

# RULE REVIEW

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## Office for People with Developmental Disabilities

The NYS Office For People With Developmental Disabilities (OPWDD) published in the January 6, 2010 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 OPWDD rule makings finalized during calendar years 2000 and 2005 which are subject to the cited SAPA section 207 five-year review of rules.

During calendar year 2000, OPWDD adopted seven rules. These seven rule makings finalized during 2000 were identified and described as follows at the time the respective notices were first published in the State Register:

00-1. MRD-06-99-00016 (State Register of 2/10/99). Amendments to 14 NYCRR adding a Subpart 635-6: Allowability of capital costs and costs of transactions with related parties. This regulation sets forth standards for the allowability of capital costs, moveable equipment and personal property, and whether the costs are pursuant to transactions with related parties. The regulation also sets forth rules for the allowability of costs of transactions with related parties. The regulation is applicable to all facilities and services funded by OPWDD. It is current and continues to be necessary so that it must be maintained, without modification, to govern these topics within the context of the respective reimbursement methodologies.

00-2. MRD-46-99-00008 (State Register of 11/17/99). Amendment of 14 NYCRR by the addition of Subpart 635-5: Reimbursement of Medicaid service coordination. This regulation replaces two previously existing means of reimbursement for service coordination in the OPWDD service system with a single streamlined Medicaid Service Coordination reimbursement methodology. The subpart implements a monthly fee paid to the provider for each individual served. It standardizes payments, streamlines billing procedures and reduces billing paperwork. It remains current and needs to be maintained, without modification.

00-3. MRD-01-00-00007 (State Register of 1/05/00). Amendments to 14 NYCRR section 633.12: Objection to services process. These amendments clarify and supplement objection to services processes as applied to individuals receiving HCBS waiver services and require that individuals receive written notice of the provider's intent to reduce, suspend, or discontinue services, and of the mechanism for resolving an objection to the provider's proposed action. The amendments continue to be pertinent and must be maintained, without modification.

The statutory authority for this specific rule making is found in Mental Hygiene Law, sections 13.07, 13.09 and 16.00. Most notably, Section 16.00 of the Mental Hygiene Law enables the commissioner of OPWDD to regulate and assure the consistent high quality of services provided within the state to its citizens with developmental disabilities.

00-4. MRD-03-00-00004 (State Register of 1/19/00). Amendments to 14 NYCRR sections 635-10.5 (HCBS Waiver Services), 671.7 (HCBS Waiver Community Residential Habilitation Services), 680.12

(Specialty Hospitals), 681.11 (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, 2000) 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 OPWDD establishes current rates/fees of reimbursement for the affected facilities or services.

00-5. MRD-11-00-00006 (State Register of 3/15/00). Amendment of 14 NYCRR section 635-10.5: Reimbursement of HCBS waiver services known as plan of care support services and family education and training. The amendments set forth the requirements, and the means of reimbursement for these two HCBS waiver services. Neither the service standards nor the reimbursement method have changed, so that the rule needs to be maintained without modification.

00-6. MRD-13-00-00008 (State Register of 3/29/00). Amendments to 14 NYCRR section 81.10: Fees and Reimbursement Fees. These amendments revise the fee-setting methodology for facilities certified as schools for persons with developmental disabilities to include reimbursement provisions for facilities classified as integrated residential communities. This reimbursement method remains current, and should be maintained without modification.

00-7. MRD-29-00-00004 (State Register of 7/19/00). Amendments to 14 NYCRR sections 635-10.5 (HCBS Waiver Services), 671.7 (HCBS Waiver Community Residential Habilitation Services), 679.6 (Clinic Treatment facilities), and 690.7 (Day Treatment facilities for persons with developmental disabilities). These amendments revise the respective reimbursement methodologies used to calculate fees of the referenced facilities or programs to establish salary enhancement add-ons effective July 1, 2000. Consistent with Chapter 54 of the Laws of 2000, the revisions recognize the costs of a \$750.00 per full time equivalent annual salary increase, plus salary related fringe benefits, for the direct care and support workers of these facilities and service provider agencies. While the subject matter of these amendments may appear dated with respect to their specificity, the standards must be maintained without modification, as necessary elements of fee calculations going forward.

During calendar year 2005, OPWDD finalized eight rules. One of these rule makings was proposed and adopted as a consensus rule making identified by the Department of State as MRD-31-05-00008 (State Register of 8/3/05), to conform management of personal allowance funds to requirements of the Social Security Administration. As a consensus rule making, it is exempted from the review requirements by subdivision (5) of SAPA section 207. The remaining seven rule makings finalized during 2005 were identified and described as follows at the time the respective notices were published in the State Register:

05-1. MRD-43-04-00004 (State Register of 10/27/04). Responsibility for home health aide and personal care services in certain residential facilities and day programs. The amendments specify that home health aide and personal care services cannot be separately billed to

Medicaid for persons residing in an IRA or community residence and for persons attending day treatment and day habilitation programs. Instead, it is the responsibility of the provider to purchase these services or provide them itself. This continues to be the policy in New York State and the regulations need to be maintained without modification.

05-2. MRD-03-05-00008 (State Register of 1/19/05) 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, 2005 to Dec. 31, 2005 and July 1, 2005 to June 30, 2006 and establish trend factors to be applied within the context of the referenced reimbursement methodologies, effective January 1, 2005. Although specific trend factors are calculated annually, they are cumulative. The other changes to the methodologies also remain current and they need to be maintained, without modification, to define how OPWDD establishes current rates/fees of reimbursement for the affected facilities or services.

05-3. MRD-07-05-00024 (State Register of 2/16/05). Rate/Fee setting in voluntary agency operated IRA facilities and HCBS waiver services and for ICF/DD facilities. The amendments revise the reimbursement methodologies to establish a supplemental trend factor for calendar 2004 and 2004-2005 rate/fee periods. Although specific trend factors are calculated annually, they are cumulative. They need to be maintained, without modification, to define how OPWDD establishes current rates/fees of reimbursement for the affected facilities or services.

05-4. MRD-38-05-00010 (State Register of 9/21/05). Amendments to 14 NYCRR section 633.11. Expansion of the list of surrogate decision-makers who are authorized to make informed consent decisions, when professional medical treatment is recommended for a person who lives in an OPWDD operated or certified residence and the person does not have the capacity to make the decision for herself or himself. The amendments add actively involved siblings, actively involved family members and the Willowbrook Consumer Advisory Board to the existing list of surrogates authorized to make informed consent decisions. The list of authorized surrogate decision-makers is necessary and OPWDD intends to maintain the regulation without modification.

The statutory authority for this specific rule making is found in Mental Hygiene Law, sections 13.07, 13.09 and 16.00. Most notably, Section 16.00 of the Mental Hygiene Law enables the commissioner of OPWDD to regulate and assure the consistent high quality of services provided within the state to its citizens with developmental disabilities.

05-5. MRD-42-05-00014 (State Register of 10/19/05). Amendments to 14 NYCRR sections 635-10.5, 671.7, 679.6, 680.12, 681.14, and 690.7. The amendments revise the various rate/fee setting methodologies to include a health benefit funding initiative. The amendments implement a funding initiative that will enable agencies which operate facilities and provide services under the auspices of OPWDD to address the health care costs of their employees. OPWDD has been consistently building on this funding initiative so that the regulations remain an indispensable element of the reimbursement methodologies and OPWDD intends to maintain them without modification.

05-6. MRD-42-05-00015 (State Register of 10/19/05). Amendments to 14 NYCRR section 635-10.5, Fee setting for HCBS waiver day habilitation services provided under the auspices of OPWDD. The amendments implement an efficiency adjustment applicable to the reimbursement of HCBS waiver day habilitation services. The changes need to be maintained, without modification, to define how OPWDD establishes current rates/fees of reimbursement for HCBS waiver day habilitation services.

05-7. MRD-43-05-00017 (State Register of 10/26/05). Amendments to 14 NYCRR section 635-10.5, Fee setting for HCBS waiver

day habilitation services. The reimbursement methodologies for HCBS waiver day habilitation and prevocational services are revised to create new definitions of billing units of service, establish statewide regulatory standards for the service duration associated with each billing unit, and enhance provider accountability; establish clear standards to document the provision of services; and simplify the price setting methodologies. The regulations adopted in 2005 continue to be necessary and should remain without further modification.

With the exception of the rule makings identified as item 00-3 and 05-4 above, for which the statutory authority was discussed in the relevant paragraph, the present mandated five-year reviews concern amendments which revise OPWDD'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 OPWDD's responsibility for setting Medicaid rates for services in facilities licensed by OPWDD.

The public was invited to review and comment on OPWDD's proposed disposition regarding these 2000 and 2005 rule makings beginning January 6, 2010. OPWDD 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.

*Any written comments or inquiries for further information may be directed to the Regulatory Affairs Unit at: Barbara Brundage, Director, Regulatory Affairs Unit, Office of Counsel, Office For People With Developmental Disabilities, 44 Holland Avenue, Albany, NY 12229, (518) 474-1830, e-mail: barbara.brundage@omr.state.ny.us*