

RULE REVIEW

Office of Mental Retardation and Developmental Disabilities

The NYS Office of Mental Retardation and Developmental Disabilities (OMRDD) published in the January 7, 2009 issue of the State Register a Public Notice of Five-Year Rule in satisfaction of the requirements of the State Administrative Procedure Act (SAPA) section 207. The purpose of this Notice was to identify and discuss OMRDD rule makings finalized during calendar years 1999 and 2004 which are subject to the cited SAPA section 207 five-year review of rules.

During calendar year 1999, OMRDD adopted five rules. These five rule makings finalized during 1999 were identified and described as follows at the time the respective notices were first published in the State Register:

99-1. MRD-04-99-00001 (State Register of 1/27/99). 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 various trend factor and cost of living adjustment (COLA) provisions that were applied (beginning January 1, 1999) within the context of the various rate/fee setting methodologies. Although specific trend factors for the different types of facilities and services are calculated annually, they are cumulative. COLAs are also important elements of the reimbursement methodologies. With the exception of the amendment to 681.12, which section was later repealed in its entirety, these amendments need to be maintained, without modification, as integral parts of the methodologies to define how OMRDD established current rates/fees of reimbursement for the affected facilities or services that year.

99-2. MRD-14-99-00011 (State Register of 4/7/99). Amendment of 14 NYCRR Part 681 to repeal the entire section 681.12 - Rate setting and financial reporting in voluntary agency operated intermediate care facilities for persons with developmental disabilities (ICF/DDs). OMRDD had previously proposed and adopted (effective January 1, 1999) a new section 681.11 as part of a cyclical process of establishing a new base year and revised rate setting methodology for under 31-bed ICF/DD facilities. Section 681.12 was therefore to become obsolete by the beginning of the rate cycle for Region I facilities in July 1 of 1999. The amendment to repeal section 681.12 was adopted effective July 1, 2003, and its repeal need not be revisited.

99-3. MRD-23-99-00011 (State Register of 6/9/99). Amendments to 14 NYCRR section 681.11 - Rate setting and financial reporting in voluntary agency operated intermediate care facilities for persons with developmental disabilities (ICF/DDs). These amendments were necessary to clarify the cost category standards (screens) contained in the section 681.11 under thirty-one bed ICF/DD rate setting methodology. The amendments specified that the regional screens corresponding to the actual geographic location of the particular ICF/DD facility were the ones that were to be applied. Section 681.11 has since been

replaced by its successor section 681.14, and it contains the clarifications proposed and adopted in the 1999 rule making. The clarifying language continues to be pertinent so that OMRDD finds that these amendments adopted in 1999 should be maintained without modification in the successor section 681.14.

99-4. MRD-34-99-00006 (State Register of 8/25/99). Amendments to section 681.11 - Rate setting and financial reporting in voluntary agency operated intermediate care facilities for persons with developmental disabilities (ICF/DDs). These amendments allow for increased reimbursement for enhanced day training services received by certain residents of ICF/DD facilities, based upon documented need for more intensive day training. The provision to allow increased reimbursement for more intensive day training services is still necessary in the ICF/DD rate setting methodology. Therefore, OMRDD intends to maintain this provision without modification in the successor section 681.14.

99-5. MRD-43-99-00006 (State Register of 10/27/99). Amendment of section 671.7 - Reimbursement and fiscal reporting for HCBS waiver community residential habilitation services. This amendment provides for an increase in funding for supervised and supportive community residence facilities in the form of an add-on to the operating portion of the reimbursement fee for such facilities. As with trend factors, the amendment needs to be maintained, without modification, to define how the current fee for community residential facilities is established.

During calendar year 2004, OMRDD adopted and finalized seven rules. Two of these rule makings were proposed and adopted as consensus rule makings identified by the Department of State as MRD-24-04-00008, Definition of "developmental disability"; and MRD-34-04-00009, Obsolete service fee and rate schedules. As consensus rule makings, these are exempted from the review requirements by subdivision (5) of SAPA section 207. The remaining five rule makings finalized during 2004 were identified and described as follows at the time the respective notices were published in the State Register:

04-1 MRD-52-03-00003 (State Register of 12/31/03). Health Care Decisions Act for Persons with Mental Retardation and Developmental Disabilities. The statutory authority for this rule making is in Mental Hygiene Law, sections 13.07 and 13.09 and in section 1750-b of the Surrogates Court Procedure Act (SCPA) which required the commissioner of OMRDD to promulgate implementing regulations in order for a specific statutory provision to be effective. The amendments implement changes to section 1750-b of the SCPA by establishing a specific safeguarding process to ensure that, in accordance with the changes to the SCPA, appropriate health care decisions can be made for persons with mental retardation and developmental disabilities who are terminally ill or who have other extremely serious medical conditions. More specifically, the regulations establish a process for OMRDD to determine whether physicians and psychologists are qualified to make decisions or provide consultation to the attending physician and include additional delineation of the responsibility of OMRDD and agencies operating OMRDD-certified residences when they receive notification of health care decisions that involve the with-

drawal or withholding of life-sustaining treatment. The process implemented by the regulation remains pertinent and the regulations continue to be necessary. Therefore, the regulations need to be maintained without modification.

04-2. MRD-03-04-00002 (State Register of 1/21/04). Rate/fee setting in voluntary agency operated individualized residential alternative (IRA) facilities and home and community-based (HCBS) waiver services; HCBS waiver community residential habilitation services; specialty hospitals; intermediate care facilities for persons with developmental disabilities; and day treatment facilities serving persons with developmental disabilities. The amendments revise the methodologies used to calculate rates/fees of the referenced facilities or programs for the periods of Jan. 1, 2004 to Dec. 31, 2004 and July 1, 2004 to June 30, 2005 and establish trend factors to be applied within the context of the referenced reimbursement methodologies, effective January 1, 2004. 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.

04-3. MRD-16-04-00020 (State Register of 4/21/04). Fee setting for various HCBS waiver habilitation services provided under the auspices of OMRDD. These regulatory changes clarify provisions governing the reimbursement of HCBS waiver residential habilitation services, and make various other technical and conforming amendments to update affected glossary definitions. Specifically, the regulations clarify that residential habilitation and supported employment services must be provided and documented in accordance with the persons Individualized Service Plan (ISP) and with the relevant Residential Habilitation Services Plan or Supported Employment Plan. The regulations continue to be necessary and need to be maintained without modification.

04-4. MRD-39-04-00005. Amendments to 14 NYCRR section 635-10.5. Reimbursement of HCBS waiver services. The amendments establish an hourly unit of service for HCBS waiver respite services. This change to the methodology for setting prices of HCBS waiver respite services is current practice and OMRDD intends to maintain the regulation without modification.

04-5. MRD-42-04-00010. Amendments to 14 NYCRR section 681.14. Rate Setting for Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DD). This rule making amended the methodology for reimbursement of under 31-bed ICF/DD facilities to implement an efficiency adjustment. These elements of the reimbursement methodology remain necessary and OMRDD intends to maintain the regulation without modification.

With the exception of the rule making identified as item 04-1 for which the statutory authority was discussed in the relevant paragraph, the present mandated five-year reviews concern 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.

The public was invited to review and comment on OMRDD's proposed disposition regarding these 1999 and 2004 rule makings as outlined in the Notice that appeared in the January 7, 2009 issue of the State Register. OMRDD received no comment on this Notice of Five-Year Rule Review, so that it will abide by its intended disposition with regard to these regulations.