, supra**, regarding refusals and failures to submit to alcohol and/or controlled substances tests. A driver's failure or refusal to submit to random testing on the same day as notified by his/her motor carrier shall be a violation of this regulation (*cf.*, **Paragraphs VIII.F and VIII.F.1, supra**) and shall be deemed to constitute a confirmed, positive test result for alcohol above the maximum limit and/or a confirmed, positive test result for controlled substances.
8. A driver shall only be tested for alcohol while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver shall have ceased performing such functions.

D. Reasonable Suspicion Testing

1. Each motor carrier shall require a driver or escort to submit to an alcohol test when the motor carrier, the Chancellor and/or the Chancellor's designee(s) has reasonable suspicion to believe that the driver or escort has violated the prohibitions of 49 C.F.R. Part 382, Subpart B and/or this regulation concerning alcohol. The motor carrier's, Chancellor's or Chancellor's designee's finding that reasonable suspicion exists to require a driver or escort to undergo an alcohol test must be based on specific, contemporaneous, articulable observations about the appearance, behavior, speech or body odors of the driver or escort.
2. Each motor carrier shall require a driver or escort to submit to a controlled substances test when the motor carrier, the Chancellor and/or the Chancellor's designee(s) has reasonable suspicion to believe that the driver or escort has violated the prohibitions of 49 C.F.R. Part 382, Subpart B and/or this regulation concerning controlled substances. The motor carrier's, Chancellor's or Chancellor's designee's finding that reasonable suspicion exists to require the driver or escort to undergo a controlled substances test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver or escort. The observations may include indications of the chronic and withdrawal effects of controlled substances.
3. The required observations for alcohol and/or controlled substances reasonable suspicion testing shall be made by a supervisor or company official of the motor carrier who is trained in accordance with 49 C.F.R. § 382.603. If the person making

²⁴ *Cf.*, **Note 22, supra**.

²⁵ If a motor carrier notifies a driver of a random controlled substances test before the start of the driver's morning run, the driver shall perform the affected morning run and immediately thereafter report to a testing facility for the administration of the test. If it is impracticable for a driver to return to New York City after a morning run on the day when notified of a random test for controlled substances, e.g., a driver's route takes him/her to eastern Nassau County, Suffolk County, Connecticut, New Jersey, northern Westchester County, etc., the driver shall report immediately after the end of the afternoon run to a testing facility that is open at such later hours.

the observations for alcohol and/or controlled substances reasonable suspicion testing is a Chancellor's designee(s) other than an OPT staff member who is trained in accordance with 49 C.F.R. § 382.603, then the observation of the affected Chancellor's designee(s) must be confirmed by an OPT staff member who is trained in accordance with 49 C.F.R. § 382.603. OPT management shall be responsible to ensure that sufficient OPT Investigation Unit and OPT school bus inspection staff shall have been trained in accordance with 49 C.F.R. § 382.603 to enable proper and confirmed observations by persons acting as the Chancellor's designee(s) under this regulation. The person who makes the determination that reasonable suspicion exists to conduct an alcohol test shall not conduct the alcohol test of the driver.

4. Alcohol testing is authorized by this **Paragraph IX.D** only if the observations required by **Paragraph IX.D.1**, *supra*, are made during, just preceding, or just after the period of the work day that the worker is required to comply with 49 C.F.R. Part 382 and this regulation. The motor carrier, the Chancellor or a Chancellor's designee(s) may only direct a driver to undergo reasonable suspicion testing while the worker is performing safety-sensitive functions, just before the worker is to perform safety-sensitive functions, or just after the worker shall have ceased performing such functions.
5.
 - a. If an alcohol test required by this **Paragraph IX.D** is not administered within two (2) hours after the finding under **Paragraph IX.D.1**, *supra*, the motor carrier shall prepare and maintain on file a record stating the reasons the alcohol test was not promptly administered. If an alcohol test required by this section is not administered within eight (8) hours after the finding under **Paragraph IX.D.1**, *supra*, the motor carrier shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test. Copies of such records shall be submitted annually by March 31st to the OPT Director.
 - b. Notwithstanding the absence of a reasonable suspicion alcohol test under this **Paragraph IX.D**, no driver or escort shall report for duty or remain on duty requiring the performance of safety-sensitive functions while the driver or escort is under the influence of or impaired by alcohol, as shown by the behavioral, speech, and performance indicators of alcohol misuse, nor shall a motor carrier permit the driver or escort to perform or continue to perform safety-sensitive functions, until: (i) an alcohol test is administered and the driver's alcohol concentration measures less than 0.02; or, (ii) twenty-four (24) hours have elapsed following the determination under **Paragraph IX.D.1**, *supra*, that there is reasonable suspicion to believe that the driver or escort has violated the prohibitions in this part concerning the use of alcohol.
6. Except as provided in **Paragraph IX.D.5.b**, *supra*, no motor carrier or other employer shall take any action under 49 C.F.R. Part 382, the New York City Administrative Code, §§ 17-601 to 17-615, or this regulation against a driver or escort based solely on the driver's or escort's behavior and appearance, with respect to alcohol use, in the absence of an alcohol test. This does not prohibit a motor carrier or other employer with independent authority of 49 C.F.R. Part 382 from taking any action otherwise consistent with law.
7. A written record shall be made of the observations leading to an alcohol or controlled substances reasonable suspicion test, and signed by the supervisor, company official, Chancellor or Chancellor's designee(s) who made the observations, within 24 hours of the observed behavior or before the results of the alcohol or controlled substances tests are released, whichever is earlier.

E. Return-to-Duty Testing

The requirements for return-to-duty testing must be performed in accordance with 49 C.F.R. Part 40, Subpart O.

1. Alcohol Test

Every motor carrier shall ensure that, before a driver or escort returns to duty requiring the performance of a safety-sensitive function or other school transportation duties after having engaged in conduct prohibited by this regulation concerning alcohol, the driver or escort shall undergo a return-to-duty alcohol test. If the result of any such test shall indicate an alcohol concentration of 0.02 or greater, the motor carrier may not return the affected driver or escort to duty.

2. Controlled Substances Test

Under the policies expressed in **Paragraphs XII and XIII, *infra***, return-to-duty testing for controlled substances will be exceedingly rare. In the unusual case where a driver or escort shall be reinstated after a positive test result for a controlled substance(s), every motor carrier shall ensure that, before a driver or escort returns to duty requiring the performance of a safety-sensitive function or other school transportation duties after having engaged in conduct prohibited by this regulation concerning alcohol, the driver or escort shall undergo a return-to-duty controlled substances test. If the result of any such test shall indicate the presence of any controlled substance(s), the motor carrier may not return the affected driver or escort to duty.

F. Follow-Up Testing

The requirements for follow-up testing must be performed in accordance with 49 C.F.R. Part 40, Subpart O.

1. Requirements

After a determination under **Paragraph XIII, *infra***, that a driver or escort needs assistance to resolve problems associated with alcohol misuse,²⁶ every motor carrier shall ensure that the affected driver or escort shall be subject to unannounced follow-up alcohol tests as directed by a substance abuse professional (“SAP”) pursuant to **Paragraph XIII, *infra***, and all applicable Federal and City of New York statutes, rules and regulations.

2. When to Perform Follow-Up Tests

Follow-up tests shall be conducted only when the affected driver or escort is performing safety-sensitive functions or other school transportation duties, just before the affected driver or escort shall begin to perform safety-sensitive functions or other school transportation duties, or just after the affected driver or escort shall have ceased to perform safety-sensitive functions or other school transportation duties.

3. Length of Period for Follow-Up Tests

A driver or escort who is tested under this **Paragraph IX.F** shall be administered at least one (1) unannounced controlled substances test per month for up to sixty months after returning to active duty, as prescribed by the Chancellor or the Chancellor’s designee(s).

²⁶ Pursuant to the policies expressed in **Paragraphs XII and XIII, *infra***, follow-up testing for controlled substances will be exceedingly rare. In the unusual circumstance where a driver or escort shall be reinstated following a positive test result for a controlled substance(s), follow-up tests shall be administered under the same rules as those prescribed herein regarding follow-up tests for alcohol.

X. HANDLING TEST RESULTS, RECORD RETENTION AND CONFIDENTIALITY

A. Retention of Records

1. General Requirements

Each motor carrier shall maintain records of its alcohol misuse and controlled substances use prevention programs as provided in this **Paragraph X**. The records shall be maintained in a secure location with controlled access. The motor carrier shall invest its DER with sufficient authority, training and resources to be able to maintain all records required under 49 C.F.R. Parts 40 and 382 and this regulation in accordance with the standards expressed in the said Federal regulations and this regulation.

2. Periods of Retention

Each motor carrier shall maintain the records in accordance with the following schedule:

- a. Five years: The following records shall be maintained for a minimum of five (5) years:
- Records of driver and escort alcohol test results indicating an alcohol concentration of 0.02 or greater;
 - Records of driver and escort verified positive controlled substances test results;
 - Documentation of refusals to take required alcohol and/or controlled substances tests;
 - Driver and escort evaluation and referrals;
 - Calibration documentation;
 - Records related to the administration of the alcohol and controlled substances testing programs; and,
 - A copy of each annual calendar year summary required by 49 C.F.R. § 382.403.
- b. Two years: Records related to the alcohol and controlled substances collection process (except calibration of evidential breath testing devices) shall be maintained for a minimum of two (2) years.
- c. One year: Records of negative and cancelled controlled substances test results (as defined in 49 C.F.R. Part 40) and alcohol test results with a concentration of less than 0.02 shall be maintained for a minimum of one (1) year.
- d. Indefinite period: Records related to the education and training of breath alcohol technicians, screening test technicians, supervisors, drivers and escorts shall be maintained by the motor carrier while the individual performs the functions which require the training and for two (2) years after having ceased to perform those functions.

3. Types of Records

The following specific types of records shall be maintained. "Documents generated" are documents that may have to be prepared under a requirement of this part. If the record is required to be prepared, it must be maintained.

- a. Records related to the collection process:
- Collection logbooks, if used;
 - Documents relating to the random selection process;
 - Calibration documentation for evidential breath testing devices;

- Documentation of breath alcohol technician training;
 - Documents generated in connection with decisions to administer reasonable suspicion alcohol or controlled substances tests;
 - Documents generated in connection with decisions on post-accident tests;
 - Documents verifying existence of a medical explanation of the inability of a driver and/or escort to provide adequate breath or to provide a urine specimen for testing; and
 - A copy of each annual calendar year summary as required by 49 C.F.R. § 382.403.
- b. Records related to a driver's and/or escort's test results:
- The motor carrier's copy of the alcohol test form including the results of the test;
 - The motor carrier's copy of the controlled substances test chain of custody and control form;
 - Documents sent by the MRO to the employer including those required by 29 C.F.R. Part 40, Subpart G;
 - Documents related to the refusal of any driver and/or escort to submit to an alcohol or controlled substances test required by this 49 C.F.R. Part 382 and/or this regulation;
 - Documents presented by a driver and/or escort to dispute the result of an alcohol or controlled substances test administered under 49 C.F.R. Part 40 and/or this regulation; and,
 - Documents generated in relation to verifications of prior employers' alcohol or controlled substances test results that the motor carrier:
 - i. must obtain in connection with the exception contained in 49 C.F.R. § 382.301, and,
 - ii. must obtain as required by 49 C.F.R. § 382.413.
- c. Records related to other violations of 49 C.F.R. Parts 40 and 382 and/or this regulation.
- d. Records related to evaluations:
- i. Records pertaining to a determination by an SAP concerning a driver's and/or escort's need for assistance; and,
 - ii. Records concerning a driver's and/or escort's compliance with recommendations of the SAP.
- e. Records related to education and training:
- Materials on alcohol misuse and controlled substance use awareness including a copy of the motor carrier's policy on alcohol misuse and controlled substance use;
 - Documentation of compliance with the requirements of 49 C.F.R. § 382.601 and this regulation including the driver's and/or escort's signed receipt of education materials;
 - Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol and/or controlled substances testing based on reasonable suspicion;
 - Documentation of training for breath alcohol technicians as required by 49 C.F.R. § 40.213(a); and,

- Certification that any training conducted under 49 C.F.R. Parts 40 and 3823 and/or this regulation complies with the requirements for such training.
- f. Administrative records related to alcohol and controlled substances testing:
 - Agreements with collection site facilities, laboratories, breath alcohol technicians, screening test technicians, medical review officers, consortia, and third party service providers;
 - Names and positions of officials and their role in the employer's alcohol/controlled substances testing program(s);
 - Semi-annual laboratory statistical summaries of urinalysis required by 49 C.F.R. § 40.111(a); and,
 - The motor carrier's alcohol and controlled substances testing policy and procedures.

4. Location(s) of Records

All records required by 49 C.F.R. Part 382 and this regulation shall be maintained as required by 49 C.F.R. § 390.31 and shall be made available for inspection at the motor carrier's principal place of business within two (2) business days after a request shall have been made by an authorized representative of FMCSA or the NYCDOE.

B. Reporting of Results in a Management and Information System

1. Each motor carrier shall prepare and maintain a summary of the results of its alcohol and controlled substances testing programs performed under this regulation during the previous calendar year, when requested by the Secretary of Transportation, any USDOT agency, the NYCDOE, or any State or local officials with regulatory authority over the employer or any of its drivers and/or escorts.
2. If a motor carrier is notified, during the month of January, of an FMCSA request to report the motor carrier's annual calendar year summary information, the motor carrier shall prepare and submit the report to FMCSA by March 15 of that year. The motor carrier shall ensure that the annual summary report is accurate and received by March 15 at the location that FMCSA specifies in its request. The motor carrier must use the Management Information System ("MIS") form and instructions as required by 49 C.F.R. Part 40 (at § 40.26 and appendix H to Part 40). The motor carrier may also use the electronic version of the MIS form provided by USDOT. The Administrator may designate means (e.g., electronic program transmitted *via* the Internet), other than hard-copy, for MIS form submission. For information on the electronic version of the form, see: <http://www.fmcsa.dot.gov/safetyprogs/drugs/engtesting.htm>. For each form a motor carrier submits to FMCSA, the motor carrier shall make and submit at the same time a copy to the OPT Executive Director.
3. When the report is submitted to FMCSA by mail or electronic transmission, the information requested shall be typed, except for the signature of the certifying official. Each motor carrier shall ensure the accuracy and timeliness of each report submitted by the motor carrier or a consortium.
4. If a motor carrier has a covered driver who performs multi-USDOT agency functions (e.g., a worker drives a commercial motor vehicle and performs maintenance duties for the same employer), the motor carrier shall count the driver only on the MIS report for the USDOT agency under which he/she is randomly tested. Normally, this will be the USDOT agency under which the driver performs more than fifty percent (50%) of his/her duties. Motor carriers may have to explain the testing data for these employees in the event of a USDOT agency and/or NYCDOE inspection or audit.
5. A service agent (e.g., a C/TPA as defined in 49 CFR § 382.107) may prepare the MIS report on behalf of a motor carrier. However, an official of the motor carrier (e.g., a DER) must certify the accuracy and completeness of the MIS report, no matter who prepares it.

C. Access to Facilities and Records

1. Except as required by law or expressly authorized or required in 49 C.F.R. § 382.405 or this **Paragraph X.C**, no motor carrier shall release driver or escort information that is contained in records required to be maintained under 49 C.F.R. § 382.401 and/or **Paragraph X.A**, *supra*.
2. Each driver and escort is entitled, upon written request, to obtain copies of any records pertaining to the driver's or escort's use of alcohol or controlled substances including any records pertaining to his/her alcohol or controlled substances tests. The motor carrier shall promptly provide the records requested by the driver or escort. Access to a driver's or escort's records shall not be contingent upon payment for records other than those specifically requested.
3. Each motor carrier shall permit access to all facilities used in complying with the requirements of 49 C.F.R. Parts 40 and 382 and this regulation to the Secretary of Transportation, any USDOT agency, the NYCDOE, or any State or local officials with regulatory authority over the motor carrier, other employer or any drivers and/or escorts.
4. Each motor carrier shall make available copies of all results for alcohol and/or controlled substances testing conducted under 49 C.F.R. Parts 40 and 382 and/or this regulation and any other information pertaining to the motor carrier's alcohol misuse and/or controlled substances use prevention program, when requested by the Secretary of Transportation, any USDOT agency, the NYCDOE, or any State or local officials with regulatory authority over the motor carrier, other employer or any drivers and/or escorts. Each motor carrier shall permit the Chancellor or the Chancellor's designee(s) to examine all records relating to the administration and results of the drug testing program established by each such motor carrier pursuant to this regulation.
5. When requested by the National Transportation Safety Board and/or the NYCDOE as part of an accident inquiry, each motor carrier shall disclose information regarding the motor carrier's administration of post-accident alcohol and controlled substance tests administered after the accident under investigation.
6. Records shall be made available to a subsequent employer upon receipt of a written request from a driver or escort. Disclosure to the subsequent employer is permitted only as expressly authorized by the terms of the driver's or escort's written request.
7. A motor carrier may disclose information required to be maintained under 49 C.F.R. Parts 40 and 382 and/or this regulation pertaining to a driver or escort to the decision maker in a lawsuit, grievance, or administrative proceeding initiated by or on behalf of the individual, and arising from a positive USDOT drug or alcohol test or a refusal to test (including, but not limited to, adulterated or substituted test results) of 49 C.F.R. Part 382 and/or this regulation (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the driver or escort). Additionally, a motor carrier may disclose information in criminal or civil actions in accordance with 49 C.F.R. § 40.323(a)(2).
8. A motor carrier shall release information regarding a driver's or escort's records as directed by the specific written consent of the driver or escort authorizing release of the information to an identified person or entity. Release of such information by the person or entity receiving the information is permitted only according to the terms of the driver's or escort's specific written consent as outlined in 49 C.F.R. § 40.321(b).

D. Medical Review Officer's Notifications to Motor Carriers

Medical review officers ("MROs") shall report the results of controlled substances tests to motor carriers according to the requirements of 49 C.F.R. Part 40, Subpart G. In addition, MROs shall report the results of controlled substances tests to each new motor carrier to

which a driver or escort may transfer for new employment. As expressed in **Paragraph X.E.4, *infra***, each motor carrier shall be responsible to obtain written, specific authorization from each driver and escort for the release of such information.

E. MRO's Record Retention for Controlled Substance Tests

1. An MRO or C/TPA shall maintain all dated records and notifications, identified by individual, for a minimum of five (5) years for verified positive controlled substances test results.
2. An MRO or C/TPA shall maintain all dated records and notifications, identified by individual, for a minimum of one (1) year for negative and canceled controlled substances test results.
3. No person may obtain the individual controlled substances test results retained by an MRO or C/TPA, and no MRO or C/TPA shall release the individual controlled substances test results of any driver to any person, without first obtaining a specific, written authorization from the tested driver or escort. Nothing in this **Paragraph X.E.3** shall prohibit an MRO or C/TPA from releasing to the employer or to officials of the Secretary of Transportation, any USDOT agency, the NYCDOE, or any State or local officials with regulatory authority over the controlled substances testing program under 49 C.F.R. Part 382 the information delineated in 49 C.F.R. Part 40, Subpart G.
4. Regarding **Paragraphs X.D** and **X.E.3, *supra***, each motor carrier shall obtain at the time of each driver's and escort's initial employment and at least annually thereafter a specific, written authorization²⁷ from each driver and escort for the release of alcohol and controlled substances test results to the NYCDOE and, if not the driver's and/or escort's employer, also to the motor carrier itself. If the motor carrier uses as consortium or third party administrator, the motor carrier shall obtain at the time of each driver's and escort's initial employment and at least annually thereafter from each driver and escort specific written authorization for the release of alcohol and controlled substances test results to the C/TPA.

F. Motor Carrier Notifications

1. Each motor carrier shall notify each driver of the results of a pre-employment controlled substances test conducted under 49 C.F.R. Part 382 and this regulation, if the driver requests such results within sixty (60) calendar days of being notified of the disposition of the employment application. Each motor carrier shall notify each driver of the results of random, reasonable suspicion and post-accident tests for controlled substances conducted under 49 C.F.R. Part 382 and this regulation, if the test results are verified positive. Each motor carrier shall notify each escort of the results of reasonable suspicion tests for controlled substances conducted under 49 C.F.R. Part 382 and this regulation, if the test results are verified positive. The employer shall inform the driver and/or escort which controlled substance(s) were verified positive.
2. The DER shall make reasonable efforts to contact and request each driver and escort who submitted a specimen under the motor carrier's program, regardless of the driver's or escort's employment status, to contact and discuss the results of the controlled substances test with an MRO who shall have been unable to contact the driver or escort.
3. The DER shall immediately notify the MRO that the driver or escort has been notified to contact the MRO within seventy-two (72) hours.

²⁷ As in 49 C.F.R. § 40.321, "specific written consent" means a statement signed by the driver or escort that he/she agrees to the release of a particular piece of information to a particular, explicitly identified, person or organization at a particular time. "Blanket releases," in which a driver or escort agrees to a release of a category of information (e.g., all test results) or to release information to a category of parties (e.g., other employers who are members of a C/TPA, companies to which the employee may apply for employment), are prohibited under 49 C.F.R. Parts 40 and 382 and this regulation.

4. Each driver and escort who does not pass a controlled substances test shall receive within ten (10) days of the confirmatory test, together with written notification of his/her test result, written notice of the right to undergo an additional controlled substances test performed on a sample of the same specimen, at his/her option and expense, within thirty (30) days after administration of the original controlled substances test.

G. Release of Alcohol and Controlled Substances Test Information by Previous Employers

Each motor carrier shall request alcohol and controlled substances information from previous employers in accordance with the requirements of 49 C.F.R. § 40.25.

XI. ANNUAL MOTOR CARRIER REPORTS TO THE NYCDOE

A. Each motor carrier shall submit an annual report to the NYCDOE by March 31st summarizing the following information for the period from March 1st through February 28th (February 29th for leap years) for the preceding twelve (12) months:

1. Total number of controlled substances and alcohol tests administered;
2. The number of controlled substances and alcohol tests administered and the dates of administration in each testing category (i.e., pre-employment, post-accident, reasonable suspicion, random, return to duty and follow-up);
3. The number of post-accident controlled substances and alcohol tests administered and the dates of administration in each accident category (i.e., fatal, personal injury, property damage or three accidents);
4. For post-accident tests, the number of hours between the accident and the collection of a urine specimen;
5. Total number of persons who did not pass a controlled substances and/or alcohol test;
6. The number of individuals who did not pass a controlled substances and/or alcohol test by testing category;
7. The number of individuals who did not pass a post-accident controlled substances and/or alcohol test by accident category;
8. The action taken by the motor carrier with respect to each individual who did not pass a controlled substances and/or alcohol test;
9. The number of controlled substances tests submitted to the laboratory that showed evidence of one or more controlled substances in the immunoassay screening test in a sufficient quantity to warrant a confirmatory test;
10. Total number of controlled substances tests submitted to the laboratory that showed evidence of one or more controlled substances in the confirmatory test in a sufficient quantity to be reported as positive to the MRO;
11. The number of controlled substances tests submitted to the laboratory that showed evidence of one or more controlled substances in the confirmatory test in a sufficient quantity to be reported as positive by the MRO;
12. The reports required under **Paragraphs IX.B.5** and **IX.D.5**, *supra*; and,
13. Such other relevant information as the NYCDOE shall require.

XII. CONSEQUENCES FOR ALCOHOL AND/OR CONTROLLED SUBSTANCE MISUSE

A. Removal from Safety-Sensitive Function

1. Except as provided in 49 C.F.R. Part 382, Subpart F and/or **Paragraphs XIII** and **XIV**, *infra*, no driver or escort shall perform safety-sensitive functions including, but not limited to, driving a commercial motor vehicle, if the driver or escort has engaged in conduct prohibited by 49 C.F.R. Part 382, Subpart B and/or **Paragraph VIII**, *supra*, or an alcohol or controlled substances rule of another USDOT agency.

2. No motor carrier shall permit any driver or escort to perform safety-sensitive functions including, but not limited to, driving a commercial motor vehicle, if the motor carrier has determined that the driver or escort has violated 49 C.F.R. Part 382, Subparts B and/or E, **Paragraph VIII**, *supra*, and/or this **Paragraph XII**.
3. For purposes of 49 C.F.R. Part 382, Subpart E and this **Paragraph XII**, commercial motor vehicle means a commercial motor vehicle in commerce as defined in 49 C.F.R. § 382.107, and a commercial motor vehicle in interstate commerce as defined in 49 C.F.R. Part 390.
4. For any driver or escort who violates 49 C.F.R. Part 382, Subparts B and/or E, **Paragraph VIII**, *supra*, and/or this **Paragraph XII**, a motor carrier shall have the right to impose any sanctions and/or discipline it shall deem appropriate up to and including termination of employment.
5. For every driver and escort who shall be removed from safety sensitive functions due to a violation of 49 C.F.R. Part 382, Subparts B and/or E, **Paragraph VIII**, *supra*, and/or this **Paragraph XII**, each motor carrier shall give prompt written notice of such removal to the OPT (Executive) Director, which notice shall include the worker's name, the date of removal, a copy the MRO report, the C/TPA report and/or the alcohol test report giving rise to the worker's removal, and such additional information as the OPT (Executive) Director may require.

B. Revocation of NYCDOE Certification of Approval

Pursuant to **Paragraph XIII**, *infra*, every driver and escort who shall be removed from safety sensitive functions due to a violation of 49 C.F.R. Part 382, Subparts B and/or E, **Paragraph VIII**, *supra*, and/or this **Paragraph XII**, shall be subject to disciplinary action by OPT regarding the worker's NYCDOE certification of approval for school transportation service. As expressed in **Paragraph XIII**, *infra*, a material violation (**except** under **Paragraph XII.C**, *infra*) shall result in the permanent revocation of a driver's or escort's NYCDOE certification of approval for school transportation service. To the extent applicable, each affected driver and escort shall have recourse to Regulation of the Chancellor No. C-100.

C. Other Alcohol-Related Conduct

1. No driver or escort tested under the provisions of 49 C.F.R. Part 382, Subpart C and/or **Paragraph IX**, *supra*, who is found to have an alcohol concentration of 0.02 or greater but less than 0.04 shall perform or continue to perform safety-sensitive functions for a motor carrier including, but not limited to, driving a commercial motor vehicle, nor shall a motor carrier permit the driver or escort to perform or continue to perform safety-sensitive functions until the start of the driver's or escort's next regularly scheduled duty period, but not less than twenty-four (24) hours following administration of the test. For every driver or escort who shall be found to have an alcohol concentration of at least 0.02 but not as high as 0.04, the motor carrier shall give prompt written notice of such temporary removal to the OPT (Executive) Director, which notice shall include the driver's or escort's name, the date of removal, a copy of the alcohol test report giving rise to the worker's removal, and such additional information as the OPT (Executive) Director may require.
2. See **Paragraph XIII**, *infra*, for required action by each motor carrier arising from a driver's or escort's violation of **Paragraph XII.C.1**, *supra*.

XIII. ZERO TOLERANCE POLICY FOR CONTROLLED SUBSTANCES AND/OR ALCOHOL

A. General Policy

1. For the NYCDOE, the safe and efficient operation of all school transportation vehicles (school buses, ambulances, coach buses and other modes of conveyance) is an essentially important policy and objective. Moreover, school transportation workers (drivers and escorts) work alone during transit to supervise general education pupils, special education pupils, pre-kindergarten children, early intervention program

children and other authorized passengers. All school transportation workers are important role models and authority figures in the lives of the children they transport. In addition, school transportation workers are integral members of the school operational team, upon whom the NYCDOE depends for reliability.

2. The Regulations of the New York State Commissioner of Education expressed at 8 N.Y.C.R.R. § 156.3(a)(3)(i) entitled, "Physical Fitness," provide the following: "Each driver of a school transportation conveyance shall have the physical and mental ability to operate safely a school transportation conveyance and to satisfactorily perform the other responsibilities of a school bus driver." The Commissioner's Regulations expressed at 8 N.Y.C.R.R. § 156.3(b)(6) entitled, "Character Requirement," provide the following: "The driver of a vehicle for the transportation of school children shall be of good moral character and thoroughly reliable." The Regulations of the Commissioner expressed at 8 N.Y.C.R.R. § 156.3(c)(3)(i) entitled, "Physical Fitness," provide the following: "Each school bus monitor and attendant shall have the physical and mental ability to satisfactorily perform his or her duties." NYCDOE school bus contracts provide the following: "To provide the safety and welfare of children, the contractor shall only employ persons of good moral character to serve as escorts." Such contracts provide further: "Escorts must be competent, reliable, over twenty-one years of age, physically fit and properly qualified to perform their duties."
3. In view of **Paragraphs XIII.A.1 and XIII.A.2**, *supra*, and other applicable portions of this regulation, it is the policy of the NYCDOE that drivers and escorts are prohibited to use, consume and/or possess alcohol and/or controlled substances before, during and after performing their school transportation duties (*i.e.*, safety sensitive functions and other basic transportation work) to the extent provided in this regulation. This means **zero tolerance** for alcohol (concentration of 0.02 or greater) and **zero tolerance** for any controlled substances (any amount enough to register a positive result in an immunoassay test and a confirmatory gas chromatography/mass spectrometry test). Pursuant to 49 C.F.R. § 40.3, the term "controlled substances" includes marijuana, cocaine, amphetamines, phencyclidine (PCP), and opiates.
 - a. **Prescription Drugs.** Some controlled substances are ingredients of commonly prescribed drugs such as, but not limited to, cold/flu remedies, pain remedies and allergy remedies. So, drivers and escorts need to be carefully aware of the ingredients contained in prescription drugs they take and to keep careful records of their prescriptions in case needed to show to an MRO. In addition, each driver and escort must not take any prescription drugs not prescribed by a medical doctor for him/her. More than a few drivers and escorts have had their NYCDOE certification of approval for school transportation service revoked because (i) they lost their copies of prescriptions, (ii) they took prescription drugs prescribed for people other than themselves, or (iii) while in a foreign country, they obtained a drug over the counter that requires a prescription in the U.S.A.

B. Pre-Employment Tests

Any driver who tests positive for alcohol (concentration of 0.02 or greater) and/or any controlled substance in a pre-employment test shall be denied NYCDOE certification of approval for school transportation service with respect to all contractors and other transportation providers.²⁸ Any such driver shall be permanently ineligible to be considered for NYCDOE certification of approval for school transportation service.

²⁸ NYCDOE certification of approval is a two (2) step process, in which an applicant must first be hired by a contractor or other transportation provider, after which the motor carrier submits the driver or escort to OPT for approval. The NYCDOE does not approve school transportation workers independently, *i.e.*, without first having obtained employment with an NYCDOE contractor or other NYCDOE transportation provider. It is possible that a contractor or other transportation provider may condition the driver's or escort's employment upon the NYCDOE's official issuance of certification of approval.

C. Post-Accident and Random Tests

1. Controlled Substances or Alcohol (0.04 Concentration)

NYCDOE certification of approval for school transportation service shall be revoked immediately with respect to all contractors and other transportation providers for any driver with a positive result for alcohol (concentration of 0.04 or greater) and/or any controlled substance arising from post-accident or random tests. Any such driver shall be permanently ineligible to be considered for NYCDOE certification of approval for school transportation service following any such positive test(s).

2. Alcohol (0.02 Concentration)

NYCDOE certification of approval for school transportation service shall be revoked immediately with respect to all contractors and other transportation providers for any driver with a positive result for alcohol (concentration of 0.02 or greater) arising from a post-accident or random test. Any such driver shall be ineligible to be considered for NYCDOE certification of approval for school transportation service for a period of not less than two (2) years following any such positive test.²⁹ If after the ineligibility period expressed in the preceding sentence a driver shall apply for work with an NYCDOE contractor or other transportation provider, the driver must provide documentary proof from an SAP of his/her rehabilitation and successful return-to-duty controlled substances and alcohol tests. If a motor carrier does not cover the costs for rehabilitation and the return-to-duty tests, the driver alone shall bear all such costs. The completion date for rehabilitation process and the date of the return-to-duty controlled substances and alcohol tests must be no earlier than six (6) months before the driver's employment application date. Such a driver must successfully undergo new pre-employment tests for controlled substances and alcohol at the time of his/her employment application. Such a driver shall be subject to unannounced follow-up tests for alcohol and controlled substances at least once per month for not less than the first twenty-four (24) months and, in the discretion of the OPT (Executive) Director, up to the first sixty (60) months of his/her new NYCDOE service. In addition, such a driver must present with his/her employment application a minimum of three (3) letters of reference from community leadership sources, former employers and/or religious leaders (not related by blood or marriage to the driver) that attest specifically to the driver's rehabilitation from alcohol misuse.

D. Reasonable Suspicion Tests

1. Controlled Substances or Alcohol (0.04 Concentration)

NYCDOE certification of approval for school transportation service shall be revoked immediately with respect to all contractors and other transportation providers for any driver or escort with a positive result for alcohol (concentration of 0.04 or greater) and/or any controlled substance arising from a reasonable suspicion test(s). Any such driver or escort shall be permanently ineligible to be considered for NYCDOE certification of approval for school transportation service following any such positive test(s).

2. Alcohol (0.02 Concentration)

NYCDOE certification of approval for school transportation service shall be revoked immediately with respect to all contractors and other transportation providers for any driver or escort with a positive result for alcohol (concentration of 0.02 or greater) arising from a reasonable suspicion test. Any such driver or escort shall be ineligible to be considered for NYCDOE certification of approval for school transportation service for not less than two (2) years following any such positive test.³⁰ If after the

²⁹ If certification of approval shall be granted, it shall **not** be deemed to be "reinstated" but a new certification of approval with the driver's loss of seniority privileges under the Employee Protection Provisions, if applicable.

³⁰ Same rule as **Note 29**, *supra*.

ineligibility period expressed in the preceding sentence a driver or escort shall apply for work with an NYCDOE contractor or transportation provider, the driver or escort must provide documentary proof from an SAP of his/her rehabilitation and successful return-to-duty controlled substances and alcohol tests. If a motor carrier does not cover the costs for rehabilitation and the return-to-duty tests, the driver or escort alone shall bear all such costs. The completion date for the rehabilitation process and the date of the return-to-duty controlled substances and alcohol tests must be no earlier than six (6) months before the driver's or escort's employment application date. Such a driver or escort must successfully undergo new pre-employment tests for alcohol and controlled substances at the time of his/her employment application. Such a driver or escort shall be subject to unannounced follow-up tests for alcohol and controlled substances at least once per month for not less than the first twenty-four (24) months and, in the discretion of the OPT (Executive) Director, up to the first sixty (60) months of his/her new NYCDOE service. In addition, such a driver must present with his/her employment application a minimum of three (3) letters of reference from community leadership sources, former employers and/or religious leaders (not related by blood or marriage to the driver) that attest specifically to the driver's rehabilitation from alcohol misuse and/or controlled substances use.

E. Failure or Refusal to Appear and/or Submit to a Test

Under 49 C.F.R. Parts 40 and 382 and the NYC Administrative Code, § 17-610(c), any driver or escort who refuses or fails (as defined in 49 C.F.R. § 382.107) to appear for, and submit to, any required controlled substances and/or alcohol test shall be deemed to have received a positive test result for controlled substances and/or alcohol (concentration of 0.04 or greater). The NYCDOE certification of approval for school transportation service shall be revoked immediately with respect to all contractors and transportation providers for such worker. Any such driver or escort shall be permanently ineligible³¹ to be considered for NYCDOE approval for school transportation service following such a failure or refusal.³²

F. Follow-Up Tests and Recalcitrance

NYCDOE certification of approval for school transportation service shall be revoked immediately and permanently with respect to all contractors and other transportation providers for any driver or escort with a positive result for alcohol (concentration of 0.02 or greater) arising from a follow-up test(s) for the reason of recalcitrance and/or recidivism. A failure or refusal to undergo a follow-up test is deemed to be the same as a positive result for controlled substances and/or alcohol.

XIV. ALCOHOL & CONTROLLED SUBSTANCES INFORMATION, TRAINING & REFERRAL

A. Motor Carrier's Responsibility to Promulgate and Implement a Policy on the Misuse of Alcohol and the Use of Controlled Substances

1. General Requirements

Each motor carrier shall provide educational materials that explain the requirements of

³¹ The New York City Administrative Code, § 17-610(c) provides for removal of a driver from active service for a **minimum** period of one (1) year. Based upon actual experience with such failures and refusals since the late 1980s, the NYCDOE finds and determines that the various types of conduct involved in such failures and refusals are much more serious than indicated by the **minimum** period of removal provided in the New York City Administrative Code. 49 C.F.R. Parts 40 and 382 specifically envision that employers may choose not to rehire employees who have violated the USDOT regulations. The New York City Administrative Code, § 19-614 places no restrictions upon employers who choose to terminate or otherwise discipline employees who violate the City's parallel rules. As a result, the NYCDOE finds and determines that permanent revocation of approval expressed in **Paragraphs XIII.B, XIII.C and XIII.D, supra**, and this **Paragraph XIII.E** are reasonably and justifiably targeted to reduce school transportation vehicle accidents and, furthermore, to deter school transportation workers from engaging in conduct that denigrates the positions of school bus workers as authority figures and role models to school children, i.e., see **Paragraph XIII.A, supra**.

³² Same rule as **Note 29, supra**.

this regulation and the motor carrier's policies and procedures with respect to meeting these requirements.

- a. Each motor carrier shall ensure that a copy of these materials is distributed to each driver and escort before the start of alcohol and controlled substances testing under this regulation and to each driver and escort subsequently hired or transferred into a position requiring driving a commercial motor vehicle or performing other school transportation duties.
- b. Each motor carrier shall provide written notice to representatives of employee organizations of the availability of this information.
- c. Each motor carrier shall provide a copy of all materials specified under this **Paragraph XIV** to the Office of Pupil Transportation upon the effective date of this regulation, promptly upon each material update, revision, addition to, deletion from, or other change to the said materials, and upon receipt of written request.

2. Required Content

The materials to be made available to drivers shall include detailed discussion of at least the following:

- The identity of the person(s) designated by the employer, i.e., the designated employer representative(s) ("DER"), to answer driver and escort questions about the materials;
- The categories of drivers and escorts who are subject to the provisions of 49 C.F.R. Parts 40 and 382 and this regulation;
- Sufficient information about the safety-sensitive functions performed by those drivers and escorts to make clear what period of the work day the driver and escort is required to be in compliance with 49 C.F.R. Part 382 and this regulation;
- Specific information concerning driver and escort conduct that is prohibited by 49 C.F.R. Part 40 and this regulation;
- The circumstances under which a driver and/or escort will be tested for alcohol and/or controlled substances under 49 C.F.R. Part 382 and this regulation including post-accident testing for drivers under 49 C.F.R. § 382.303 and **Paragraph IX.B, supra**;
- The procedures that will be used to test for the presence of alcohol and controlled substances, protect the driver and escort and the integrity of the testing processes, safeguard the validity of the test results, and ensure that those results are attributed to the correct driver or escort including post-accident information, procedures and instructions required by 49 C.F.R. § 382.303 and **Paragraph IX.B, supra**;
- The requirement that a driver and escort submit to alcohol and controlled substances tests administered in accordance with 49 C.F.R. Part 382 and this regulation;
- An explanation of what constitutes a refusal to submit to an alcohol or controlled substances test and the attendant consequences;
- The consequences for drivers and escorts found to have violated 49 C.F.R. Part 382, Subpart B and/or **Paragraph VIII, supra**, including the requirement that the driver and/or escort be removed immediately from safety-sensitive functions, and the procedures under 49 C.F.R. Part 40, Subpart O and **Paragraphs XII and XIII, supra**;
- The consequences for drivers and escorts found to have an alcohol concentration of 0.02 or greater but less than 0.04;

- Information concerning the effects of alcohol and controlled substances use on an individual's health, work, and personal life; signs and symptoms of an alcohol or a controlled substances problem (the driver's, escort's or a co-worker's); and available methods of intervening when an alcohol or a controlled substances problem is suspected including confrontation, referral to any employee assistance program, and/or referral to management.

3. Additional Required Provision

The materials supplied to drivers and escorts shall also include information on additional employer policies with respect to the use of alcohol or controlled substances, including any consequences for a driver or escort found to have a specified alcohol or controlled substances level, that are based on the employer's authority independent of 49 C.F.R. Part 382 such as, but not limited to, the New York City Administrative Code, §§ 17-601 to 17-615 and this regulation. Such additional policies or consequences must be clearly and obviously described as being based on independent authority.

4. Certificate of Receipt

Each motor carrier shall ensure that each driver and escort is required to sign a statement certifying that he/she has received a copy of the materials described in 49 C.F.R. and this **Paragraph XIV**. Each motor carrier shall maintain the original of the signed certificate, shall provide a copy of the certificate to the NYCDOE upon request, and may provide a copy of the certificate to the driver and escort.

B. Training of Supervisors and Administrative Personnel

Each motor carrier shall ensure that all persons designated to supervise drivers and/or escorts receive at least sixty (60) minutes of training on alcohol misuse and receive at least an additional sixty (60) minutes of training on controlled substances use. The training will be used by the supervisors to determine whether reasonable suspicion exists to require a driver to undergo testing under 49 C.F.R. § 382.307 and/or **Paragraph IX.D, supra**. The training shall include the physical, behavioral, speech, and performance indicators of probable alcohol misuse and use of controlled substances. Recurrent training for supervisory personnel is not required. Every motor carrier shall ensure that each supervisor and administrator who receives the training is required to sign a statement certifying that he/she has received the training required under 49 C.F.R. § 603 and this **Paragraph XIV.B**. Each motor carrier shall maintain the original of the signed certificate, shall provide a copy of the certificate to the NYCDOE upon request, and may provide a copy of the certificate to the supervisor and administrator.

C. Referral, Evaluation and Treatment

The requirements for referral, evaluation, and treatment must be performed in accordance with 49 CFR Part 40, Subpart O.

1. Substance Abuse Professional Information

Motor carriers must give each worker (including an applicant or new employee) who violates a USDOT controlled substances and/or alcohol regulation or this regulation a list of substance abuse professionals ("SAPs") both readily available to the worker and acceptable to the motor carrier, with names, addresses, and telephone numbers. The motor carrier may not charge a worker any fee for compiling or providing this list. The motor carrier may provide this list itself or through a C/TPA or other service agent.

2. SAP Evaluation and Referral and the Treatment/Education Process

- a. When a driver or escort violates this regulation or USDOT alcohol regulations,³³ he/she may not again perform any USDOT safety-sensitive duties for any employer/motor carrier until and unless he/she completes the SAP evaluation, referral, and education/treatment process set forth in 49 C.F.R. Part 40, Subpart O and applicable USDOT agency regulations. The first step in the process is an SAP evaluation. Even if a driver or escort shall complete the SAP evaluation, referral, education and treatment process, the policies stated in **Paragraph XIII**, *supra*, shall govern whether the Chancellor or his/her designee(s) will consider an application for certification of approval for NYCDOE transportation service pursuant to the Education Law, § 3624 and NYCDOE transportation contracts.
- b. For purposes of 49 C.F.R. Part 40, Subpart O, a verified positive USDOT controlled substances test result, a USDOT alcohol test with a result indicating an alcohol concentration of 0.04 or greater, a refusal to test (including without limitation by adulterating or substituting a urine specimen) or any other violation of the prohibition on the use of alcohol or controlled substances under a USDOT agency regulation constitutes a USDOT controlled substances and/or alcohol regulation violation. For purposes of this regulation, a verified positive result on a USDOT controlled substances test or a non-USDOT controlled substances test, a USDOT alcohol test or a non-USDOT alcohol test with a result indicating an alcohol concentration of 0.04 or greater, a refusal to test (including by adulterating or substituting a urine specimen) or any other violation of the prohibition on the use of alcohol or controlled substances under a USDOT agency regulation or this regulation constitutes a violation of this regulation.

3. SAP Evaluation and Treatment Services

- a. Motor carriers are not required to provide an SAP evaluation or any subsequent recommended education or treatment for a driver who has violated any USDOT controlled substances and/or alcohol regulation or this regulation. Neither the USDOT regulations nor the New York City Administrative Code provide for controlled substance and/or alcohol rehabilitation for school bus escorts.
- b. However, if a motor carrier offers an employee an opportunity to return to a USDOT safety-sensitive duty following a violation, the motor carrier must, before the employee again performs that duty, ensure that the employee receives an evaluation by a SAP meeting the requirements of 49 C.F.R. § 40.281 and that the worker successfully complies with the SAP's evaluation recommendations.
- c. Payment for SAP evaluations and services is left for employers and employees to decide and may be governed by existing management-labor agreements and health care benefits.
- d. If undertaken by a motor carrier and/or a driver, the education, referral, treatment and SAP evaluation process must conform in every respect with 49 C.F.R. Part 40, Subpart O.

4. No Abrogation of Management Rights

Nothing contained in this regulation shall limit any right of a motor carrier to terminate or otherwise discipline any driver or escort who violates this regulation. In addition, as indicated in this **Paragraph XIV**, nothing in this regulation shall compel a motor carrier to re-hire and/or reinstate a driver or escort after he/she shall have undertaken rehabilitation and received an SAP's certification.

³³ Pursuant to the policies expressed in **Paragraphs XII** and **XIII**, *supra*, reinstatement following violations for controlled substances will be exceedingly rare. In the unusual circumstance where a driver or escort shall be reinstated following a positive test result for a controlled substance(s), return-to-duty shall be administered under the same rules as those prescribed herein regarding alcohol violations.

XV. EMPLOYEE ADMISSION OF ALCOHOL AND/OR CONTROLLED SUBSTANCE USE

- A. Employees who admit to alcohol misuse or controlled substances use are not subject to the referral, evaluation and treatment requirements of 49 C.F.R. Parts 40 and 382 and/or this regulation, provided that:
1. The admission is in accordance with a written employer-established voluntary self-identification program or policy that meets the requirements of 49 C.F.R. § 382.121(b) and **Paragraph XV.B**, *infra*;
 2. The driver does not self-identify in order to avoid testing under the requirements of 49 C.F.R. Part 382 and this regulation;
 3. The driver makes the admission of alcohol misuse or controlled substances use prior to performing a safety sensitive function, i.e., prior to reporting for duty; and,
 4. The driver does not perform a safety sensitive function until the motor carrier is satisfied that the worker has been evaluated and successfully completed education or treatment requirements in accordance with the self-identification program guidelines.
- B. A qualified voluntary self-identification program/policy must contain the following elements:
1. It must prohibit the employer/motor carrier from taking adverse action against an employee making a voluntary admission of alcohol misuse or controlled substances use within the parameters of the program or policy 49 C.F.R. § 382.121(a) and **Paragraph XV.A**, *supra*;
 2. It must allow the employee sufficient opportunity to seek evaluation, education or treatment to establish control over the employee's drug or alcohol problem;
 3. It must permit the employee to return to safety sensitive duties only upon successful completion of an educational or treatment program, as determined by a drug and alcohol abuse evaluation expert, i.e., employee assistance professional, substance abuse professional, or qualified drug and alcohol counselor;
 4. It must ensure that:
 - a. Before participating in a safety sensitive function, the employee shall undergo a return-to-duty test with a result indicating an alcohol concentration of less than 0.02; and/or,
 - b. Before participating in a safety sensitive function, the employee shall undergo a return-to-duty controlled substance test with a verified negative test result for controlled substances use; and;
 5. It may incorporate employee monitoring and include non-USDOT follow-up testing.

XVI. MISCELLANEOUS PROVISIONS

A. Designated Employer Representative ("DER")

Every motor carrier shall appoint not less than one (1) designated employer representative ("DER") who is an employee of the motor carrier authorized to take immediate action(s) to remove drivers and escorts from safety-sensitive duties, or cause drivers and escorts to be removed from these covered duties, and to make required decisions in the testing and evaluation processes. The DER also receives test results and other communications on behalf of the motor carrier, consistent with the requirements of 49 C.F.R. Parts 40 and 382 and this regulation. Two or more affiliated³⁴ motor carriers may use a single DER, provided, the employer representative is available equally to the drivers and escorts of all of the affiliated entities. Service agents may not act as DERs.

³⁴ Persons are affiliates of one another if, directly or indirectly, one controls or has the power to control the other, or a third party controls or has the power to control both. Indicators of control include, but are not limited to the following: interlocking management or ownership; shared interest among family members; shared facilities or equipment; or, common use of employees.

B. Motor Carriers May Form Consortium

Two or more motor carriers may join together to form a consortium for the purpose of employing a third party administrator, medical review officer, laboratory and other service agents to comply with the requirements of 49 C.F.R. Parts 40 and 382, the New York City Administrative Code, and this regulation.

C. Motor Carriers May Use Third Party Administrators

A motor carrier(s) may engage a service agent as a consortium/third party administrator ("C/TPA") to provide and/or coordinate provision of a variety of controlled substances and alcohol testing services to motor carriers. The C/TPA typically performs administrative tasks concerning the operation of the controlled substances and alcohol testing programs undertaken by motor carriers. The term C/TPA includes, but is not limited to, groups of employers who join together to administer, as a single entity, the USDOT and/or NYCDOE controlled substances and alcohol testing programs of its members. A C/TPA is not a "motor carrier" or "employer" for purposes of 49 C.F.R. Parts 40 and 382 or this regulation.

D. Motor Carriers Shall Use Only Approved Service Agents

A service agent is any person or entity, other than an employee of a motor carrier, who provides services specified under 49 C.F.R. Parts 40 and 382 and/or this regulation to motor carriers and/or drivers and escorts in connection with USDOT controlled substances and alcohol testing requirements. Service agents include, but are not necessarily limited to, collectors, breath alcohol technicians ("BATs"), screening test technicians ("STTs"), laboratories, MROs, substance abuse professionals, and C/TPAs. No motor carrier shall use the services of a service agent who is subject to public interest exclusion according to 49 C.F.R. Part 40, Subpart R. To act as service agents, persons and organizations must meet the qualifications set forth in applicable sections of 49 C.F.R. Parts 40 and/or 382. Service agents are not employers for purposes of 49 C.F.R. Parts 40 and 382 and/or this regulation. Motor carriers shall use only those laboratories certified under the United States Department of Health and Human Services mandatory guidelines for federal workplace drug testing programs or approved by the New York state Department of Health.

E. Motor Carrier's Primary Responsibility

Notwithstanding anything expressed in **Paragraphs XVI.B, XVI.C** and **XVI.D**, *supra*, each motor carrier shall be individually responsible for complying with the provisions of 49 C.F.R. Part 40 and 382, the New York City Administrative Code, and this regulation.

F. Use of USDOT and Non-USDOT Controlled Substances and Alcohol Tests

1. USDOT and Non-USDOT Controlled Substances and Alcohol Tests

Motor carriers must use USDOT controlled substances and alcohol tests whenever permissible under 49 C.F.R. Parts 40 and 382. Whenever non-USDOT controlled substances tests must be undertaken, motor carriers shall use only such screening and confirmatory procedures that are at least as reliable as the enzyme multiplied immunoassay screening test and the gas chromatography/mass spectrometry confirmatory test. Whenever non-USDOT alcohol tests must be undertaken, motor carriers shall use only alcohol screening devices ("ASDs"), evidential breath testing devices ("EBTs") and other procedures, devices and equipment that are approved for use in USDOT alcohol tests under 49 C.F.R. Part 40. For all non-USDOT controlled substances and alcohol tests, motor carriers shall use only reporting, control and/or chain-of-custody forms that are approved in advance by the Chancellor's designee(s).

2. Motor Carriers Shall Report Use of Non-USDOT Tests

With the information submitted in the semi-annual reports under **Paragraph XI**, *supra*, motor carriers shall report to the NYCDOE each instance when a non-USDOT controlled substance(s) and/or alcohol test is administered along with such relevant additional information as specified by the Chancellor's designee(s).

G. Motor Carriers That Are Not Employers of Drivers or Escorts

If a motor carrier is not the “employer” of any driver(s) and/or escort(s), then the motor carrier must have a written agreement(s) with the employer to effectuate all of the provisions of this regulation. All such agreements must be submitted to NYCDOE and are subject to prior approval.

XVII. INQUIRIES

Inquiries pertaining to this regulation should be addressed to:

	FOR POLICY, ADMINISTRATIVE, AND ALL OTHER NON-LEGAL QUESTIONS:	
Telephone:	<i>Office of Pupil Transportation</i>	Fax:
718-392-8855	N.Y.C. Department of Education 44-36 Vernon Blvd. – 6 th floor Long Island City, NY 11101	718-482-3885 718-482-3701
	FOR ALL LEGAL QUESTIONS:	
212-374-6888	<i>Office of Legal Services</i> N.Y.C. Department of Education 52 Chambers Street – Room 308 New York, NY 10007-1222	212-374-5596