

RULE REVIEW

OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES

The NYS Office of Mental Retardation and Developmental Disabilities (OMRDD) published in the January 8, 2003 issue of the *State Register*, a Regulatory Agenda in satisfaction of the requirements of the State Administrative Procedure Act (SAPA) section 207. The purpose of this agenda was to identify and discuss OMRDD rule makings finalized during calendar year 1998, and which are subject to the cited SAPA section 207 five-year review of rules.

During calendar year 1998, OMRDD adopted eleven rules. Five of these were proposed and adopted as minor rule makings, identified by the Department of State as MRD-43-97-00020; MRD-43-97-00021; MRD-43-97-00022; MRD-02-98-00027; and MRD-36-98-00007. As minor rule makings these are exempted from the review requirements by subdivision (5) of SAPA section 207.

The remaining six rule makings were identified and described as follows at the time the respective notices were first published in the *State Register*:

1. MRD-02-98-00026 (*State Register* of 1/14/98). Amendments to 14 NYCRR section 635-10.5. The purpose of these amendments was to establish a provision allowing the commissioner of OMRDD to authorize a one-time payment to reimburse providers for HCBS waiver prevocational and supported employment services delivered to persons newly eligible to receive such services as a result of the removal of a previous Federal restriction. These provisions were temporary features of the methodology which are no longer necessary. They have already been deleted (for supported employment) or will be (for prevocational services) at first opportunity.

2. MRD-03-98-00001 (*State Register* of 1/21/98). Amendments to 14 NYCRR sections 635-10.5 (HCBS Waiver Services), 671.7 (HCBS Waiver Community Residential Habilitation Services), 680.12 (Specialty Hospitals), 681.12 (Intermediate Care Facilities for persons with developmental disabilities), and 690.7 (Day Treatment Services for persons with developmental disabilities). These amendments establish trend factors to be applied (beginning January 1, 1998) within the context of the various rate/fee setting methodologies. Although specific trend factors are calculated annually, they are cumulative. They need to be maintained, without modification, to define how OMRDD establishes current rates/fees of reimbursement for the affected facilities or services.

3. MRD-11-98-00014 (*State Register* of 3/18/98). Amendments to 14 NYCRR sections 633.1 and 633.4 - Communication needs of non-English speaking persons seeking and/or receiving services under the auspices of OMRDD. The statutory authority for OMRDD's proposal and adoption of these amendments is in Mental Hygiene Law sections 13.07, 13.09(e), and 16.00. These amendments add provisions to ensure that providers of services to persons with developmental disabilities are aware of their responsibilities to meet the language/communication needs of non-English speaking persons

seeking or receiving services from providers operating under the auspices of OMRDD. These amendments must be maintained without modification because the regulations are required by Mental Hygiene Law section 13.09(e) which remains unchanged.

4. MRD-13-98-00004 (*State Register* of 4/1/98). Amendments to 14 NYCRR sections 635-10.5, 671.7, and 686.13 - Fee setting and financial reporting in OMRDD certified or operated home and community-based (HCBS) waiver services, HCBS waiver community residential habilitation services, and individualized residential alternative facilities. These amendments clarify that there can be no billing for therapeutic leave days for HCBS waiver residential habilitation services provided in individualized residential alternative facilities. This clarification was necessary because the Federal Health Care Financing Agency (HCFA) clarified its policy on the reimbursement of such vacancies and held that a State cannot pay for therapeutic leave days for persons who reside in IRAs and receive residential habilitation services. Since this remains the policy of the Federal Centers for Medicare and Medicaid Services (CMS, formerly HCFA), the amendments must be maintained without modification.

5. MRD-15-98-00018 (*State Register* of 4/15/98). Amendments to sections 635-10.5 and 686.13 - Fee setting and financial reporting in home and community-based (HCBS) waiver services and individualized residential alternative (IRA) facilities. These amendments allow for the voluntary waiver by participating service providers of certain fee appeal and fee-setting provisions in order to facilitate the conversion of other existing facilities and services to IRAs with HCBS waiver services. These provisions are still a necessary part of the methodology and must be maintained without modification.

6. MRD-43-98-00006 (*State Register* of 10/28/98). The addition of new section 681.11 - Rate setting and financial reporting in voluntary agency operated intermediate care facilities for persons with developmental disabilities (ICF/DDs). This section eventually replaced previous section 681.13 for all ICF/DD facilities during the course of the 1998 calendar year. The new section established 1994 as a new base year for under 31-bed ICF/DD facilities and revised the cost category screens and other reimbursement provisions to reflect cost data and changes in spending patterns. OMRDD has recently proposed and adopted a new section 681.14 which repeats this cyclical process of establishing a new base year and revised rate setting methodology for under 31-bed ICF/DD facilities. Section 681.11 (added during 1998) needed to be maintained in effect without modification until June 30, 2003, which is the end of the rate year for ICF/DD facilities in Region I. Effective July 1, 2003, new section 681.14 replaced section 681.11 for all ICF/DD facilities so that the amendment adopted in 1998 became obsolete and was repealed effective July 1, 2003 (MRD-16-03-00026-A).

In summary, the mandated five year-review for which a notice was published in the *State Register* of January 8, 2003, concerned (with the exception of item #3 for which the statutory authority is discussed above) amendments which revise OMRDD's rate/fee setting methodologies. The legal basis for the adoption of these rules is in

sections 13.07, 13.09 and 43.02 of the Mental Hygiene Law. In particular, section 43.02 of the Mental Hygiene Law sets forth OMRDD's responsibility for setting Medicaid rates for services in facilities licensed by OMRDD.

These various rate/fee setting methodologies describe and determine the way in which OMRDD calculates the reimbursement of voluntary agency providers of services. Each successive amendment constitutes a building block integral to each such methodology. In addition, many of the features of the various methodologies are subject to, or contain audit provisions and rate/fee appeals provisions which make it necessary to preserve, as a matter of official public record, all necessary elements of each year's rate/fee calculation. Therefore, the notice for the SAPA section 207 five-year review proposed to maintain the amendments (except for items #1 and #6 whose intended disposition was discussed), without modification and as adopted in 1998.

The public was invited to review and comment on OMRDD's proposed disposition regarding these 1998 rule makings beginning January 8, 2003. OMRDD has received no comment pertaining to this January 8, 2003 notice of five-year review of rules, so that it will abide by its intended disposition with regard to the 1998 rule makings.