

# RULE MAKING ACTIVITIES

Each rule making is identified by an I.D. No., which consists of 13 characters. For example, the I.D. No. AAM-01-96-00001-E indicates the following:

AAM      -the abbreviation to identify the adopting agency  
01        -the *State Register* issue number  
96        -the year  
00001    -the Department of State number, assigned upon receipt of notice.  
E         -Emergency Rule Making—permanent action not intended (This character could also be: A for Adoption; P for Proposed Rule Making; RP for Revised Rule Making; EP for a combined Emergency and Proposed Rule Making; EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing.)

Italics contained in text denote new material. Brackets indicate material to be deleted.

---

## Department of Correctional Services

---

### PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### Temporary Release Program and Short Term Temporary Release Program

I.D. No. COR-16-11-00001-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Amendment of sections 1900.3(a)(1), 1901.1(a) and (c)(2)(i)(a) of Title 7 NYCRR.

**Statutory authority:** Correction Law, sections 112 and 851(2)

**Subject:** Temporary Release Program and Short Term Temporary Release Program.

**Purpose:** To add language to recognize same-sex marriages under certain circumstances.

**Text of proposed rule:** Section 1900.3(a)(1) of Title 7 NYCRR is amended as follows:

To visit his/her spouse, child, brother, sister, grandchild, parent, grandparent or ancestral aunt or uncle during his or her last illness if death appears imminent; *(For the purposes of this section the term "spouse" shall also include a person who is the same sex as the inmate if the same-sex marriage or civil union was performed in an outside jurisdiction that authorizes such marriages or unions. Counsel's Office may be consulted to determine whether the outside jurisdiction does authorize same-sex marriages or civil unions.)*

Section 1901.1(a) of Title 7 NYCRR is amended as follows:

(a) Leave of absence program. Any inmate may apply for this program,

regardless of time criteria, as long as all other requirements are satisfied. The point score must, however, be at least 30. A leave of absence lets the inmate leave an institution to visit his/her spouse, child, brother, sister, grandchild, parent (natural or legally adoptive), grandparent or ancestral aunt or uncle during his or her last illness if death appears to be imminent; to attend the funeral of such individual, or to undergo surgery or to receive medical or dental treatment not available in a correctional institution only if deemed absolutely necessary to the health and well-being of the inmate and where approval is granted by the commissioner or his designee. *(For purposes of this section the term "spouse" shall also include a person who is the same sex as the inmate if the same-sex marriage or civil union was performed in an outside jurisdiction that authorizes such marriages or unions. Counsel's Office may be consulted to determine whether the outside jurisdiction does authorize same-sex marriages or civil unions.)* A temporary release committee form 4188 must be completed and signed by the facility health services director in the last instance.

Section 1901.1(c)(2)(i)(a)(4) of Title 7 NYCRR to be amended and a new subclause (5) added as follows:

(4) common law spouse where the relationship had existed more than one year before incarceration[.];

(5) *same-sex spouse where the same-sex marriage or civil union was performed in an outside jurisdiction that authorizes such marriages or unions. Counsel's Office may be consulted to determine whether the outside jurisdiction authorizes same-sex marriage or civil union.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Maureen E. Boll, Deputy Commissioner and Counsel, New York State Department of Correctional Services, 1220 Washington Avenue, Building 2 - State Campus, Albany, NY 12206-2050, (518) 457-4951, email: Rules@docs.ny.state.us

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

#### Regulatory Impact Statement

##### Statutory Authority

Section 112 of Correction Law grants the Commissioner of DOCS the superintendence, management and control of the correctional facilities and inmates confined therein and to promulgate rules and regulations for this purpose. Section 851(2) requires the commissioner to promulgate regulations to give direction to the temporary release committees at each facility.

##### Legislative Objective

By vesting the commissioner with this rulemaking authority, the legislature intended the commissioner to ensure that the agency complies with all court decisions and directions provided from the Governor's Office in legally defining spousal relationships.

##### Needs and Benefits

These rules are being proposed, in accordance with the Governor's direction, in order to bring the agency into compliance with the recent Appellate Division decision that dealt with the recognition of same-sex marriage or civil union under certain circumstances. Specifically, if a same-sex marriage or civil union was performed in another jurisdiction that authorizes such marriages or unions, then under the full faith and credit clause of the United States Constitution, New York must also recognize the validity of such marriage or civil union.

##### Costs

a) To agency, the state and local governments: None.

b) Costs to private regulated parties: None. The proposed amendment does not apply to private parties.

c) This cost analysis is based upon the fact that this proposal merely defines spousal relationships.

##### Local Government Mandates

There are no new mandates imposed upon local governments by these proposals. The proposed amendments do not apply to local governments.

##### Paperwork

There are no new reports, forms or paperwork that would be required as a result of amending these rules.

**Duplication**

These proposed amendments do not duplicate any existing State or Federal requirement.

**Alternatives**

No alternatives are apparent and none have been considered as this is a legal court ruling.

**Federal Standards**

None.

**Compliance Schedule**

The Department of Correctional Services will achieve compliance with the proposed rules immediately.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments. This proposal merely adds language to recognize same-sex marriages under certain circumstances.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas. This proposal merely adds language to recognize same-sex marriages under certain circumstances.

**Job Impact Statement**

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This proposal merely adds language to recognize same-sex marriages under certain circumstances.

## Department of Economic Development

### EMERGENCY RULE MAKING

**Excelsior Jobs Program**

**I.D. No.** EDV-48-10-00010-ED

**Filing No.** 329

**Filing Date:** 2011-04-04

**Effective Date:** 2011-04-04

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Addition of Parts 190-196 to Title 5 NYCRR.

**Statutory authority:** Economic Development Law, art. 17; L. 2010, ch. 59

**Finding of necessity for emergency rule:** Preservation of general welfare.

**Specific reasons underlying the finding of necessity:** Regulatory action is needed immediately to implement the Excelsior Jobs Program which was created by Chapter 59 of the Laws of 2010. The Excelsior Jobs Program will provide job creation and investment incentives to firms that create and maintain new jobs or make significant financial investment. The Excelsior Jobs Program is one of the State's key economic development tools for ensuring that businesses in the new economy choose to expand or locate in New York State. It is imperative that this Program be implemented immediately so that New York remains competitive with other States, regions, and even countries as businesses make their investment and location decisions. Helping existing New York businesses create new jobs and make significant capital investments with the financial incentives of the Excelsior Jobs Program is equally important and needs to happen now.

The emergency rule is necessary because it establishes the application process, standards for application evaluation and procedures for businesses claiming the tax credit under this Program. Immediate adoption of this rule will enable the State to begin achieving its economic development goals.

It bears noting that section 356 of the Economic Development Law directs the Commissioner of Economic Development to promulgate regulations and explicitly indicates that such regulations may be adopted on an emergency basis.

**Subject:** Excelsior Jobs program.

**Purpose:** To create the process by which businesses may apply for and receive the tax credits provided by the Excelsior Jobs Program.

**Substance of emergency rule:** The regulation creates new Parts 190-196 in 5 NYCRR as follows:

1) The regulation adds the definitions relevant to the Excelsior Jobs Program (the "Program"). Key definitions include, but are not limited to, certificate of eligibility, certificate of tax credit, industry with significant potential for private sector growth and economic development in the State, preliminary schedule of benefits, regionally significant project and significant capital investment.

2) The regulation creates the application and review process for the Excelsior Jobs Program. In order to become a participant in the Program, an applicant must submit a complete application and agree to a variety of requirements, including, but not limited to, the following: (a) allowing the exchange of its tax information between Department of Taxation and Finance and Department of Economic Development (the "Department"); (b) allowing the exchange of its tax and employer information between the Department of Labor and the Department; (c) agreeing to be permanently decertified from the empire zones program if admitted into the Excelsior Jobs Program; (d) providing, if requested by the Department, a plan outlining the schedule for meeting job and investment requirements as well as providing its tax returns, information concerning its projected investment, an estimate of the portion of the federal research and development tax credits attributable to its research and development activities in New York state, and employer identification or social security numbers for all related persons to the applicant.

3) Applicants must also certify that they are in substantial compliance with all environmental, worker protection and local, state and federal tax laws.

4) Upon receiving a complete application, the Commissioner of the Department shall review the application to ensure it meets eligibility criteria set forth in the statute (see 5 below). If it does not, the application shall not be accepted. If it does meet the eligibility criteria, the Commissioner may admit the applicant into the Program. If admitted into the Program, an applicant will receive a certificate of eligibility and a preliminary schedule of benefits. The preliminary schedule of benefits may be amended by the Commissioner provided he or she complies with the credit caps established in General Municipal Law section 359.

5) The regulation sets forth the eligibility criteria for the Program. To be a participant in the program, an applicant must be operating predominantly in a strategic industry and meet the respective job requirements for strategic industries or be a regionally significant project. The strategic industries are specifically delineated in the regulation as follows: (a) financial services data center or a financial services back office operation; (b) manufacturing; (c) software development; (d) scientific research and development; (e) agriculture; (f) back office operations in the state; (g) distribution center; or (h) in an industry with significant potential for private-sector economic growth and development in this state. When determining whether an applicant is operating predominantly in a strategic industry, or as a regionally significant project, the commissioner will examine the nature of the business activity at the location for the proposed project and will make eligibility determinations based on such activity.

6) In addition, a business entity operating predominantly in manufacturing must create at least twenty-five net new jobs; a business entity operating predominantly in agriculture must create at least ten net new jobs; a business entity operating predominantly as a financial service data center or financial services customer back office operation must create at least one hundred net new jobs; a business entity operating predominantly in scientific research and development must create at least ten net new jobs; a business entity operating predominantly in software development must create at least ten net new jobs; a business entity creating or expanding back office operations or a distribution center in the state must create at least one hundred fifty net new jobs; or a business entity must be a Regionally Significant Project; or a business entity operating predominantly in one of the industries referenced above but which does not meet the job requirements must have at least fifty full-time job equivalents, and must demonstrate that its benefit-cost ratio is at least ten to one (10:1).

7) A business entity must be in substantial compliance with all worker protection and environmental laws and regulations and may not owe past due state or local taxes. Also, the regulation explicitly excludes: a not-for-profit business entity, a business entity whose primary function is the provision of services including personal services, business services, or the provision of utilities, and a business entity engaged predominantly in the retail or entertainment industry, and a company engaged in the generation or distribution of electricity, the distribution of natural gas, or the production of steam associated with the generation of electricity from eligibility for this program.

8) The regulation sets forth the evaluation standards that the Commis-

sioner can utilize when determining whether to admit an applicant to the Program. These include, but are not limited to, the following: (1) whether the Applicant is proposing to substantially renovate contaminated, abandoned or underutilized facilities; or (2) whether the Applicant will use energy-efficient measures, including, but not limited to, the reduction of greenhouse gas and emissions and the Leadership in Energy and Environmental Design (LEED) green building rating system for the project identified in its application; or (3) the degree of economic distress in the area where the Applicant will locate the project identified in its application; or (4) the degree of Applicant's financial viability, strength of financials, readiness and likelihood of completion of the project identified in the application; or (5) the degree to which the project identified in the Application supports New York State's minority and women business enterprises; or (6) the degree to which the project identified in the Application supports the principles of Smart Growth; or (7) the estimated return on investment that the project identified in the Application will provide to the State; or (8) the overall economic impact that the project identified in the Application will have on a region, including the impact of any direct and indirect jobs that will be created; or (9) the degree to which other state or local incentive programs are available to the Applicant; or (10) the likelihood that the project identified in the Application would be located outside of New York State but for the availability of state or local incentives.

9) The regulation requires an applicant to submit evidence of achieving job and investment requirements stated in its application in order to become a participant in the Program. After such evidence is found sufficient, the Department will issue a certificate of tax credit to a participant. This certificate will specify the exact amount of the tax credit components a participant may claim and the taxable year in which the credit may be claimed.

10) A participant's increase in employment, qualified investment, or federal research and development tax credit attributable to research and development activities in New York state above its projections listed in its application shall not result in an increase in tax benefits under this article. However, if the participant's expenditures are less than the estimated amounts, the credit shall be less than the estimate.

11) The regulation next delineates the calculation of the tax credits as described in statute.

12) The tax credit components are refundable. If a participant fails to satisfy the eligibility criteria in any one year, it loses the ability to claim the credit for that year.

13) The regulation requires participants to keep all relevant records for their duration of program participation plus three years.

14) The regulation requires a participant to submit a performance report annually and states that the Commissioner shall prepare a program report on a quarterly basis for posting on the Department's website.

15) The regulation calls for removal of a participant in the Program for failing to meet the application requirements or failing to meet the minimum job or investment requirements of the statute. Upon removal, a participant will be notified in writing and have the right to appeal such removal.

16) The regulation lays out the appeal process for participant's who have been removed from the Program. A participant will have thirty (30) days to appeal to the Department. An appeal officer will be appointed and shall evaluate the merits of the appeal and any response from the Department. The appeal officer will determine whether a hearing is necessary and the level of formality required. The appeal officer will prepare a report and make recommendations to the Commissioner. The Commissioner will then issue a final decision in the case.

The full text of the emergency rule is available at the Department's website at <http://www.esd.ny.gov/BusinessPrograms/Excelsior.html>.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDV-48-10-00010-P, Issue of December 1, 2010. The emergency rule will expire June 2, 2011.

**Text of rule and any required statements and analyses may be obtained from:** Thomas P. Regan, NYS Department of Economic Development, 30 South Pearl Street, Albany, NY 12245, (518) 292-5123, email: [tregan@empire.state.ny.us](mailto:tregan@empire.state.ny.us)

#### **Regulatory Impact Statement**

##### **STATUTORY AUTHORITY:**

Chapter 59 of the Laws of 2010 established Article 17 of the Economic Development Law, creating the Excelsior Jobs Program and authorizing the Commissioner of Economic Development to adopt, on an emergency basis, rules and regulations governing the Program.

##### **LEGISLATIVE OBJECTIVES:**

The emergency rulemaking accords with the public policy objectives the Legislature sought to advance because they directly address the legisla-

tive findings and declarations that New York State needs, as a matter of public policy, to create competitive financial incentives for businesses to create jobs and invest in the new economy. The Excelsior Jobs Program is created to support the growth of the State's traditional economic pillars including the manufacturing and financial industries and to ensure that New York emerges as the leader in the knowledge, technology and innovation based economy. The Program will encourage the expansion in and relocation to New York of businesses in growth industries such as clean-tech, broadband, information systems, renewable energy and biotechnology.

The emergency rule is specifically authorized by the Legislature.

##### **NEEDS AND BENEFITS:**

The emergency rule is required in order to immediately implement the statute contained in Article 17 of the Economic Development Law, creating the Excelsior Jobs Program. The statute directed the Commissioner of Economic Development to adopt regulations with respect to an application process and eligibility criteria and authorized the adoption of such regulations on an emergency basis notwithstanding any provisions to the contrary in the state administrative procedures act.

New York is in the midst of a national economic slowdown that some predict could become a double dip recession or worse. The impact of the national financial crisis and resulting slowed economic growth was particularly devastating to New York State and is having severe consequences on New York's immediate fiscal health and could harm its economic future. The Excelsior Jobs Program will be one of the State's key economic development tools for ensuring that businesses in the new economy choose to expand or locate in New York State. It is imperative that this Program be implemented immediately so that New York remains competitive with other States, regions, and even countries as businesses make their investment and location decisions. Helping existing New York businesses create new jobs and make significant capital investments with the financial incentives of the Excelsior Jobs Program is equally important and needs to happen now.

This rule will establish the process and procedures for launching this new Program in the most efficient and cost-effective manner while protecting all New York State taxpayers with rules to ensure accountability, performance and adherence to commitments by businesses choosing to participate in the Program.

##### **COSTS:**

A. Costs to private regulated parties: None. There are no regulated parties in the Excelsior Jobs Program, only voluntary participants.

B. Costs to the agency, the state, and local governments: The Department of Economic Development does not anticipate any significant costs with respect to implementation of this program. There is no additional cost to local governments.

C. Costs to the State government: None. There will be no additional costs to New York State as a result of the emergency rule making.

##### **LOCAL GOVERNMENT MANDATES:**

None. There are no mandates on local governments with respect to the Excelsior Jobs Program. This emergency rule does not impose any costs to local governments for administration of the Excelsior Jobs Program.

##### **PAPERWORK:**

The emergency rule requires businesses choosing to participate in the Excelsior Jobs Program to establish and maintain complete and accurate books relating to their participation in the Excelsior Jobs Program for a period of three years beyond their participation in the Program. However, this requirement does not impose significant additional paperwork burdens on businesses choosing to participate in the Program but instead simply requires that information currently established and maintained be shared with the Department in order to verify that the business has met its job creation and investment commitments.

##### **DUPLICATION:**

The emergency rule does not duplicate any state or federal statutes or regulations.

##### **ALTERNATIVES:**

No alternatives were considered with regard to amending the regulations in response to statutory revisions. The Department conducted outreach with respect to this rulemaking. Specifically, it contacted the Citizens Budget Commission, Partnership for New York City, the Buffalo Niagara Partnership and the New York State Economic Development Council and received comments from them. The Department carefully considered all comments made with respect to the regulation. Certain comments were incorporated into the rulemaking while others deemed inappropriate were not.

##### **FEDERAL STANDARDS:**

There are no federal standards in regard to the Excelsior Jobs Program. Therefore, the emergency rule does not exceed any Federal standard.

##### **COMPLIANCE SCHEDULE:**

The period of time the state needs to assure compliance is negligible, and the Department of Economic Development expects to be compliant immediately.



**Regulatory Flexibility Analysis****1. Effect of rule**

The emergency rule imposes record-keeping requirements on all businesses (small, medium and large) that choose to participate in the Excelsior Jobs Program. The emergency rule requires all businesses that participate in the Program to establish and maintain complete and accurate books relating to their participation in the Program for the duration of their term in the Program plus three additional years. Local governments are unaffected by this rule.

**2. Compliance requirements**

Each business choosing to participate in the Excelsior Jobs Program must establish and maintain complete and accurate books, records, documents, accounts, and other evidence relating to such business's application for entry into the program and relating to annual reporting requirements. Local governments are unaffected by this rule.

**3. Professional services**

The information that businesses choosing to participate in the Excelsior Jobs Program would be information such businesses already must establish and maintain in order to operate, i.e. wage reporting, financial records, tax information, etc. No additional professional services would be needed by businesses in order to establish and maintain the required records. Local governments are unaffected by this rule.

**4. Compliance costs**

Businesses (small, medium or large) that choose to participate in the Excelsior Jobs Program must create new jobs and/or make capital investments in order to receive any tax incentives under the Program. If businesses choosing to participate in the Program do not fulfill their job creation or investment commitments, such businesses would not receive financial assistance. There are no other initial capital costs that would be incurred by businesses choosing to participate in the Excelsior Jobs Program. Annual compliance costs are estimated to be negligible for businesses because the information they must provide to demonstrate their compliance with their commitments is information that is already established and maintained as part of their normal operations. Local governments are unaffected by this rule.

**5. Economic and technological feasibility**

The Department of Economic Development ("DED") estimates that complying with this record-keeping is both economically and technologically feasible. Local governments are unaffected by this rule.

**6. Minimizing adverse impact**

DED finds no adverse economic impact on small or large businesses with respect to this rule. Local governments are unaffected by this rule.

**7. Small business and local government participation**

DED is in compliance with SAPA Section 202-b(6), which ensures that small businesses and local governments have an opportunity to participate in the rule-making process. DED has conducted outreach within the small and large business communities and maintains continuous contact with small and large businesses with regard to their participation in this program. Local governments are unaffected by this rule.

**Rural Area Flexibility Analysis**

The Excelsior Jobs Program is a statewide business assistance program. Strategic businesses in rural areas of New York State are eligible to apply to participate in the program entirely at their discretion. Municipalities are not eligible to participate in the Program. The emergency rule does not impose any special reporting, record keeping or other compliance requirements on private entities in rural areas. Therefore, the emergency rule will not have a substantial adverse economic impact on rural areas nor on the reporting, record keeping or other compliance requirements on public or private entities in such rural areas. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

**Job Impact Statement**

The emergency rule relates to the Excelsior Jobs Program. The Excelsior Jobs Program will enable New York State to provide financial incentives to businesses in strategic industries that commit to create new jobs and/or to make significant capital investment. This Program, given its design and purpose, will have a substantial positive impact on job creation and employment opportunities. The emergency rule will immediately enable the Department to fulfill its mission of job creation and investment throughout the State and in economically distressed areas through implementation of this new economic development program. Because this emergency rule will authorize the Department to immediately begin offering financial incentives to strategic industries that commit to creating new jobs and/or to making significant capital investment in the State during these difficult economic times, it will have a positive impact on job and employment opportunities. Accordingly, a job impact statement is not required and one has not been prepared.

**Assessment of Public Comment**

The agency received no public comment

**Department of Health****EMERGENCY  
RULE MAKING****April 2011 Ambulatory Patient Groups (APGs) Payment Methodology**

**I.D. No.** HLT-16-11-00002-E

**Filing No.** 308

**Filing Date:** 2011-03-31

**Effective Date:** 2011-03-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Subpart 86-8 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2807(2-a)(e)

**Finding of necessity for emergency rule:** Preservation of public health.

**Specific reasons underlying the finding of necessity:** It is necessary to issue the proposed regulation on an emergency basis in order to meet the regulatory requirement found within the regulation itself to update the Ambulatory Patient Group (APG) weights at least once a year. To meet that requirement, the weights needed to be revised and published in the regulation for January 2010 and updated thereafter. Additionally, the regulation needs to reflect the many software changes made to the APG payment software, known as the APG grouper-pricer, which is a sub-component of the eMedNY Medicaid payment system. These changes include the revised list of If Stand Alone do Not Pay APGs and the ability to reduce APG reimbursement for drugs purchased through the 340B drug benefit program.

There is a compelling interest in enacting these amendments immediately in order to secure federal approval of associated Medicaid State Plan amendments and assure there are no delays in implementation of these provisions. APGs represent the cornerstone to health care reform. Their continued refinement is necessary to assure access to preventive services for all Medicaid recipients.

**Subject:** April 2011 Ambulatory Patient Groups (APGs) Payment Methodology.

**Purpose:** To refine the APG payment methodology.

**Substance of emergency rule:** The amendments to Part 86 of Title 10 (Health) NYCRR are required to update the Ambulatory Patient Groups (APGs) methodology, implemented on December 1, 2008, which governs reimbursement for certain ambulatory care fee-for-service (FFS) Medicaid services. APGs group procedures and medical visits that share similar characteristics and resource utilization patterns so as to pay for services based on relative intensity.

**86-8.2 - Definitions**

The proposed amendment to section 86-8.2 of Title 10 (Health) NYCRR removes subdivision (r), which defined ambulatory surgery permissible procedures.

**86-8.7 - APGs and relative weights**

The proposed revision to section 86-8.7 of Title 10 (Health) NYCRR repeals all of section 86-8.7 effective April 1, 2011 and replaces it with a new section 86-8.7 that includes revised APG weights, procedure-based weights, and APG fee schedule fees.

**86-8.9 Diagnostic coding and rate computation**

The proposed revision to section 86-8.9 of Title 10 (Health) NYCRR removes subdivision (c), which references ambulatory surgery permissible procedures. Additionally, subdivision (f) is added to allow for a reduction of reimbursement for drugs purchased through the 340B drug benefit program.

**86-8.10 Exclusions from payment**

The proposed revision to section 86-8.10 of Title 10 (Health) NYCRR amends subdivision (i) to add APG 490 Incidental to Medical, Significant Procedure or Therapy Visit to the if stand alone do not pay list.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire June 28, 2011.

**Text of rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqa@health.state.ny.us

**Regulatory Impact Statement****Statutory Authority:**

Authority for the promulgation of these regulations is contained in section 2807(2-a)(e) of the Public Health Law, as amended by Part C of Chapter 58 of the Laws of 2008 and Part C of Chapter 58 of the Laws of 2009, which authorize the Commissioner of Health to adopt and amend rules and regulations, subject to the approval of the State Director of the Budget, establishing an Ambulatory Patient Groups methodology for determining Medicaid rates of payment for diagnostic and treatment center services, free-standing ambulatory surgery services and general hospital outpatient clinics, emergency departments and ambulatory surgery services.

**Legislative Objectives:**

The Legislature's mandate is to convert, where appropriate, Medicaid reimbursement of ambulatory care services to a system that pays differential amounts based on the resources required for each patient visit, as determined through Ambulatory Patient Groups ("APGs"). The APGs refer to the Enhanced Ambulatory Patient Grouping classification system which is owned and maintained by 3M Health Information Systems. The Enhanced Ambulatory Group classification system and the clinical logic underlying that classification system, the EAPG software, and the Definitions Manual associated with that classification system, are all proprietary to 3M Health Information Systems. APG-based Medicaid Fee For Service payment systems have been implemented in several states including: Massachusetts, New Hampshire, and Maryland.

**Needs and Benefits:**

The proposed regulations are in conformance with statutory amendments to provisions of Public Health Law section 2807(2-a), which mandated implementation of a new ambulatory care reimbursement methodology based on APGs.

This reimbursement methodology provides greater reimbursement for high intensity services and relatively less reimbursement for low intensity services. It also allows for greater payment homogeneity for comparable services across all ambulatory care settings (i.e., Outpatient Department, Ambulatory Surgery, Emergency Department, and Diagnostic and Treatment Centers). By linking payments to the specific array of services rendered, APGs will make Medicaid reimbursement more transparent. APGs provide strong fiscal incentives for health care providers to improve the quality of, and access to, preventive and primary care services.

These amendments include updated APG and, procedure-based weights, and APG fee schedule fees, which will provide reimbursement precision and specificity. These amendments also remove all reference to ambulatory surgery permissible procedures list, which no longer exists. Additionally, drugs purchased through the 340B drug benefit program will be reimbursed at a reduced rate and APG 490 INCIDENTAL TO MEDICAL, SIGNIFICANT PROCEDURE OR THERAPY VISIT was added to the If Stand Alone do Not Pay list.

**COSTS**

Costs for the Implementation of, and Continuing Compliance with this Regulation to the Regulated Entity:

There will be no additional costs to providers as a result of these amendments.

**Costs to Local Governments:**

There will be no additional costs to local governments as a result of these amendments.

**Costs to State Governments:**

There will be no additional costs to NYS as a result of these amendments.

**Costs to the Department of Health:**

There will be no additional costs to the Department of Health as a result of these amendments.

**Local Government Mandates:**

There are no local government mandates.

**Paperwork:**

There is no additional paperwork required of providers as a result of these amendments.

**Duplication:**

This regulation does not duplicate other state or federal regulations.

**Alternatives:**

These regulations are in conformance with Public Health Law section 2807(2-a)(e). Although the 2009 amendments to PHL 2807 (2-a) authorize the Commissioner to adopt rules to establish alternative payment methodologies or to continue to utilize existing payment methodologies where the APG is not yet appropriate or practical for certain services, the utilization of the APG methodology is in its relative infancy and is otherwise continually monitored, adjusted and evaluated for appropriateness by the Department and the providers. This rulemaking is in response to this continually evaluative process.

**Federal Standards:**

This amendment does not exceed any minimum standards of the federal government for the same or similar subject areas.

**Compliance Schedule:**

The proposed amendment will become effective upon filing with the Department of State.

**Regulatory Flexibility Analysis****Effect on Small Business and Local Governments:**

For the purpose of this regulatory flexibility analysis, small businesses were considered to be general hospitals, diagnostic and treatment centers, and free-standing ambulatory surgery centers. Based on recent data extracted from providers' submitted cost reports, seven hospitals and 245 DTCs were identified as employing fewer than 100 employees.

**Compliance Requirements:**

No new reporting, record keeping or other compliance requirements are being imposed as a result of these rules.

**Professional Services:**

No new or additional professional services are required in order to comply with the proposed amendments.

**Compliance Costs:**

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

**Economic and Technological Feasibility:**

Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are intended to further reform the outpatient/ambulatory care fee-for-service Medicaid payment system, which is intended to benefit health care providers, including those with fewer than 100 employees.

**Minimizing Adverse Impact:**

The proposed amendments apply to certain services of general hospitals, diagnostic and treatment centers and freestanding ambulatory surgery centers. The Department of Health considered approaches specified in section 202-b (1) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given that this reimbursement system is mandated in statute.

**Small Business and Local Government Participation:**

These changes do not affect small businesses and local governments.

**Rural Area Flexibility Analysis****Effect on Rural Areas:**

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene	Saratoga	

The following 9 counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

**Compliance Requirements:**

No new reporting, recordkeeping, or other compliance requirements are being imposed as a result of this proposal.

**Professional Services:**

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

**Compliance Costs:**

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

**Minimizing Adverse Impact:**

The proposed amendments apply to certain services of general hospitals, diagnostic and treatment centers and freestanding ambulatory surgery centers. The Department of Health considered approaches specified in section 202-bb (2) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given that the reimbursement system is mandated in statute.

**Opportunity for Rural Area Participation:**

These changes do not affect rural areas.

**Job Impact Statement**

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed regulations, that they will not have a substantial adverse impact on jobs or employment opportunities.

## EMERGENCY RULE MAKING

### Distributions from the Health Care Initiatives Pool for Poison Control Center Operations

**I.D. No.** HLT-16-11-00003-E

**Filing No.** 309

**Filing Date:** 2011-03-31

**Effective Date:** 2011-03-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of section 68.6 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 2500-d, 2807-j and 2807-l

**Finding of necessity for emergency rule:** Preservation of public health and general welfare.

**Specific reasons underlying the finding of necessity:** Section 40(e) of Part B of Chapter 109 of the Laws of 2010 authorizes the Commissioner to issue the proposed regulations on an emergency basis in order to meet the timeframes prescribed by the enacted 2010/11 New York State (NYS) Budget related to implementing a statewide consolidation of Regional Poison Control Center (RPCC) services. Section 13 of Part B of Chapter 109 of the Laws of 2010 (10th Extender Bill enacted June 7, 2010) decreased total Health Care Initiatives (HCI) Pool funding to the RPCCs and directed consolidation of PCC services down from five RPCCs statewide to two RPCCs. To implement consolidation, effective January 1, 2011, the Commissioner has removed the designation of three Centers, thereby eliminating their eligibility for HCI Pool grant funding, and designated two RPCCs (one upstate and one downstate) which remain eligible on an ongoing basis for HCI Pool grant monies. Consolidation down to two RPCCs statewide restructured the geographical service area that the surviving RPCCs are now responsible for and rendered the existing HCI Pool funding distribution methodology contained in section 68.6 of 10 NYCRR obsolete. The proposed amendment establishes a new distribution methodology that will allow for more equitable distribution of available HCI Pool funds to the remaining two RPCCs on an ongoing basis effective January 1, 2011.

**Subject:** Distributions from the Health Care Initiatives Pool for Poison Control Center Operations.

**Purpose:** Revises the methodology for distributing HCRA grant funding to Regional Poison Control Centers (RPCCs).

**Text of emergency rule:** Section 68.6 - Distributions from the Health Care Initiatives Pool for Poison Control Center Operations is REPEALED and a new Section 68.6 is added to read as follows:

*Section 68.6 - Distributions from the Health Care Initiatives Pool for Poison Control Center Operations*

(a) *The monies available for distribution from the Health Care Initiatives (HCI) Pool for poison control center operations shall be distributed on a semi-annual basis in accordance with the methodology below:*

(1) *Population density by county, as established by the latest available decennial census data for New York State (NYS) as determined by the U.S. Census Bureau, shall be the basis for allocating available HCI Pool monies for distribution to the regional poison control centers.*

(2) *Population density applicable to the total county geographic area served by each regional poison control center shall be determined and the center's percentage to total NYS population density shall be calculated.*

(3) *Available HCI Pool monies shall be distributed proportionally to each regional poison control center based on the center's percentage population density served to total NYS population density.*

(b) *The Commissioner shall consider only those applications for prospective revisions of the projected pool distributions which are in writing and are based on errors, whether mathematical or clerical, made by the department in the pool distribution calculation process. Applications made pursuant to this subdivision must be submitted within thirty days of receipt of notice of the projected pool distribution for the calendar year.*

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire June 28, 2011.

**Text of rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqa@health.state.ny.us

**Regulatory Impact Statement****Statutory Authority:**

The statutory authority for the regulation is contained in sections 2500-d(7), 2807-j, and 2807-l(1)(c)(iv) of the Public Health Law (PHL), which authorizes the Commissioner to make distributions from the Health Care Initiatives (HCI) Pool to the Regional Poison Control Centers (RPCCs). This HCI Pool funding is intended to assist the Centers with meeting the operational costs of providing expert poison call response and poison consultation services on a 24/7 basis to health care professionals and the public statewide.

**Legislative Objectives:**

The enacted 2010/11 New York State (NYS) Budget (10th Extender Bill, Section 13 of Part B of Chapter 109 of the Laws of 2010) decreased total HCI Pool funding to the RPCCs and directed consolidation of PCC services down from five RPCCs statewide to two RPCCs (one upstate and one downstate). To implement consolidation, effective January 1, 2011, the Commissioner has removed the designation of three Centers, thereby eliminating their eligibility for HCI Pool grant funding, and designated two RPCCs, one located at SUNY Syracuse University Hospital as the upstate RPCC and another located at Bellevue Hospital as the downstate RPCC, which remain eligible on an ongoing basis for HCI Pool grant monies. Consolidation down to two RPCCs restructured the geographical service area the surviving RPCCs are now responsible for and rendered the HCI Pool funding distribution methodology contained in section 68.6 of 10 NYCRR obsolete. Under the current methodology a Center's award is fixed at an amount established based on pre-HCRA (1996) operating costs. The methodology is outdated and provides no sensitivity to reflect current RPCC operations, both from a cost and a programmatic standpoint.

**Needs and Benefits:**

Effective January 1, 1997, the New York Prospective Hospital Reimbursement Methodology (NYPHRM) system expired and was replaced by a new system established under the Health Care Reform Act (HCRA) of 1996. HCRA substantially deregulated hospital reimbursement, allowing insurers, employers and other health care payers to freely negotiate rates of payment with hospitals, rather than base their payments as previously done on the Medicaid rates. For hospitals that sponsored PCCs, and for Emergency Room (ER) services in particular, the Medicaid ER rate included cost consideration for PCC operations. Under HCRA deregulation and effective January 1, 1997, forward, other payers were no longer obligated to recognize such PCC costs in their reimbursement rates to the sponsoring hospitals, placing financial support for this imperative public health service in jeopardy. To address this concern, enhanced funding for PCC operations was made available to the Centers through HCRA HCI Pool grant funding.

Effective January 1, 1997, forward, the HCI Pool grant amounts calculated for each PCC were determined based on each Center's ratio of projected revenue shortfall created by the expiration of the NYPHRM, plus allocated Medicare costs, to total projected revenue shortfall. PCC cost as reported on the affiliated hospital's 1996 Institutional Cost Report was utilized as the basis for this calculation, and once established the award amount was fixed for the given PCC at the 1996 determined grant dollar amount. This methodology, in place since the implementation of the HCRA, provides no flexibility to appropriately respond to changes in PCC operations over time or to recognize the impact on operating costs of State mandated PCC restructuring, as provided for in the enacted 2010/11 State Budget.

The proposed amendment repeals the existing obsolete provisions and establishes a new distribution methodology that will allow for more equitable distribution of available HCI Pool funds, as appropriated annually by the legislative/budget process, to the remaining two RPCCs on an ongoing basis, effective January 1, 2011.

**COSTS:****Costs to State Government:**

There will be no additional costs to State government as a result of implementation of the regulation. To the extent that funds are appropri-



ated annually by a given enacted State budget, the proposed amendment serves only to revise the methodology by which such appropriated Pool funds will be distributed to the RPCCs effective January 1, 2011, forward.

**Costs to Private Regulated Parties:**

There will be no additional costs to private regulated parties.

**Costs to Local Government:**

There will be no additional costs to local governments as a result of these amendments. The funds are State grants with no local district share of costs (not Medicaid funds).

**Costs to the Department of Health:**

There will be no additional costs to the Department of Health.

**Local Government Mandates:**

This regulation does not impose any program, service, duty or other responsibility on any county, city, town, village, school district, fire district or other special district.

**Paperwork:**

There is no additional paperwork required of providers as a result of these amendments.

**Duplication:**

These regulations do not duplicate existing State and Federal regulations.

**Alternatives:**

An alternative was evaluated prior to the selection of the proposed distribution methodology that considered the volume of human exposure calls by county as received by the RPCCs over time. Historically, the Centers have not consistently reported such data to the Department over the past decade, particularly as it relates to county specific call volume. The Department acknowledges that the American Association of Poison Control Centers (AAPCC) owns and manages a large database on poison information and human exposure calls. However, the reports they produce are generic in nature and do not offer the requisite state specific, by county, information that would be necessary to serve as a basis for Pool fund distributions. Though customized reports are available for sale, it is unknown whether reporting to the database on all calls is a mandatory requirement of PCC nationwide or to what degree the AAPCC database is inclusive of all poison related calls/services for a given PCC/state (by county). Furthermore, any such special reports would come at a cost to the Department and may not appreciably improve decision making relative to distributing HCI Pool grant funding. Population density related to the geographic areas served by the two RPCCs, as determined by the US Census Bureau's latest decennial survey data, provides a common ground that should fairly reflect each Center's scope of obligation for poison call response (exposure calls), poison consultation services (poison information requests) and poison education responsibilities for their respective service areas.

**Federal Standards:**

The amendment does not exceed any minimum standards of the federal government for the same or similar subject areas.

**Compliance Schedule:**

The proposed amendment establishes a revised distribution methodology for HCI Pool grant funds. There is no period of time necessary for regulated parties to achieve compliance with the regulation.

**Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not required pursuant to Section 202-b(3)(a) of the State Administrative Procedures Act. It is apparent from the nature of the proposed rule that it does not impose any adverse economic impact on small businesses or local governments, and will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local governments. The proposed rule revises the methodology for determining Health Care Initiatives (HCI) Pool grant distributions to Regional Poison Control Centers (RPCCs). Effective January 1, 2011, poison control center operations statewide will be downsized from five RPCCs to two RPCCs, rendering the existing grant distribution methodology obsolete. The proposed regulation revises the methodology to reflect population density related to the restructured geographic area served by the surviving RPCCs, rather than continue their grant funding at the amounts that were established in 1997 based on poison control service revenue shortfall established for 1997. The HCI Pool grant funds are 100% State dollars, as appropriated for a given calendar year, and the proposed revised distribution methodology will have no impact on small businesses and local governments.

**Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis is not required pursuant to Section 202-bb(4)(a) of the State Administrative Procedure Act. It is apparent from the nature of the proposed rule that it does not impose any adverse economic impact on rural areas, and will not impose any reporting, recordkeeping, or other compliance requirements on public or private entities in rural

areas. The proposed rule revises the methodology for determining Health Care Initiatives (HCI) Pool grant distributions to Regional Poison Control Centers (RPCCs). Effective January 1, 2011, poison control center operations statewide will be downsized from five RPCCs to two RPCCs, rendering the existing grant distribution methodology obsolete. The proposed regulation revises the methodology to reflect population density related to the restructured geographic area served by the surviving RPCCs, rather than continue their grant funding at the amounts that were established in 1997 based on poison control service revenue shortfall established for 1997. The HCI Pool grant funds are 100% State dollars, as appropriated for a given calendar year, and the proposed revised distribution methodology will have no impact rural areas.

**Job Impact Statement**

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have a substantial adverse impact on jobs and employment opportunities. The proposed regulation replaces an existing obsolete methodology for determining grant funding to Regional Poison Control Centers. The proposed regulation will have no implications for job opportunities.

**NOTICE OF ADOPTION**

**Consumer Directed Personal Assistance Program**

**I.D. No.** HLT-39-10-00006-A

**Filing No.** 311

**Filing Date:** 2011-03-31

**Effective Date:** 2011-04-20

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Addition of section 505.28 to Title 18 NYCRR.

**Statutory authority:** Social Services Law, section 365-f

**Subject:** Consumer Directed Personal Assistance Program.

**Purpose:** To establish regulations for the administration and operation of the Consumer Directed Personal Assistance Program (CDPAP).

**Substance of final rule:** The Consumer Directed Personal Assistance Program (CDPAP) regulations provide local social services districts, CDPAP fiscal intermediaries, consumers, and other long term care stakeholders with a single, standardized operational framework supportive of the program's unique design and philosophy.

The regulations include a description of the program as defined in Social Services Law section 365-f, followed by definitions of terms referenced throughout the regulations.

The regulations also contain the CDPAP eligibility requirements and the assessment/reassessment process used by local social services districts to determine an applicant's eligibility and appropriateness for participation in the program.

As a Medicaid funded home care program administered and prior authorized by the local social services districts, the regulations also include prior authorization and client notification protocols.

As a consumer directed model of home care, the regulations describe the role and responsibilities of program participants and of the fiscal intermediary that acts as the employer of record on behalf of the consumer.

The payment portion of the regulations identifies the Department of Health as being responsible for establishing CDPAP rates. The regulations also identify that a local social services district, with Department of Health approval, may establish an alternative payment methodology for determining a county's CDPAP rates.

The regulations promote state-wide program uniformity and comparability of benefits by providing stakeholders with a clear understanding of their respective roles and responsibilities, the purpose of the program, and procedures to be used in determining program eligibility.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 505.28(b)(12), (c)(2)-(7), (d)(1), (3), (f)(1), (g)(2), (3), (h)(1), (4) and (8).

**Text of rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Regulatory Affairs Unit, Room 2438, ESP, Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqa@health.state.ny.us

**Revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Changes made to the last published rule do not necessitate revision to the previously published RIS, RFA, RAFA and JIS.

**Assessment of Public Comment**

Notice of adoption of rulemaking pursuant to the authority vested in the New York State Department of Health by 365-f of the Laws of 1992.

Public comment was received from 26 commentors, including the Consumer Directed Personal Assistance Association of New York State (CDPAANYS); the New York State Nurses Association (NYSNA); NYS Disabilities Advocacy Association & Network (NYS DAAN); Selfhelp Community Services, Inc.; New York State Association of Health Care Providers, Inc. (HCP); NYS Home Care Association (HCA), ENABLE of Central NY; New York State Association of Health Care Providers, Inc. (HCP); Center for Disability Rights (CDR); Schuyler County Legislature; eight districts' representatives and the remainder, consumers. Comments were also submitted by the New York State Education Department (SED) and the Department for the Aging (DFA).

Comments received were primarily focused on 17 areas of the proposed regulations:

Subdivision b(3) Payment to relatives: The Department received 15 responses to the addition of daughters, daughters-in-law, sons and sons-in-law to the list of acceptable relatives to function as a personal assistant. The issues raised by the commentors will be addressed in policy directives providing clear guidelines for the circumstances under which such Medicaid payment would be allowed.

Subdivision b(4) Continuous 24 hour care: The Department received 4 responses all related to the requirement for receipt of 24 hour continuous care. DOH has determined the issues raised will be addressed in policy directives.

Subdivision b(12) Stable Medical Condition: The Department received 8 responses indicating confusion related to the definition of a stable medical condition. The Department revised the regulations to clarify its intent and will provide greater clarity and explanation in future program policy directives.

Subdivision d Assessment Process: The Department received a single comment related to the process related to the use of 24 hour care. This issue is not relevant to the proposed regulations.

Subdivision d(1)(i)-(iv) Physician's Orders: The Department received 9 responses related to completion of the order within 30 days of the office visit; the requirement that a physician must sign the orders and cannot order hours of services; and the need for orders at reassessment. Physician's orders must be signed by a physician in accordance with Social Services Law § 365-a(2)(e). NYS' existing policy of not allowing physicians to order hours of service has been upheld in litigation. (Kuppersmith v. Dowling) To maintain consistency between the PCSP and CDPAP, it is the decision to retain the language addressing the 30 day requirement.

Subdivision (d)(2), (3) Nursing Assessment: There were 7 responses received regarding the requirement that the nurse assessor determine the ability of the consumer to self direct. All 7 responders recommended that the nurse not be the sole determiner of the consumer's ability to self direct. The regulatory language has been changed.

Subdivision (d)(4) Guidelines for completion of Social Assessment: There were 4 responders, the majority of which expressed concern that a 30 day time period for completion of the assessment was too long. The DOH determined that the 30 day turn around time is consistent with the guidelines for the PCSP and made no change to assure consistency in both programs.

Subdivision (d)(5) Local Professional Director Review: There were 2 responders, one response indicated a misunderstanding of the required process. The other responder's comments will be addressed in policy directives.

Subdivision (e) Authorization Process: There were multiple comments to this section indicating a need for expansion of the area in policy directives but no change to the regulatory language is required.

Subdivision (e)(6) Combination with other services: There were 3 comments to this section but no change to regulatory language is required as policy directives will clarify and address the concerns raised.

Subdivision (f) Reassessment and Reauthorization: There were 8 comments received relating to due process, timely notice and language concerning changes in mental health status. Change was made to the regulatory language to remove the term "mental health status". Changes were also made to clarify that timely and adequate notices must be in accordance with 18 NYCRR Part 358. The additional concerns raised will be addressed in policy directives.

Subdivision (g) Consumer Responsibilities: There were 16 comments received in this area focusing on hiring and sharing of information. Changes were made to the regulatory language to address all the concerns.

Subdivision (g)(2) Consumer Responsibilities: There were 3 comments received in this area regarding the consumer's employment status and the need for the fiscal intermediaries to receive notification. Changes were made in the regulations to address the issues.

Subdivision (g)(3) Consumer Responsibilities: Comments were received which focused on the need for the fiscal intermediaries and/or

stakeholders to be advised of changes in the employment status of the personal assistants. Changes were made in the regulations to address the issues.

Subdivision (g)(4)-(6) Consumer Responsibilities: HRA requested task sheets be required of the personal assistants. This issue will be addressed in policy directive. Both CDR and CDPAANYS objected to use of any alternative system for time reporting and that task reporting should not be required. These issues are best addressed in policy directives.

Subdivision (g)(8) Consumer Responsibilities: 3 comments recommended an MOU between the consumer and the fiscal intermediary. DOH strongly supports this recommendation and a sample MOU will be included in the administrative directives but the regulations need not be changed.

Subdivision (h) Social Services District Responsibilities: There were 8 responses, approximately 25% of the responses recommended that the local district should be mandated to notify all consumers of the availability of the CDPAP. Revisions were made in accordance with the comments.

Subdivision (i) Fiscal Intermediary Responsibilities: There were 12 responses addressing the responsibilities required of the fiscal intermediaries. The responses raised concern about the need for criminal history background checks for personal assistants and the need for health assessments. Since criminal history background checks are not currently supported in statute, they cannot be required of personal assistants absent a change to the statute. To maintain consistency of health requirement for all home care workers, DOH will continue to require initial and yearly health assessments for personal assistants.

There was one discrete change made to the regulations based on comments from NYSED regarding a change in terminology that was incorrect. The term "physician's assistant" and "specialist's assistant" was changed to "physician assistant" and "specialist assistant". This is consistent with NYSED regulatory language.

The majority of comments received were statements related to clarification of intent which will be addressed in policy directives.

**NOTICE OF ADOPTION****Cost of Examinations - Medicaid**

**I.D. No.** HLT-02-11-00005-A

**Filing No.** 332

**Filing Date:** 2011-04-04

**Effective Date:** 2011-04-20

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of section 360-5.5 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, section 368-a(1)(f)

**Subject:** Cost of Examinations - Medicaid.

**Purpose:** Change in citation referenced within existing regulation.

**Text or summary was published** in the January 12, 2011 issue of the Register, I.D. No. HLT-02-11-00005-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Regulatory Affairs Unit, Room 2438, ESP, Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqa@health.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

---

## Office of Parks, Recreation and Historic Preservation

---

**NOTICE OF WITHDRAWAL**

**Navigation of Vessels, Conduct of Regattas and Placement of Navigation Aids and Floating Objects on Navigable Waters**

**I.D. No.** PKR-05-11-00001-W

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Notice of proposed rule making, I.D. No. PKR-05-11-



00001-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on February 2, 2011.

**Subject:** Navigation of vessels, conduct of regattas and placement of navigation aids and floating objects on navigable waters.

**Reason(s) for withdrawal of the proposed rule:** Adding new material.

## Office for People with Developmental Disabilities

### PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### Reimbursement Methodology for Group Day Habilitation Services and Supplemental Group Day Habilitation Services

**I.D. No.** PDD-16-11-00012-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Amendment of section 635-10.5(c) of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.09(b) and 43.02

**Subject:** Reimbursement methodology for group day habilitation services and supplemental group day habilitation services.

**Purpose:** To modify the reimbursement methodology for day habilitation services effective July 1, 2011.

**Text of proposed rule:** Subdivision 635-10.5(c) is amended by the addition of new paragraphs (16) and (17):

(16) Effective July 1, 2011, group day habilitation and supplemental group day habilitation prices shall be reduced according to the measures outlined in this paragraph. There are two distinct actions to the price reductions. The personal services action addresses provider surpluses in funding for direct care, clinical and support staff and the associated fringe benefits. The administrative action addresses reimbursable administrative costs and holds reimbursement to a level of efficiency. Providers may be subject to only one action or to both actions or they may be exempt from both.

(i) **Applicability.** The price reductions will apply to all providers except for those which meet the criteria for exemption.

The first criterion, in order for any provider to be exempt from the impact of the reductions on any basis, is a cost report requirement. Region I providers must have filed a 2008-2009 cost report and Regions II and III providers must have filed a 2008 cost report before or on December 23, 2010, except that a provider may submit the cost report after December 23, 2010 if the cost report represents an original submission or a resubmission specifically requested by OPWDD due to identified inaccuracies or insufficiencies. Cost reports submitted after December 23, 2010 must be submitted by May 1, 2011 unless the Commissioner exercises or has exercised his or her discretion to extend the May 1, 2011 deadline. Providers with cost reports submitted in accordance with the deadlines in this subparagraph (i) may qualify for exemption from the personal services surpluses action pursuant to clause (a) of subparagraph (ii) of this paragraph. Providers with cost reports submitted in accordance with the deadlines in this subparagraph (i) may qualify for exemption from the administrative action pursuant to clause (a) of subparagraph (iii) of this paragraph. Providers which did not submit cost reports in accordance with the deadlines in this subparagraph (i) shall be subject to price reductions pursuant to subparagraph (iv) of this paragraph.

OPWDD shall employ data extracted from the most recent 2008/2008-2009 cost report submitted by a provider on or before December 23, 2010, except that data from a 2008/2008-2009 cost report submitted after December 23, 2010 representing an original submission or a resubmission specifically requested by OPWDD due to identified inaccuracies or insufficiencies and submitted by May 1, 2011 or a later deadline extended by the Commissioner shall also be utilized. For providers of group day habilitation and/or supplemental group day habilitation services which did not operate any supervised IRAs for the cost reporting year 2008/2008-2009, the components subjected to analysis relate to the provider's group day habilitation and supplemental group day habilitation services. For providers which did operate a supervised IRA(s) for the cost reporting year 2008/2008-2009, the components subjected to analysis relate to the combination of the provider's group day habilitation, supplemental group day habilitation, and supervised IRA services. Additionally, for providers which converted a day program to a group day habilitation or

supplemental group day habilitation program or a residential program to a supervised IRA subsequent to the 2008/2008-2009 cost report period, OPWDD incorporated the data included in the 2008/2008-2009 cost reports for the converted program(s) prior to conversion into its analyses.

(ii) **Personal Services Surpluses Action.**

(a) **Exemptions.**

(1) Providers with FTE personal services losses and actual personal services fringe benefit percentages greater than the reimbursable percentages are exempt. To qualify for this exemption, a provider must meet each of the two criteria which follow.

(i) FTE personal services loss. OPWDD compared each provider's actual FTEs for direct care, clinical care and support as reported in its 2008/2008-2009 cost report to the maximum reimbursable FTEs designated for direct care, clinical care and support as reflected in the corresponding price(s). This analysis included the FTE equivalents for contracted services. OPWDD identified a subset of providers which demonstrated an excess of actual FTEs over reimbursable FTEs. They meet the first criterion for this exemption.

(ii) Fringe benefit percentage. The fringe benefit percentage equals the total fringe benefits costs for direct care, clinical and support staff divided by the salary costs for direct care, clinical and support staff expressed as a percentage. For the providers which meet the criterion in item (i) of this subclause, OPWDD compared each provider's actual direct care, clinical and support services associated fringe benefit percentage as evidenced by its 2008/2008-2009 cost report data to the direct care, clinical and support services associated fringe benefit percentage as reflected in the corresponding price(s). OPWDD identified a subset of providers with actual fringe benefit percentages that were higher than the fringe benefit percentage in the prices. They are exempt.

(2) Providers with a loss in personal services and associated fringe benefits combined are exempt. OPWDD examined 2008/2008-2009 cost reports for those providers not exempted by virtue of subclause (1) of this clause. OPWDD compared each provider's actual expenses for direct care, clinical care and support and the associated fringe benefits to the total reimbursable costs reflected in the corresponding price(s) and designated for direct care, clinical care and support and the associated fringe benefits cost categories. This analysis included contracted services. OPWDD identified a subset of providers which demonstrated an excess of actual expenses for direct care, clinical care and support and the associated fringe benefits over reimbursable costs reflected in the corresponding prices and designated for direct care, clinical care and support and the associated fringe benefits. They are exempt.

(3) Providers with aggregate unmodified surpluses. Providers not exempted by virtue of subclauses (1) or (2) of this clause were identified as having aggregate unmodified surpluses equal to the amount by which the aggregated reimbursable costs as reflected in the prices and designated for direct care, clinical care and support and the associated fringe benefits exceeded the corresponding aggregated actual expenses for direct care, clinical care and support and the associated fringe benefits as reported in providers' cost reports for reporting year 2008/2008-2009.

(4) To/from transportation modification. For all providers with aggregate unmodified surpluses as defined in subclause (3) of this clause, OPWDD examined their 2008/2008-2009 cost reports. OPWDD compared the provider's aggregated actual expenses for to/from transportation to the aggregated total reimbursable costs reflected in the corresponding price(s) and designated for to/from transportation. If the aggregated total reimbursable costs exceeded aggregated actual expenses for to/from transportation, OPWDD added the amount of this excess to the aggregate unmodified surplus amount calculated pursuant to subclause (3) of this clause to yield the aggregate surplus. Conversely, if the aggregated actual expenses for to/from transportation exceeded the aggregated total reimbursable costs reflected in the corresponding price(s) for to/from transportation, OPWDD offset the aggregate unmodified surplus amount calculated pursuant to subclause (3) of this clause by this difference to derive the aggregate surplus. If, however, this calculation yielded a negative number for any provider, it is not considered a surplus and such provider is exempt.

(b) Providers subject to the personal services surpluses action are those providers which are not specifically exempted pursuant to clause (a) of this subparagraph.

(c) **Untrended tentative aggregate gross reduction.** A provider identified as having an aggregate surplus after the to/from transportation modification pursuant to the analysis conducted by OPWDD as described in subclause (4) of clause (a) of this subparagraph shall be subject to a price reduction. This aggregate surplus is referred to as the untrended tentative aggregate gross reduction.

(d) **Tentative aggregate gross reduction.** The tentative aggregate gross reduction equals the untrended tentative aggregate gross reduction pursuant to clause (c) of this subparagraph trended to June 30, 2011 dollars.

(iii) *Administrative action.*(a) *Exemptions.*

(1) *Total agency revenue exemption.* Providers with total agency gross revenues less than \$1.5 million dollars as reflected in the agency fiscal summaries of their 2008/2008-2009 cost reports are exempt.

(2) *Compensation exemption.* For each provider not exempted by virtue of subclause (1) of this clause, OPWDD extracted from the governing board and compensation summaries in its 2008/2008-2009 cost report, the total annualized compensation of all employees with agency administrative titles. Using this dollar value, OPWDD compared the total annualized compensation to the total agency revenue as described in subclause (1) of this clause to establish a value that expressed the total annualized compensation as a percentage of total agency revenue. OPWDD identified a subset of providers with percentages equal to or less than one half of one percent. They are exempt.

(3) *Administrative expenses as a percent of operating expenses exemption.* For providers not exempted by virtue of subclauses (1) or (2) of this clause, total reimbursable administration (agency and program including fringe benefits) costs as reflected in the price(s) corresponding to the provider's 2008/2008-2009 reporting year were expressed as a percentage of the total reimbursable operating costs in that price (those prices). As a prerequisite to this calculation, when appropriate, respective amounts were adjusted for capacity changes that occurred throughout the year. OPWDD identified a subset of providers with percentages of less than 10 percent. They are exempt.

(b) Providers subject to the administrative action are those providers which are not specifically exempted pursuant to clause (a) of this subparagraph.

(c) *Tentative aggregate gross reduction.* For providers subject to the administrative action, OPWDD used the compensation data also used in subclause (2) of clause (a) of this subparagraph and the reported number of FTEs corresponding to those administrative titles as reported in providers' 2008/2008-2009 cost reports. OPWDD computed a provider-specific average compensation per FTE for the administrative titles. Similarly, OPWDD computed a provider-specific average compensation per FTE for direct care, clinical and support staff using data from providers' 2008/2008-2009 cost reports. (Direct care, clinical and support staff collectively are referred to as direct support staff.) The compensation data for both administrative titles and direct support titles included fringe benefits. A ratio of average administrative compensation to average direct support compensation was determined for each provider. Providers' ratios were then ranked and separated into 5 graduated levels. A reduction percentage was established to correspond to each level of compensation ratios. The reduction percentage for a provider is dependent on a provider's positioning in the five levels. The following chart gives the explicit ranges for the compensation ratios and the applicable reduction percentages.

Compensation Ratios Administration to Direct Support	Reimbursable Administrative Costs Reduction Percentage
Equal to or greater than 10.0:1	9.0%
Equal to or greater than 6.0:1 but less than 10.0:1	7.5%
Equal to or greater than 4.0:1 but less than 6.0:1	6.0%
Equal to or greater than 3.0:1 but less than 4.0:1	4.0%
Less than 3.0:1	2.0%

The tentative aggregate gross reduction equals the reduction percentage determined by a provider's ranking in the compensation ratio comparisons applied to that provider's aggregate reimbursable administrative costs as reflected in the corresponding price(s) at June 30, 2011.

(iv) *Total impact limitation.* Before OPWDD revises a provider's group day habilitation and/or supplemental group day habilitation price, it shall assess the total impact on a provider of all the tentative gross reductions and tentative aggregate gross reductions pursuant to this paragraph 635-10.5(c)(16) and sections 635-10.5(b)(18)(iv), 635-10.5(e)(6) and 671.7(a)(13) of this Title combined with the final price and fee reductions pursuant to sections 635-10.5(b)(18)(iii), 635-10.5(d)(6), 635-10.5(h)(3)(iii)(d), 635-10.5(ab)(12)(iii)(b) and 671.7(a)(12) of this Title. The total impact to an individual provider shall be limited to an amount not to exceed 6.5 percent of the aggregated total gross reimbursable operating costs as reflected in a provider's June 30, 2011 prices and the aggregated total gross allowable reimbursement reflected in a provider's June 30, 2011 fees for the provider's programs and/or services subject to the price and fee revisions. The lesser of the amount of the total impact or the amount of the total impact as limited by the 6.5 percent provision represents the final impact. For providers for which no 2008/2008-

2009 cost reports were available because the conditions established in subparagraph (i) of this paragraph were not met, the total impact is calculated as follows: The aggregated total gross reimbursable operating costs as reflected in a provider's June 30, 2011 prices and the aggregated total gross allowable reimbursement as reflected in a provider's June 30, 2011 fees for the provider's programs and/or services subject to the price and fee revisions are summed. The total is multiplied by 6.5 percent. The product is the final impact for these providers.

(v) *Allocation of final impact.* Before allocation, the final impact on a provider shall be reduced by the final price and fee reductions pursuant to sections 635-10.5(b)(18)(iii), 635-10.5(d)(6), 635-10.5(h)(3)(iii)(d), 635-10.5(ab)(12)(iii)(b) and 671.7(a)(12) of this Title because those reductions are not subject to any further revisions. The remainder of the final impact on a provider shall be distributed equitably across the reimbursable operating costs in that provider's group day habilitation and supplemental group day habilitation services, supervised residential habilitation, and prevocational services in proportion to the amount of reduction each of these programs would have incurred had the reductions been calculated separately. OPWDD shall make an internal allocation within the price for providers subject to both the personal services surplus action and the administrative action pursuant to this paragraph 635-10.5(c)(16).

(vi) *Final group day habilitation and supplemental group day habilitation price reduction percentage.* The allocation of the final impact to a provider's group day habilitation and supplemental group day habilitation services shall be expressed as a percentage of the total gross reimbursable operating costs reflected in the price in effect on June 30, 2011.

(vii) *The final group day habilitation and supplemental group day habilitation price shall be the group day habilitation and supplemental group day habilitation price in effect on June 30, 2011 reduced by the final group day habilitation and supplemental group day habilitation price reduction percentage pursuant to subparagraph (vi) of this paragraph applied to that price.*

(viii) *For the purposes of requesting a price adjustment, the effects of this price reduction shall not be construed as a basis for loss. In processing a price adjustment, any revised price will be offset by the monetary impact, prorated as appropriate, of the price reduction as calculated pursuant to this clause.*

(ix) *The commissioner, at his or her discretion, may waive all or a portion of this adjustment for a provider upon the provider demonstrating that the imposition of the reduction would jeopardize the continued operation of the group day habilitation and/or supplemental group day habilitation services.*

(17) *Revenues realized by providers from reimbursement attributable to components of the price other than the administrative component shall not be used to fund administrative expenses.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Barbara Brundage, Director, Regulatory Affairs Unit, OPWDD, 44 Holland Avenue, Albany, New York 12229, (518) 474-1830, email: barbara.brundage@opwdd.ny.gov

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

**Additional matter required by statute:** Pursuant to the requirements of the State Environmental Quality Review Act, OPWDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

#### **Regulatory Impact Statement**

##### **1. Statutory authority:**

a. OPWDD has the statutory authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

b. OPWDD has the statutory responsibility for setting Medicaid rates and fees for other services in facilities licensed or operated by OPWDD, as stated in section 43.02 of the Mental Hygiene Law.

**2. Legislative objectives:** These proposed amendments further the legislative objectives embodied in sections 13.09(b) and 43.02 of the Mental Hygiene Law. The proposed amendments are concerning changes in the price methodology for Group and Supplemental Group Day Habilitation services.

**3. Needs and benefits:** New York State is seeking to achieve efficiencies in its Medicaid program including Medicaid funded services overseen by OPWDD. One such efficiency will change the price methodology for Group and Supplemental Group Day Habilitation services. The new methodology is intended to align a provider's reimbursement for direct care, support, clinical, related fringe benefit costs and transportation to actual costs. Additionally, the new methodology reduces administrative reimbursement for most providers of Group and Supplemental Group Day



Habilitation services. In most cases, the new prices will be predicated on cost information from provider's reporting periods that ended either on December 31, 2008 or June 30, 2009 with those costs adjusted for inflationary factors. Additionally, providers will be constrained from utilizing revenues realized from reimbursement attributable to components of the price other than the administrative component to fund administrative expenses. The new methodology strives to more closely match reimbursements to costs and to institute efficiency standards. OPWDD proposes to revise the current prices on July 1, 2011.

These changes will assist in achieving Medicaid efficiency for New York State. Since the methodology change is structured in large part to eliminate operating surpluses, OPWDD believes that providers will be able to absorb this reduction while not reducing supports or services or service quality. Additionally, there is a limitation on the total impact to providers resulting from OPWDD's concurrent reimbursement actions. A provider's revenue reduction shall be held to an amount not to exceed 6.5 percent of that provider's June 30, 2011 aggregate operating revenue for services subject to price reductions which may include its supervised IRAs and CRs, Group and Supplemental Group Day Habilitation, Prevocational services, supportive IRAs and CRs, Community Habilitation, Waiver Supportive Employment and Waiver Respite. This limitation acts as a safety measure so that reductions will not jeopardize the quality of supports and services provided.

#### 4. Costs:

a. Costs to the Agency and to the State and its local governments: There is an approximate \$38.2 million savings in Medicaid that will be evenly shared by the State (approximately \$19.1 million) and the Federal (approximately \$19.1 million) governments. There will be no savings to local governments as a result of these specific amendments. There will be no savings to local governments as a result of these specific amendments concerning some individuals receiving supported employment services because pursuant to Social Services Law sections 365 and 368-a, either local governments incur no costs for these services or the State reimburses local governments for their share of the cost of Medicaid funded programs and services. Concerning the remainder of individuals, for the current State fiscal year, there are no savings to local governments as a result of these specific amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

b. Costs to private regulated parties: There are neither initial capital investment costs nor initial non-capital expenses. There are no additional costs associated with implementation and continued compliance with the rule. The proposed amendments are expected to result in a decrease of approximately \$38.2 million in aggregate funding to providers of Group and Supplemental Group Day Habilitation.

5. Local government mandates: There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

6. Paperwork: The proposed amendments do not require any additional paperwork to be completed by providers.

7. Duplication: The proposed amendments do not duplicate any existing State or Federal requirements that are applicable to services for persons with developmental disabilities.

8. Alternatives: In developing this regulatory proposal, OPWDD consulted with representatives of provider associations and considered alternatives to achieve the desired efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that the changes in price methodology proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

9. Federal standards: The proposed amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: OPWDD expects to finalize the proposed amendments effective July 1, 2011. There are no additional compliance activities associated with these amendments.

#### **Regulatory Flexibility Analysis**

1. Effect on small business: The OPWDD has determined, through a review of the certified cost reports, that most Group and Supplemental Group Day Habilitation services are provided by non-profit agencies which employ more than 100 people overall. However, some smaller agencies which employ fewer than 100 employees overall would be classified as small businesses. Currently, there are 290 providers of Group and Supplemental Group Day Habilitation services. OPWDD is unable to estimate the portion of these providers that may be considered to be small businesses.

The proposed amendments have been reviewed by OPWDD in light of their impact on small businesses. The proposed amendments are expected to result in a decrease of approximately \$38.2 million in funding to providers of Group and Supplemental Group Day Habilitation. OPWDD has

determined that these amendments will not result in increased costs for additional services or increased compliance requirements.

2. Compliance requirements: The proposed amendments do not impose any additional compliance requirements on providers.

The amendments will have no effect on local governments.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no compliance costs since the proposed amendments will not impose any additional compliance requirements on providers.

5. Economic and technological feasibility: The proposed amendments do not impose the use of any new technological processes on regulated parties.

6. Minimizing adverse economic impact: The purpose of these proposed amendments is to make changes in the price methodology for Group and Supplemental Group Day Habilitation services in order to achieve efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that it could adjust prices for Group and Supplemental Group Day Habilitation services to encourage efficiencies in operation and still adequately reimburse providers of such services. The proposed amendments represent OPWDD's best effort at adjusting reimbursement in a way which will accommodate the realization of efficiencies where they can best be achieved and afforded, and with the most equitable distribution possible. In addition, the proposed amendments exempt providers with total gross revenues under \$1.5 million from any reduction in reimbursement for administrative expenses.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. Other than exempting providers with revenues under \$1.5 million, the approaches outlined in this section cannot be effectively applied because these amendments require no specific compliance response of regulated parties.

OPWDD determined that the changes in price methodology proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

7. Small business participation: The proposed regulations were discussed with representatives of providers, including the New York State Association of Community and Residential Agencies (NYSACRA), on March 8, March 16, March 21, March 22, and March 28, 2011. In addition, the proposed regulations were discussed at a meeting of the Fiscal Sustainability Team, also on March 8. NYSACRA was part of the Fiscal Sustainability Team. Some of the members of NYSACRA have fewer than 100 employees. Finally, OPWDD will be mailing these proposed amendments to all providers, including providers that are small businesses.

#### **Rural Area Flexibility Analysis**

1. Description of the types and estimation of the number of rural areas in which the rule will apply: OPWDD services are provided in every county in New York State. 44 counties have a population less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauque, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. 9 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga and Orange.

The proposed amendments have been reviewed by OPWDD in light of their impact on entities in rural areas. The proposed amendments are expected to result in a decrease of approximately 38.2 million dollars in funding to providers of Group and Supplemental Group Day Habilitation services for all of New York State. While the reduction in funding will have an adverse fiscal impact on providers of Group and Supplemental Group Day Habilitation services, the geographic location of any given program (urban or rural) will not be a contributing factor to any such impact.

2. Compliance requirements: The proposed amendments do not impose any additional reporting, recordkeeping or other compliance requirements on providers.

The amendments will have no effect on local governments.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no compliance costs since the proposed amendments will not impose any additional compliance requirements on providers or local governments.

5. Minimizing adverse economic impact: The purpose of these proposed



amendments is to make changes in the price methodology for Group and Supplemental Group Day Habilitation services in order to achieve efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that it could adjust prices for Group and Supplemental Group Day Habilitation services to encourage efficiencies in operation and still adequately reimburse providers of such services. The proposed amendments represent OPWDD's best effort at adjusting reimbursement in a way which will accommodate the realization of efficiencies where they can best be achieved and afforded, and with the most equitable distribution possible. In addition, the proposed amendments exempt providers with total gross revenues under \$1.5 million from any reduction in reimbursement for administrative expenses.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-bb(2)(b) of the State Administrative Procedure Act. Since these amendments impose no compliance requirements on regulated parties or local governments, the approaches outlined in section 202-bb(2)(b) cannot be effectively applied.

6. Participation of public and private interests in rural areas: The proposed regulations were discussed at meetings with representatives of providers on March 8, March 16, March 21, March 22 and March 28, 2011. In addition, the proposed regulations were discussed at a meeting of the Fiscal Sustainability Team, also on March 8. The Fiscal Sustainability Team includes self-advocates, family members, and representatives of providers. Provider associations which were present, such as NYSARC, the NYS Association of Community and Residential Agencies, NYS Catholic Conference, and CP Association of NYS, represent providers throughout NYS, including those in rural areas.

#### Job Impact Statement

The proposed amendments revise rules related to the price methodology for group and supplemental group day habilitation services.

1. Nature of the impact the rule will have on jobs and employment opportunities: The proposed amendments may decrease the number of jobs and employment opportunities, particularly for administrative staff, in group and supplemental group day habilitation programs.

2. Categories of jobs or employment opportunities affected by the rule: The proposed amendments could affect all jobs but is structured to affect administrative jobs.

3. Approximate number of jobs or employment opportunities affected: OPWDD estimates that the number of jobs or employment opportunities the proposed rule could affect State-wide, ranges from zero to 1,061. This estimate is based on the following: The total impact of the methodology change is a reduction of \$38.2 million. Assuming that providers make the decision to reduce jobs to absorb the entire amount of the reduction, even though we do not believe that they will, the State-wide job decrease is an estimate of the impact divided by an estimate of an average annual salary and fringe benefit level for an employee.

4. Region of the State where the rule would have a disproportionate adverse impact on jobs or employment opportunities: The proposed amendments would not have a disproportionate adverse impact on jobs or employment opportunities in any region of the State.

5. Measures taken to minimize any unnecessary adverse impacts on existing jobs and to promote the development of new employment opportunities: With reference to the part of the action related to direct care, support and clinical costs, the methodology was specifically structured to only eliminate surpluses in those categories. That direction was taken to achieve a minimal impact on such jobs and supports and services and service quality. For those providers affected by the administrative component of the action, the largest impacts will be borne by those providers with the highest ratio of average agency administrative compensation to direct support compensation. Accordingly, OPWDD's expectation is that any job reductions related to this component of the action would be related to the most highly compensated individuals in the provider agency and that the typical provider response would be to reduce salary levels rather than to eliminate the jobs of those employees.

Additionally, the rules incorporate a maximum funding reduction per provider that equates to 6.5 percent of that provider's June 30, 2011, operating reimbursement for its services affected by reductions that may include supervised IRAs and CRs, Group and Supplemental Group Day Habilitation, Prevocational, supportive IRAs and CRs, Community Habilitation, Waiver Supported Employment and Waiver Respite services.

### PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### Efficiency Adjustment for HCBS Waiver Community Habilitation Services

I.D. No. PDD-16-11-00013-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Amendment of section 635-10.5(ab) of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, section 13.09(b)

**Subject:** Efficiency adjustment for HCBS waiver community habilitation services.

**Purpose:** To implement an efficiency adjustment by modifying the fee schedule for HCBS waiver community habilitation services.

**Text of proposed rule:** Subparagraph 635-10.5(ab)(12)(iii) is amended as follows:

(iii) Fee schedules.

(a) Effective November 1, 2010, the fees for CH are equal to the fees in subparagraph (b)(21)(iii) of this section that were in effect on October 31, 2010.

(b) Effective July 1, 2011, the fees are as follows:

<i>CH Direct Support--Fee is hourly per person</i>				
	<i>Individual</i>	<i>Group</i>	<i>Group</i>	<i>Group</i>
	<i>Serving 1</i>	<i>Serving 2</i>	<i>Serving 3</i>	<i>Serving 4</i>
<i>Region I</i>	\$38.78	\$24.24	\$19.39	\$16.97
<i>Region II</i>	\$39.85	\$24.91	\$19.93	\$17.44
<i>Region III</i>	\$38.78	\$24.24	\$19.39	\$16.97

Subparagraph 635-10.5(ab)(13) is amended as follows:

(13) If there is a trend factor in subdivision (i) of this section, the CH fees shall be trended in accordance with such subdivision.

**Text of proposed rule and any required statements and analyses may be obtained from:** Barbara Brundage, Director, Regulatory Affairs Unit, OPWDD, 44 Holland Avenue, Albany, New York 12229, (518) 474-1830, email: barbara.brundage@opwdd.ny.gov

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

**Additional matter required by statute:** Pursuant to the requirements of the State Environmental Quality Review Act, OPWDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

#### Regulatory Impact Statement

1. Statutory authority: OPWDD has the statutory authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

2. Legislative objectives: These proposed amendments further the legislative objectives embodied in section 13.09(b) of the Mental Hygiene Law. The proposed amendments are necessary to make adjustments to the reimbursement methodology applicable to Home and Community Based Services (HCBS) waiver community habilitation services.

3. Needs and benefits: New York State is seeking to achieve efficiencies in its Medicaid program including Medicaid funded services overseen by OPWDD. One such identified efficiency will be a reduction in HCBS waiver community habilitation services funding. The current HCBS waiver community habilitation services fee schedule will be reduced by 2 percent for all providers.

Implementation of this decrease in fees will assist in achieving Medicaid efficiency for New York State. It is believed that service providers will be able to absorb this reduction while not reducing supports or services or service quality due to the payment of recent trend factor increases (3.06 percent for 2009 and 2.08% for 2010) and with the implementation of efficiency measures.

Additionally, OPWDD created a Fiscal Sustainability Team which included individuals, advocates, service providers and OPWDD staff. Although the purpose of the Team was not to discuss the option of reducing HCBS waiver community habilitation services funding, there was discussion on approaches to efficiency that would allow support and service levels to be maintained in concert with funding reductions. OPWDD continues to explore various proposals that would offer providers greater mandate relief.

4. Costs:

a. Costs to the agency and to the State and its local governments: There is an approximate \$3.8 million savings in Medicaid that will be evenly shared by the State (approximately \$1.9 million) and the federal (approximately \$1.9 million) governments. There will be no savings to local governments as a result of these specific amendments. For the current State fiscal year, there are no costs to local governments as a result of these specific amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

b. Costs to private regulated parties: There are neither initial capital

investment costs nor initial non-capital expenses. There are no additional costs associated with implementation and continued compliance with the rule. The proposed amendments are expected to result in a decrease of approximately \$3.8 million in aggregate funding to providers of HCBS waiver community habilitation services.

5. Local government mandates: There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

6. Paperwork: The proposed amendments do not require any additional paperwork to be completed by providers.

7. Duplication: The proposed amendments do not duplicate any existing State or Federal requirements that are applicable to services for persons with developmental disabilities.

8. Alternatives: In developing this regulatory proposal, OPWDD consulted with representatives of provider associations and considered alternatives to achieve the desired efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that the 2 percent reduction proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

9. Federal standards: The proposed amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: OPWDD expects to finalize the proposed amendments effective July 1, 2011. There are no additional compliance activities associated with these amendments.

#### **Regulatory Flexibility Analysis**

1. Effect on small business: The OPWDD has determined, through a review of the certified cost reports, that most Home and Community Based Services (HCBS) waiver community habilitation services are provided by non-profit agencies which employ more than 100 people overall. However, some smaller agencies which employ fewer than 100 employees overall would be classified as small businesses. Currently, there are 246 agencies that provide community habilitation services. OPWDD is unable to estimate the portion of these providers that may be considered to be small businesses.

The proposed amendments have been reviewed by OPWDD in light of their impact on small businesses. The proposed amendments are expected to result in a decrease of approximately 3.8 million dollars in funding to providers of HCBS community habilitation services. OPWDD has determined that these amendments will not result in increased costs for additional services or increased compliance requirements.

2. Compliance requirements: The proposed amendments do not impose any additional reporting, recordkeeping or other compliance requirements on providers.

The amendments will have no effect on local governments.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no compliance costs since the proposed amendments will not impose any additional compliance requirements on providers.

5. Economic and technological feasibility: The proposed amendments do not impose on regulated parties the use of any new technological processes.

6. Minimizing adverse economic impact: The purpose of these proposed amendments is to revise the reimbursement methodologies for HCBS waiver community habilitation services in order to achieve efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that it could adjust fees for HCBS waiver community habilitation services to encourage efficiencies in operation and still adequately reimburse providers of such services. The proposed amendments represent OPWDD's best effort at adjusting reimbursement in a way which will accommodate the realization of efficiencies where they can best be achieved and afforded, and with the most equitable distribution possible.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. Since these amendments require no specific compliance response of regulated parties, the approaches outlined cannot be effectively applied.

OPWDD determined that the 2 percent reduction proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

7. Small business participation: The proposed regulations were discussed with representatives of providers, including the New York State Association of Community and Residential Agencies (NYSACRA), on March 8 and March 16, 2011. In addition, the proposed regulations were

discussed at a meeting of the Fiscal Sustainability Team, also on March 8. NYSACRA was part of the Fiscal Sustainability Team. Some of the members of NYSACRA have fewer than 100 employees. Finally, OPWDD will be mailing these proposed amendments to all providers, including providers that are small businesses.

#### **Rural Area Flexibility Analysis**

1. Description of the types and estimation of the number of rural areas in which the rule will apply: OPWDD services are provided in every county in New York State. 44 counties have a population less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. 9 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga and Orange.

The proposed amendments have been reviewed by OPWDD in light of their impact on entities in rural areas. The proposed amendments are expected to result in a decrease of approximately 3.8 million dollars in funding to providers of HCBS waiver community habilitation services for all of New York State. While the reduction in funding will have an adverse fiscal impact on providers of HCBS waiver community habilitation services, the geographic location of any given program (urban or rural) will not be a contributing factor to any such impact.

2. Compliance requirements: The proposed amendments do not impose any additional reporting, recordkeeping or other compliance requirements on providers.

The amendments will have no effect on local governments.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no compliance costs since the proposed amendments will not impose any additional compliance requirements on providers or local governments.

5. Minimizing adverse economic impact: The proposed amendments revise the reimbursement methodologies for HCBS waiver community habilitation services in order to achieve efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that it could adjust fees for community habilitation services to encourage efficiencies in operation and still adequately reimburse providers of such services, including providers in rural areas. OPWDD determined that the 2 percent reduction proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-bb(2)(b) of the State Administrative Procedure Act. Since these amendments impose no compliance requirements on regulated parties or local governments, the approaches outlined in section 202-bb(2)(b) cannot be effectively applied.

6. Participation of public and private interests in rural areas: The proposed regulations were discussed at meetings with representatives of providers on March 8 and March 16, 2011. In addition, the proposed regulations were discussed at a meeting of the Fiscal Sustainability Team, also on March 8. The Fiscal Sustainability Team includes self-advocates, family members, and representatives of providers. Provider associations which were present, such as NYSARC, the NYS Association of Community and Residential Agencies, NYS Catholic Conference, and CP Association of NYS, represent providers throughout NYS, including those in rural areas.

#### **Job Impact Statement**

A job impact statement is not being submitted for these proposed amendments because OPWDD determined that they will not cause a loss of more than 100 full time annual jobs State wide. The proposed amendments decrease the community habilitation reimbursement fees by 2%. Based on conversations with providers and provider associations, OPWDD expects that any provider without sufficient surpluses to absorb all of the efficiency adjustment will adjust operations and spending in areas other than staffing, so as not to reduce supports or services or service quality. Moreover, the total state-wide impact of the efficiency adjustment is not at a level sufficient to effect a decrease of more than 100 full-time annual jobs. The total decrease in funding to all community habilitation providers will be 3.8 million dollars, and the average staff salary in the community habilitation program, including fringe benefits, is \$44,907. Even if, contrary to OPWDD and providers' expectations, every community habilitation provider reduced staffing levels by 2%, there would be a total loss of 84.61 full time annual jobs statewide.



## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Reimbursement of Clinic Treatment Facilities ("Article 16 Clinics")

**I.D. No.** PDD-16-11-00014-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Amendment of Part 679 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.07, 13.09 and 43.02; L. 2009, ch. 58, section 21; and Public Health Law, section 2807(2-a)(e)

**Subject:** Reimbursement of clinic treatment facilities ("Article 16 clinics").

**Purpose:** To effect a new reimbursement methodology for clinic treatment facilities and to achieve consistency with other State agencies.

**Substance of proposed rule (Full text is posted at the following State website: [www.opwdd.ny.gov](http://www.opwdd.ny.gov)):** The proposed regulations will change the reimbursement methodology for clinics certified or operated by OPWDD. The unit of service will be a clinic visit. A clinic visit must include face-to-face service. However, associated observation will be considered a face-to-face service. A clinic visit is all the clinical services provided for a person on a common date of service, except that a diagnostic and evaluation service conducted over more than one day will be treated as one visit, and on-site and off-site clinic visits provided on the same day will be treated as two separate visits.

Clinics will assign ICD diagnostic codes and CPT/HCPCS procedure codes to all services and will submit this information with claims for reimbursement. The methodology will group these codes to Ambulatory Patient Groups (APGs) based upon the intensity of the services provided, procedures performed, diagnoses, and resource utilization. Each APG is associated with a relative weight, and there are procedure-specific weights and associated weights. APGs, APG relative weights and procedure-specific and associated weights are listed in Department of Health regulations. APGs may package with a same-day medical visit. When multiple procedures group to the same APG, payment may be discounted.

Each clinic is assigned to a peer group. Peer Group A includes clinics that have the main clinic site in New York City or Long Island. Peer Group B includes clinics that have the main clinic site in any other county in the State. Peer Group C includes clinics that are affiliated with and serving two major hospital systems and that, as of the effective date of the regulation, are designated by the United States Department of Health and Human Services' Administration on Developmental Disabilities as a University Center for Excellence in Developmental Disabilities; are designated by the National Institutes for Health's Eunice Kennedy Shriver National Institute of Child Health and Human Development as an Intellectual and Developmental Disability Research Center, and are designated by the United States Public Health Service Health Resources and Services Administration Maternal and Child Health Bureau as a Leadership Education in Neurodevelopmental and Related Disabilities training program.

There is a base rate for each peer group. The operating component of the rate is the product of the base rate and the procedure's allowed relative APG weight or the final APG weight for each APG on a claim.

If a visit includes a service which maps to an APG which allows a capital add-on, there will be a capital add-on to the operating component of the APG payment for the visit. The capital component will equal the capital cost component of the clinic's regular visit fee in effect on the day preceding the effective date of the regulation.

OPWDD will review the capital cost component beginning a year after the effective date of the regulation for clinics that were licensed by the Department of Health as diagnostic and treatment centers, transferred long term therapeutic and clinical habilitative services on or after April 1, 2009 to an OPWDD licensed clinic, and received capital funding equal to the diagnostic and treatment center property component. OPWDD will compare the capital cost reimbursement to the clinic's actual capital expenditures from the financial report for the period two years prior. The capital cost component will then be changed to the lesser of (1) the most recent reimbursement; or (2) the greater of actual capital expenditures or the amount reimbursed to OPWDD licensed clinics that not having their capital component reviewed.

APG reimbursement will be phased in using a blended payment. The blended payment will be comprised of the clinic's provider specific average legacy fee, plus payment under the APG methodology, plus a capital cost component, if any. For the period beginning on the effective date of the regulation and ending on June 30, 2012, the payment will be 75% of the provider specific average legacy fee and 25% of the APG fee; for the

twelve months beginning July 1, 2012, the payment will be 50% of the provider specific average legacy fee and 50% of the APG fee; for the six months beginning July 1, 2013, the blend will be 25% of the provider specific average legacy fee and 75% of the APG fee. On and after January 1, 2014, fees will be entirely APG based.

OPWDD will determine the average legacy fee as follows. OPWDD will determine counts of paid visits for each clinic and visit type under the previous reimbursement methodology for service dates between April 1, 2009 and March 31, 2010. OPWDD may adjust this look-back period to accommodate instances where a clinic was not certified by OPWDD for the entire year. OPWDD will also determine each clinic's total operating payment by visit type by multiplying the count of paid visits for the visit type by the operating component of the fee in effect on the day preceding the effective date of the regulation for the same visit type. OPWDD may adjust these results to prevent a clinic from incurring a decrease or increase in Medicaid reimbursement disproportionate to that of the clinics within its peer group. OPWDD will then sum the total operating payments by visit type and then divide this amount by the clinic's total paid visits across all visit types. The result will be the average legacy fee for the provider.

Clinics that begin operation on or after the effective date of the regulation will be reimbursed in accordance with the phase-in except that the average of the legacy fees for all clinics will be used in the payment calculation, instead of the clinic-specific average legacy fee.

Department of Health regulations list the clinic services that will not be paid using the APG classification and reimbursement system.

**Text of proposed rule and any required statements and analyses may be obtained from:** Barbara Brundage, Director, OPWDD, Regulatory Affairs Unit, Office of Counsel, 44 Holland Avenue, Albany, New York 12229, (518) 474-1830, email: [barbara.brundage@opwdd.ny.gov](mailto:barbara.brundage@opwdd.ny.gov)

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

**Additional matter required by statute:** Pursuant to the requirements of the State Environmental Quality Review Act, OPWDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E. I. S. is not needed.

#### Regulatory Impact Statement

##### 1. Statutory authority:

a. The New York State Office for People With Developmental Disabilities (OPWDD) has the statutory responsibility to assure and encourage the development of programs and services in the area of care, treatment, rehabilitation, education and training of persons with developmental disabilities, as stated in the New York State Mental Hygiene Law section 13.07.

b. OPWDD has the statutory authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law section 13.09(b).

c. OPWDD has the responsibility, as stated in section 43.02 of the Mental Hygiene Law, for setting Medicaid rates and fees for services in facilities licensed or operated by OPWDD.

d. Chapter 58 of the laws of 2009, section 21 authorizes the Commissioner to implement the Ambulatory Patient Group reimbursement methodology for determining rates of payment for clinic services rendered pursuant to providers' licensure under article 16 of the Mental Hygiene Law.

e. Subdivision 2-a of section 2807 of the Public Health Law describes the Ambulatory Patient Group methodology, including a transitional process/schedule for implementation.

2. Legislative objectives: These proposed amendments further the legislative objectives embodied in sections 13.07, 13.09(b) and 43.02 of the Mental Hygiene Law; Chapter 58 of the laws of 2009, section 21; and Public Health Law section 2807(2-a) by instituting an APG-based methodology for reimbursing services provided by clinic treatment facilities certified by OPWDD and by updating reporting requirements accordingly.

3. Needs and benefits: OPWDD is proposing to transition to a new reimbursement methodology for its Part 679 clinic treatment facilities ("Article 16 clinics"). The Ambulatory Patient Group (APG) classification and reimbursement methodology determines reimbursement based on the type and the degree of complexity or intensity of the services delivered along with the amount of resources consumed in providing those services. Replete with mechanisms that adjust for economies providers realize when multiple services are delivered to one individual on the same date, it employs software that ultimately groups services by similarities in clinical characteristics and resource utilization. In so doing, it rationalizes reimbursement and more closely correlates payments to the duration and medical sophistication or intensity of the service.

OPWDD is complying with section 21 of Chapter 58 of the laws of 2009 which stipulates utilization of the APG payment methodology as



described in section 2807(2-a)(e) of the Public Health Law. In adopting the APG reimbursement methodology, OPWDD will achieve consistency with other State agencies which are also bound by the legislative directives and which either have already put this system into practice or have impending plans for its implementation. This includes the NYS Department of Health, the NYS Office of Mental Health and the NYS Office of Alcoholism and Substance Abuse Services.

OPWDD will phase in the APG methodology to allow providers to adapt to the new methodology and to ensure that any resulting changes to a provider's revenue are gradual. For a period covering the first few years of the new methodology, OPWDD will pay a blended rate. This rate will combine amounts approximating a provider's existing reimbursement in diminishing proportions with amounts derived from the new methodology in increasing proportions until full implementation is attained. In addition, OPWDD will be able to adjust the portion of the blended rate attributable to existing reimbursement to accommodate clinics that were not open for a full year and to prevent a clinic from experiencing an increase or decrease in reimbursement disproportionate to that of the clinics within its peer group.

#### 4. Costs:

a. Costs to the Agency and to the State and its local governments: New York State and OPWDD will not incur any new costs as a result of these amendments. OPWDD expects the overall payment to Article 16 clinics to remain the same. The APG system is designed to allow re-weighting of assigned APG weights which, when applied to base rates, will accommodate the mix of services provided to the resources allocated.

There will be no additional costs to local governments as a result of these amendments. Again, OPWDD expects the overall payment to clinics to remain the same. Even if the payments to clinics in a particular county increase under the APG system, there will be no increase in the county's costs because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

5. Costs to private regulated parties: There are no initial capital investment costs. There will be some initial non-capital expenses. Clinics will have to invest some staff time to learn the new APG system, but OPWDD is conducting training throughout the State during April 2011 on the APG system. Clinics should not have to invest staff time to learn how to code claims, since they have to submit HIPAA compliant claims to receive payment under the current fee schedules. Clinics will have to change their cost reporting because the APG system uses a slightly different definition of units of service. OPWDD will give clinics information, training and technical assistance on the unit of service change. OPWDD may require clinics to include procedure and/or APG codes in their annual financial reporting as a means of informing the State's process for establishing APG service intensity weights. The overall burden on providers, however, is not expected to differ dramatically from current requirements.

A small number of individual clinic providers may see some decrease in revenue. The multi-year phase-in and the ability to adjust the average legacy fee are designed to make the changes to a clinic's overall reimbursement gradual.

6. Local government mandates: There are no new requirements imposed by the rule on any county, city, town, village; or school, fire or other special district.

7. Paperwork: Clinic providers will not need to change billing practices since they already have to submit HIPAA compliant claims to receive payment under the current fee schedules. Clinics will have to report units of service in a slightly different way and may have to include procedure and/or APG codes in their annual financial reporting. OPWDD does not expect the overall burden on providers to differ dramatically from current requirements.

8. Duplication: The proposed amendments do not duplicate any existing State or Federal requirements that are applicable to Part 679 clinics.

9. Alternatives: Since OPWDD is required by statute to implement the APG reimbursement methodology, OPWDD did not consider any alternatives.

10. Federal standards: The proposed regulations do not exceed any applicable federal standards.

11. Compliance schedule: OPWDD intends to adopt these regulations to achieve a July 1, 2011 effective date in accordance with the timeframes established by the State Administrative Procedure Act.

#### **Regulatory Flexibility Analysis**

1. Effect on small businesses and local governments: These proposed regulatory amendments will apply to clinics certified by OPWDD which provide services to individuals with developmental disabilities. Many clinics are operated by providers which also serve this population by offering other services and programs and in such instances are likely to employ more than 100 people overall even if the discrete clinic site does not. Of the 55 voluntary clinics certified by OPWDD, fewer than one quarter of them may operate exclusively as clinics and those clinics are likely to be classified as small businesses.

The proposed amendments will reconfigure how services are reimbursed using Ambulatory Patient Groups (APG), but they are not designed to change the overall reimbursement paid to providers. Instead, there should be a better correlation between the service provided and the reimbursement because the reimbursement will reflect the relative intensity of service as well as resource utilization. A small number of individual providers may see some decrease in revenue. The multi-year phase-in and the ability to adjust the average legacy fee are designed to make the changes to a clinic's overall reimbursement gradual.

Clinics will have to invest some staff time to learn the new APG system, but OPWDD is conducting training throughout the State during April 2011 on the APG system. Clinics should already know how to code claims for the APG system, since they have to submit HIPAA compliant claims to receive payment under the current fee schedules. Clinics will have to report units of service differently on their cost reports, and may be required to include procedure and/or APG codes in their annual financial reporting as a means of informing the State's process for establishing APG service intensity weights. The overall burden on clinics, however, is not expected to differ dramatically from current requirements.

2. Compliance requirements: It will be necessary for providers to familiarize themselves with the new reimbursement methodology. The APG methodology also uses a slightly different definition of units of service, and providers have to report units of service on their annual financial reports. Clinics may also have to add procedure and/or APG codes for services to their annual financial reporting.

The amendments will have no effect on local governments. OPWDD expects the overall payment to clinics to remain the same. Even if the payments to clinics in a particular county increase under the APG system, there will be no increase in the county's costs because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: Clinics will have to invest some staff time to learn the new APG system, but OPWDD is helping clinics with this task by training clinic staff in April 2011 on the APG system. Clinic staff will not have to learn a new way to code claims, since they currently have to submit HIPAA compliant claims to receive payment. Clinics will have to report units of service differently, and may be required to provide procedure and/or APG codes in their annual financial reporting. The overall burden on clinic providers, however, is not expected to differ dramatically from current requirements.

5. Economic and technological feasibility: The proposed amendments do not impose on regulated parties the use of any new technological processes. Clinics are already submitting HIPAA compliant claims to receive payment.

6. Minimizing adverse economic impact: OPWDD is taking a number of measures to minimize any adverse economic impact. First, the multi-year phase-in and adjustment to the average legacy fee will make changes to an individual clinic's overall reimbursement gradual. Second, OPWDD is conducting training throughout the State to help clinics learn the APG system and will be providing information and guidance on the new unit of service definition.

7. Small business and local government participation: The proposed regulations were discussed at meetings with representatives of provider associations on January 7, January 27, February 3, February 14 and March 3, 2011. At these meetings, OPWDD solicited provider input in determining some of the components of the methodology. The provider associations present included NYSARC and Cerebral Palsy Associations of NYS. Some small business clinic providers are members of these associations.

#### **Rural Area Flexibility Analysis**

1. Description of the types and estimation of the number of rural areas in which the rule will apply: Voluntary operated, OPWDD - licensed clinics are located in the following counties with a population less than 200,000: Cattaraugus, Cayuga, Chautauqua, Chemung, Columbia, Cortland, Fulton, Greene, Madison, Ontario, Orleans, Putnam, Saratoga, Schenectady, Seneca, Sullivan, Ulster and Warren. Voluntary-operated, OPWDD - licensed clinics are located in the following counties with certain townships have a population density of 150 persons or less per square mile: Albany, Dutchess, Erie, Monroe, Onondaga and Orange.

OPWDD-operated clinics are located in the following counties with a population less than 200,000: Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Columbia, Delaware, Herkimer, Madison, Ontario, Oswego, Otsego, Saratoga, Seneca, Tompkins, Ulster, Wayne and Yates. OPWDD-operated clinics are located in the following counties with certain townships have a population density of 150 persons or less per square mile: Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga and Orange.

The proposed amendments have been reviewed by OPWDD in light of their impact on entities in rural areas. The proposed amendments are

expected to result in no overall decrease in funding to clinics. While some individual clinics may see a reduction in funding, the geographic location of the clinic (urban or rural) will not be a contributing factor to any such impact.

2. Compliance requirements: It will be necessary for clinic providers to familiarize themselves with the new reimbursement methodology. The change also utilizes a slightly different definition of units of service which clinics will have to use in completing their annual financial reports. Clinics may also have to add procedure and/or APG codes for services to their annual financial reporting.

The amendments will have no effect on local governments. OPWDD expects the overall payment to clinics to remain the same. Even if the payments to clinics in a particular county increase under the APG system, there will be no increase in the county's costs because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: Clinics will have to invest some staff time to learn the new APG system. Clinic staff will not have to learn a new way to code claims, since they currently have to submit HIPAA compliant claims to receive payment. Clinics will have to report units of service on their cost reports in a slightly different way, and may be required to provide procedure and/or APG codes in their annual financial reporting. The overall burden on clinics is not expected to differ dramatically from current requirements.

5. Minimizing adverse economic impact: OPWDD is taking a number of measures to minimize any adverse economic impact. First, the multi-year phase-in and adjustment to the average legacy fee will make changes to an individual clinic's overall reimbursement gradual. Second, OPWDD is conducting training throughout the State in April 2011 to help clinics learn the APG system. Third, OPWDD will give clinics information and guidance on the new unit of service definition.

6. Participation of public and private interests in rural areas: The proposed regulations were discussed at meetings with representatives of providers and APG Policy Committee members on January 7, January 27, February 3, February 14 and March 3, 2011. Of the provider associations present at these meetings, NYSARC, the New York State Association of Community and Residential Agencies, the New York State Rehabilitation Association and Cerebral Palsy Associations of NYS, represent providers throughout the State, including those in rural areas. The OPWDD-operated clinics were also represented at these meetings.

#### **Job Impact Statement**

A job impact statement is not being submitted for these proposed amendments because OPWDD has determined that they will not cause a decrease of more than 100 full time annual jobs or employment opportunities in the State.

The proposed amendments will implement the Ambulatory Patient Group (APG) classification and reimbursement methodology for Part 679 clinic treatment facilities. OPWDD expects that overall payment to clinics will not change as a result of the APG methodology, and therefore OPWDD does not expect the change to result in any increase or decrease of jobs or employment opportunities.

### **PROPOSED RULE MAKING NO HEARING(S) SCHEDULED**

#### **Personal Services Surpluses Adjustment for Prevocational Services**

**I.D. No.** PDD-16-11-00015-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Amendment of section 635.10-5(e) of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.09(b) and 43.02

**Subject:** Personal Services Surpluses Adjustment for Prevocational Services.

**Purpose:** To modify reimbursement methodology for Prevocational Services effective July 1, 2011.

**Text of proposed rule:** Subdivision 635-10.5(e) is amended by the addition of a new paragraph (6) as follows and existing paragraphs (6)-(10) are renumbered to be (7)-(11):

(6) *Effective July 1, 2011, prevocational services prices shall be reduced according to the measures outlined in this paragraph. This personal services action addresses provider surpluses in funding for direct care, clinical and support staff and the associated fringe benefits.*

(i) *Applicability. The price reduction shall apply to all providers except for those which meet the criteria for exemption.*

*The first criterion, in order for any provider to be exempt from the impact of the reduction on any basis, is a cost report requirement. Region I providers must have filed a 2008-2009 cost report and Regions II and III providers must have filed a 2008 cost report on or before December 23, 2010, except that a provider may submit the cost report after December 23, 2010, if the cost report represents an original submission or a resubmission specifically requested by OPWDD due to identified inaccuracies or insufficiencies. Cost reports submitted after December 23, 2010, must be submitted by May 1, 2011, unless the Commissioner exercises or has exercised his or her discretion to extend the May 1, 2011, deadline. Providers with cost reports submitted in accordance with the deadlines in this subparagraph (i) may qualify for exemption pursuant to subparagraph (ii) of this paragraph. Providers which did not submit cost reports in accordance with the deadlines in this subparagraph (i) shall be subject to price reductions pursuant to subparagraph (vii) of this paragraph. OPWDD shall employ data extracted from the most recent 2008/2008-2009 cost report submitted by a provider on or before December 23, 2010, except that data from a 2008/2008-2009 cost report submitted after December 23, 2010, representing an original submission or a resubmission specifically requested by OPWDD due to identified inaccuracies or insufficiencies and submitted by May 1, 2011, or a later deadline extended by the Commissioner shall also be utilized.*

#### **(ii) Exemptions.**

(a) *FTE personal services loss. OPWDD compared each provider's actual FTEs for direct care, clinical care and support as reported in its 2008/2008-2009 cost report to the maximum reimbursable FTEs designated for direct care, clinical care and support as reflected in the corresponding price. This analysis included the FTE equivalents for contracted services. OPWDD identified a subset of providers which demonstrated an excess of actual FTEs over reimbursable FTEs. They are exempt.*

(b) *Providers with a loss in personal services and associated fringe benefits combined are exempt. OPWDD examined 2008/2008-2009 cost reports for those providers not exempted by virtue of clause (a) of this subparagraph. OPWDD compared each provider's actual expenses for direct care, clinical care and support and the associated fringe benefits to the total reimbursable costs reflected in the corresponding price and designated for direct care, clinical care and support and the associated fringe benefits cost categories. This analysis included contracted services. OPWDD identified a subset of providers which demonstrated an excess of actual expenses for direct care, clinical care and support and the associated fringe benefits over reimbursable costs reflected in the corresponding price and designated for direct care, clinical care and support and the associated fringe benefits. They are exempt.*

(iii) *Providers subject to prevocational services price reduction are those providers which are not specifically exempted pursuant to subparagraph (ii) of this paragraph.*

(iv) *Untrended gross surplus. A provider is identified as having an untrended gross surplus when the analysis as conducted and described in clause (b) of subparagraph (ii) demonstrated an excess of reimbursable costs as reflected in the price for the respective reporting period and designated for direct care, clinical care and support and the associated fringe benefits over actual expenses for direct care, clinical care and support and the associated fringe benefits as reported in the provider's 2008/2008-2009 cost report. The amount of this excess is the untrended gross surplus.*

(v) *Untrended tentative gross reduction. The untrended gross surplus multiplied by 40 percent is referred to as the untrended tentative gross reduction.*

(vi) *Tentative gross reduction. The tentative gross reduction equals the untrended tentative gross reduction pursuant to subparagraph (v) of this paragraph trended to June 30, 2011, dollars.*

(vii) *Total impact limitation. Before OPWDD revises a provider's prevocational services price, it shall assess the total impact on a provider of all the tentative gross reductions and tentative aggregate gross reductions pursuant to this paragraph 635-10.5(e)(6) and sections 635-10.5(b)(18)(iv), 635-10.5(c)(16), and 671.7(a)(13) of this Title, combined with the final price and fee reductions pursuant to sections 635-10.5(b)(18)(iii), 635-10.5(d)(6), 635-10.5(h)(3)(ii)(d), 635-10.5(ab)(12)(iii)(b) and 671.7(a)(12) of this Title. The total impact to an individual provider shall be limited to an amount not to exceed 6.5 percent of the aggregated total gross reimbursable operating costs as reflected in a provider's June 30, 2011, prices and the aggregated total gross allowable reimbursement reflected in a provider's June 30, 2011, fees for the provider's programs and/or services subject to the price and fee revisions. The lesser of the amount of the total impact or the amount of the total impact as limited by the 6.5 percent provision represents the final impact. For providers for which no 2008/2008-2009 cost reports were available because the conditions established in subparagraph (i) of this paragraph were not met, the total impact is calculated as follows: The aggregated*



total gross reimbursable operating costs as reflected in a provider's June 30, 2011, prices and the aggregated total gross allowable reimbursement as reflected in a provider's June 30, 2011, fees for the provider's programs and/or services subject to the price and fee revisions are summed. The total is multiplied by 6.5 percent. The product is the final impact for these providers.

(viii) *Allocation of final impact.* Before allocation, the final impact on a provider shall be reduced by the final price and fee reductions pursuant to sections 635-10.5(b)(18)(iii), 635-10.5(d)(6), 635-10.5(h)(3)(iii)(d), 635-10.5(ab)(12)(iii)(b) and 671.7(a)(12) of this Title because those reductions are not subject to any further revisions. The remainder of the final impact on a provider shall be distributed equitably across the reimbursable operating costs in that provider's prevocational, supervised residential habilitation, group day habilitation, and supplemental group day habilitation services in proportion to the amount of reduction each of these programs would have incurred had the reductions been calculated separately.

(ix) *Final prevocational services price reduction percentage.* The allocation of the final impact to a provider's prevocational services shall be expressed as a percentage of the total gross reimbursable operating costs reflected in the price in effect on June 30, 2011.

(x) *The final prevocational services price shall be the prevocational services price in effect on June 30, 2011, reduced by the final prevocational services price reduction percentage pursuant to subparagraph (ix) of this paragraph applied to that price.*

(xi) *For the purposes of requesting a price adjustment, the effects of this price reduction shall not be construed as a basis for loss. In processing a price adjustment, any revised price will be offset by the monetary impact, prorated as appropriate, of the adjustment as calculated pursuant to this paragraph.*

(xii) *The commissioner, at his or her discretion, may waive all or a portion of this adjustment for a provider upon the provider demonstrating that the imposition of the reduction would jeopardize the continued operation of the prevocational services.*

Subdivision 635-10.5(e) is amended by the addition of new paragraphs (12) and (13) as follows and existing paragraph (12) is renumbered to be (14).

(12) *Revenues realized by providers from reimbursement attributable to components of the price other than the administrative component shall not be used to fund administrative expenses.*

(13) *The price determined through the application of this subdivision may be appealed. Such appeal shall be pursuant to section 686.13(i) of this Title, except that the determination following such first level appeal process shall be the commissioner's final decision. At the conclusion of the first level appeal process, OPWDD shall notify the provider of any revised price or denial of the request. Once OPWDD has informed the provider of the appeal outcome, a provider which submits a revised cost report for the period reviewed shall not be entitled to an increase in the award determination based on that resubmission.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Barbara Brundage, Director, Regulatory Affairs Unit, OPWDD, 44 Holland Avenue, Albany, New York 12229, (518) 474-1830, email: barbara.brundage@opwdd.ny.gov

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

**Additional matter required by statute:** Pursuant to the requirements of the State Environmental Quality Review Act, OPWDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

#### **Regulatory Impact Statement**

##### **1. Statutory authority:**

a. OPWDD has the statutory authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

b. OPWDD has the statutory responsibility for setting Medicaid rates and fees for other services in facilities licensed or operated by OPWDD, as stated in section 43.02 of the Mental Hygiene Law.

2. **Legislative objectives:** These proposed amendments further the legislative objectives embodied in sections 13.09(b) and 43.02 of the Mental Hygiene Law. The proposed amendments concern changes in the price methodology for Prevocational services.

3. **Needs and benefits:** New York State is seeking to achieve efficiencies in its Medicaid program including Medicaid funded services overseen by OPWDD. One such efficiency will be changes in the price methodology for Prevocational services. The new methodology is intended to better align a provider's reimbursement for direct care, support, clinical and related fringe benefit costs with actual costs, by eliminating 40% of the operating surplus for these combined categories. In most cases, the new

prices will be predicated on cost information from provider's respective reporting periods that ended either on December 31, 2008, or June 30, 2009, with those costs adjusted for inflationary factors. Additionally, providers will be constrained from utilizing revenues realized from reimbursement attributable to components of the price other than the administrative component to fund administrative expenses. The new methodology strives to more closely match reimbursements to costs and to institute efficiency standards. OPWDD proposes to revise the current prices on July 1, 2011.

These changes will assist in achieving Medicaid efficiency for New York State. Since the majority of the methodology change is structured to eliminate only 40 percent of the operating surpluses allowing providers to retain 60 percent of operating surpluses, OPWDD believes that providers will be able to absorb this reduction while not reducing supports or services or service quality. Additionally, there is a limitation on OPWDD's concurrent reimbursement actions such that a provider's revenue reduction shall be held to an amount not to exceed 6.5 percent of that provider's June 30, 2011, aggregate operating revenue for services subject to price reductions which may include its supervised IRAs and CRs, Group and Supplemental Group Day Habilitation, Prevocational services, supportive IRAs and CRs, Community Habilitation, Waiver Supported Employment and Waiver Respite. This limitation acts as a safety measure so that reductions will not jeopardize the quality of supports and services provided.

##### **4. Costs:**

a. **Costs to the Agency and to the State and its local governments:** There is an approximate \$3.4 million savings in Medicaid that will be evenly shared by the State (approximately \$1.7 million) and the Federal (approximately \$1.7 million) governments. There will be no savings to local governments as a result of these specific amendments. There will be no savings to local governments as a result of these specific amendments concerning some individuals receiving supported employment services because pursuant to Social Services Law sections 365 and 368-a, either local governments incur no costs for these services or the State reimburses local governments for their share of the cost of Medicaid funded programs and services. Concerning the remainder of individuals, for the current State fiscal year, there are no savings to local governments as a result of these specific amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

b. **Costs to private regulated parties:** There are neither initial capital investment costs nor initial non-capital expenses. There are no additional costs associated with implementation and continued compliance with the rule. The proposed amendments are expected to result in a decrease of approximately \$3.4 million in aggregate funding to providers of Prevocational services.

5. **Local government mandates:** There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

6. **Paperwork:** The proposed amendments do not require any additional paperwork to be completed by providers.

7. **Duplication:** The proposed amendments do not duplicate any existing State or Federal requirements that are applicable to services for persons with developmental disabilities.

8. **Alternatives:** In developing this regulatory proposal, OPWDD consulted with representatives of provider associations and considered alternatives to achieve the desired efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that the changes in price methodology proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

9. **Federal standards:** The proposed amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. **Compliance schedule:** OPWDD expects to finalize the proposed amendments effective July 1, 2011. There are no additional compliance activities associated with these amendments.

#### **Regulatory Flexibility Analysis**

1. **Effect on small business:** OPWDD has determined, through a review of the certified cost reports, that most prevocational services are provided by non-profit agencies which employ more than 100 people overall. However, some smaller agencies which employ fewer than 100 employees overall would be classified as small businesses. Currently, there are 100 providers of Prevocational services. OPWDD is unable to estimate the portion of these providers that may be considered to be small businesses.

The proposed amendments have been reviewed by OPWDD in light of their impact on small businesses. The proposed amendments are expected to result in a decrease of approximately \$3.4 million in funding to providers of Prevocational services. OPWDD has determined that these amendments will not result in increased costs for additional services or increased compliance requirements.



2. Compliance requirements: The proposed amendments do not impose any additional compliance requirements on providers.

The amendments will have no effect on local governments.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no compliance costs since the proposed amendments will not impose any additional compliance requirements on providers.

5. Economic and technological feasibility: The proposed amendments do not impose on regulated parties, the use of any new technological processes.

6. Minimizing adverse economic impact: The purpose of these proposed amendments is to make changes in the price methodology for Prevocational services in order to achieve efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that it could adjust prices for Prevocational services to encourage efficiencies in operation and still adequately reimburse providers of such services. The proposed amendments represent OPWDD's best effort at adjusting reimbursement in a way which will accommodate the realization of efficiencies where they can best be achieved and afforded, and with the most equitable distribution possible.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. While the amendments do not exempt all small business providers from the rule, they do allow OPWDD to waive all or part of the funding reduction for a provider, including a small business provider, if the reduction would jeopardize the continued operation of the prevocational services. Since these amendments require no specific compliance response of regulated parties, the other approaches outlined cannot be effectively applied.

OPWDD determined that the changes in price methodology proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

7. Small business participation: The proposed regulations were discussed with representatives of providers, including the New York State Association of Community and Residential Agencies (NYSACRA), on March 8, March 16, March 21, March 22, and March 28, 2011. In addition, the proposed regulations were discussed at a meeting of the Fiscal Sustainability Team, also on March 8. NYSACRA was part of the Fiscal Sustainability Team. Some of the members of NYSACRA have fewer than 100 employees. Finally, OPWDD will be mailing these proposed amendments to all providers, including providers that are small businesses.

#### **Rural Area Flexibility Analysis**

1. Description of the types and estimation of the number of rural areas in which the rule will apply: OPWDD services are provided in every county in New York State. 44 counties have a population less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. 9 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga and Orange.

The proposed amendments have been reviewed by OPWDD in light of their impact on entities in rural areas. The proposed amendments are expected to result in a decrease of approximately \$3.4 million in funding to providers of Prevocational services for all of New York State. While the reduction in funding will have an adverse fiscal impact on providers of Prevocational services, the geographic location of any given program (urban or rural) will not be a contributing factor to any such impact.

2. Compliance requirements: The proposed amendments do not impose any additional reporting, recordkeeping or other compliance requirements on providers.

The amendments will have no effect on local governments.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no compliance costs since the proposed amendments will not impose any additional compliance requirements on providers or local governments.

5. Minimizing adverse economic impact: The purpose of these proposed amendments is to make changes in the price methodology for Prevocational services in order to achieve efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that it could adjust prices for Prevocational services to encourage efficiencies in operation

and still adequately reimburse providers of such services. The proposed amendments represent OPWDD's best effort at adjusting reimbursement in a way which will accommodate the realization of efficiencies where they can best be achieved and afforded, and with the most equitable distribution possible.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-bb(2)(b) of the State Administrative Procedure Act. While the amendments do not exempt all providers in rural areas from the rule, they do allow OPWDD to waive all or part of the funding reduction for a provider, including a provider in a rural area, if the reduction would jeopardize the continued operation of the prevocational services. Since these amendments impose no compliance requirements on regulated parties or local governments, the other approaches outlined in section 202-bb(2)(b) cannot be effectively applied.

6. Participation of public and private interests in rural areas: The proposed regulations were discussed at meetings with representatives of providers on March 8, March 16, March 21, March 22 and March 28, 2011. In addition, the proposed regulations were discussed at a meeting of the Fiscal Sustainability Team, also on March 8. The Fiscal Sustainability Team includes self-advocates, family members, and representatives of providers. Provider associations which were present, such as NYSARC, the NYS Association of Community and Residential Agencies, NYS Catholic Conference, and CP Association of NYS, represent providers throughout NYS, including those in rural areas.

#### **Job Impact Statement**

OPWDD is not submitting a Job Impact Statement for this proposed rulemaking because the rulemaking will not have a substantial adverse impact on jobs or employment opportunities.

The proposed rule will change the methodology for setting Medicaid rates for prevocational services authorized by OPWDD to make use of more current cost information. The methodology was specifically structured to eliminate 40 percent of the surpluses in the categories of direct care, support and clinical. That direction was taken to achieve a minimal impact on jobs and supports and services and service quality. The changes will not result in a decrease of more than 100 full time annual jobs or employment opportunities. Prices will be based on providers' actual spending as reported on cost reports, including actual spending on salaries and benefits. Providers received recent trend factor increases (3.06 percent for 2009 and 2.08% for 2010). Additionally, as a safety measure, no provider's total Waiver funding reduction will be allowed to exceed 6.5% of their total waiver operating reimbursement for the services affected by reductions. For all these reasons, providers will be able to absorb this reduction while not reducing staff.

### **PROPOSED RULE MAKING NO HEARING(S) SCHEDULED**

#### **Limits on Reimbursement of Group Day Habilitation, Supplemental Group Day Habilitation, and Prevocational Services**

**I.D. No.** PDD-16-11-00016-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Amendment of section 635-10.5(c)(7) and (e)(8) of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, section 13.09(b)

**Subject:** Limits on reimbursement of Group Day Habilitation, Supplemental Group Day Habilitation, and Prevocational Services.

**Purpose:** To impose stricter limits on reimbursement of services per person per day.

**Text of proposed rule:** Paragraph 635-10.5(c)(7) is amended as follows:

(7) Billing limits for group day habilitation and supplemental group day habilitation.

(i) [On a given day, a maximum of one and a half units per consumer, either one full unit and one half unit, or three half units, may be reimbursed for:]

[(a) group day habilitation only; or]

[(b) any combination of group day habilitation or prevocational services (see subdivision (e) of this section).]

*On a given day, for an individual who does not receive supplemental group day habilitation on that day, a maximum of the following may be reimbursed:*

*(a) one full unit of group day habilitation; or*

*(b) one full unit of a blended service which includes group day habilitation (a blended service is a combination of day habilitation,*

prevocational services (see subdivision (e) of this section) and/or supported employment services); or

(c) any combination of two half units of: group day habilitation, prevocational services or blended services.

(ii) On a given day, for an individual who receives supplemental group day habilitation on that day, a maximum of one and a half units (either one full unit and one half unit, or three half units) may be reimbursed for any combination of group day habilitation, supplemental group day habilitation, prevocational services or blended services.

(iii) On a given day, a maximum of one full unit per [consumer] individual, either one full unit or two half units, may be reimbursed for supplemental group day habilitation.

(iv) Where more than one agency delivers services on a given day to the same individual, the total number of units billed for that day by all agencies may not exceed the maximum allowed daily units described in subparagraphs (i), (ii) and (iii) of this paragraph.

(v) Exceptions.

(a) An agency providing, or proposing to provide, services to an individual who is eligible to receive supplemental group day habilitation may request a waiver from the limits established in subparagraph (ii) of this paragraph.

(b) The billing limits established in subparagraph (ii) of this paragraph may be waived on an individual basis by the commissioner if the commissioner finds, based on the request submitted by the agency:

(1) that services in excess of the limit are necessary to preserve the health or safety of the individual; and

(2) that alternative services which are not subject to the limit have been considered to meet the health or safety needs of the individual, but that the alternative services are either inappropriate and/or unavailable.

(c) Any waiver by the commissioner shall specify the maximum number of units of service that may be reimbursed for services to the individual on a given day and shall specify the duration of the waiver. In no case shall the waiver period exceed six months. The approval may be extended (or re-extended) by the commissioner at the end of the specified period for an additional specified period which cannot exceed six months.

Paragraph 635-10.5(c)(8) is amended as follows:

(8) Billing limits for prevocational services.

(i) [On a given day, a maximum of one and a half units per consumer, either one full unit and one half unit, or three half units, may be reimbursed for:]

[(a) prevocational services; or]

[(b) any combination of prevocational services or group day habilitation.]

On a given day, for an individual who does not receive supplemental group day habilitation (see subdivision (c) of this section) on that day, a maximum of the following may be reimbursed:

(a) one unit of prevocational services; or

(b) one full unit of a blended service which includes prevocational services (a blended service is a combination of day habilitation, prevocational services and/or supported employment services); or

(c) any combination of two half units of: group day habilitation, prevocational services or blended services.

(ii) On a given day, for an individual who receives supplemental group day habilitation on that day, a maximum of one and a half units (either one full unit and one half unit, or three half units) may be reimbursed for any combination of group day habilitation, supplemental group day habilitation, prevocational services or blended services.

[(ii)] (iii) Where more than one agency delivers services on a given day to the same [consumer] individual, the total number of units billed for that day by all agencies may not exceed the maximum allowed daily units described in [subparagraph] subparagraphs (i) and (ii) of this paragraph.

(iv) Exceptions.

(a) An agency providing, or proposing to provide, services to an individual who is eligible to receive supplemental group day habilitation may request a waiver from the limits established in subparagraph (ii) of this paragraph.

(b) The billing limits established in subparagraph (ii) of this paragraph may be waived on an individual basis by the commissioner if the commissioner finds, based on the request submitted by the agency:

(1) that services in excess of the limit are necessary to preserve the health or safety of the individual; and

(2) that alternative services which are not subject to the limit have been considered to meet the health or safety needs of the individual, but that the alternative services are either inappropriate and/or unavailable.

(c) Any waiver by the commissioner shall specify the maximum number of units of service that may be reimbursed for the individual on a given day and shall specify the duration of the waiver. In no case shall the waiver period exceed six months. The approval may be extended (or re-

extended) by the commissioner at the end of the specified period for an additional specified period which cannot exceed six months.

**Text of proposed rule and any required statements and analyses may be obtained from:** Barbara Brundage, Director, Regulatory Affairs Unit, OPWDD, 44 Holland Avenue, Albany, New York 12229, (518) 474-1830, email: barbara.brundage@opwdd.ny.gov

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

**Additional matter required by statute:** Pursuant to the requirements of the State Environmental Quality Review Act, OPWDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

#### Regulatory Impact Statement

1. Statutory authority: OPWDD has the statutory authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

2. Legislative objectives: These proposed amendments further the legislative objectives embodied in section 13.09(b) of the Mental Hygiene Law. The proposed amendments revise limitations on reimbursement of Group Day Habilitation Services, Supplemental Group Day Habilitation Services and Prevocational Services.

3. Needs and benefits: Several years ago, OPWDD revised the unit of service for Day Habilitation Services and Prevocational Services. The unit of service for Group Day Habilitation, Supplemental Group Day Habilitation and Prevocational Services became a full unit. The program day duration for a full unit was established with a minimum of 4 hours and a maximum of 6 hours. (A half unit has a program day duration of a minimum of 2 hours.)

When OPWDD established the billing requirements related to the program day duration, the expectation was that providers would bill for a full unit of services regardless of whether the program day duration was at the lower or higher end of the spectrum. However, OPWDD has become aware that some providers modified routine service delivery practices so that many individuals would be served for a program day duration of slightly more than 6 hours, allowing the provider to bill for both a full unit and a half unit. These providers should generally be reimbursed for the provision of a full unit of service to these individuals per day (not for a unit and a half) and OPWDD has proposed these regulations in an attempt to better align reimbursement with actual service provision.

The existing regulations limit the number of units that will be reimbursed for services delivered in a given day per individual. For Group Day Habilitation, Prevocational Services, or a combination of these services, the current reimbursement limit is one and a half units. Reimbursement for Supplemental Group Day Habilitation is limited to one full unit or two half units per day per person. To move toward better alignment of reimbursement and service provision, the proposed regulations impose stricter limits.

For providers serving individuals who do not receive Supplemental Group Day Habilitation (which has a start time of 3:00 P.M. or later on weekdays or anytime on the weekend), the reimbursement would be limited to a full unit or two half units of any combination of Group Day Habilitation, Prevocational Services and/or blended services (which are a combination of Group Day Habilitation, Prevocational Services and/or Supported Employment Services). Individuals who live in a supervised residence certified by OPWDD (e.g., a supervised Individualized Residential Alternative or a supervised Community Residence) are not eligible to receive Supplemental Group Day Habilitation, so this limit would be applicable to reimbursement of services provided to these individuals. Individuals who live in supervised residences are receiving residential habilitation on a daily basis. The needs of these individuals for habilitation services should be adequately met with this limit. More than one full unit per day of Group Day Habilitation and/or Prevocational Services is not needed by these individuals in any circumstance.

Individuals who do not live in a supervised residence are eligible to receive Supplemental Group Day Habilitation. For providers serving these individuals, a limit is imposed on reimbursement of one and a half units per day for any combination of Group Day Habilitation, Supplemental Group Day Habilitation, Prevocational Services, and/or blended services. This limit is more generous than the limit on reimbursement for individuals who live in supervised residences, in recognition of the fact that individuals not living in supervised residences are receiving limited or no residential habilitation. However, the new limit is more restrictive than the current limit of one and a half units of Group Day Habilitation and/or Prevocational Services. OPWDD considers that providers will almost always be able to meet the needs of the individuals for the services within the new limit. OPWDD recognizes that some individuals may be receiving more than this level of services currently, with providers being paid



for this higher level of services; and in rare circumstances providers newly subject to the limits may need to provide other types of services or provide services over the limits in order to meet the individual's needs for health and safety. In recognition of this possibility, the proposed regulations establish procedures for providers to request a waiver of this limit in rare circumstances when services in excess of the limit are necessary to preserve the health or safety of the individual. The limit of reimbursement for one full unit or two half units of Supplemental Group Day Habilitation per day per individual is unchanged.

In addition, New York State is seeking to achieve efficiencies in its Medicaid program including Medicaid funded services overseen by OPWDD. The proposed regulations will result in a reduction in Medicaid expenditures for New York State. With rare exceptions, the effect of the regulation will be a reduction in reimbursement to providers who routinely delivered a day of services lasting slightly more than six hours so that the provider could bill for both a full unit and a half unit. In these situations, providers are expected to continue to provide a similar level of service to the individuals while reimbursement is adjusted to the more appropriate level that was originally intended.

#### 4. Costs:

a. Costs to the Agency and to the State and its local governments: There is an approximate \$6.8 million savings in Medicaid that will be evenly shared by the State (approximately \$3.4 million) and the federal (approximately \$3.4 million) governments. There will be no savings to local governments as a result of these amendments concerning some individuals receiving day habilitation or prevocational services because pursuant to Social Services Law sections 365 and 368-a, either local governments incur no costs for these services or the State reimburses local governments for their share of the cost of Medicaid funded programs and services. Concerning the remainder of individuals, for the current State fiscal year, there are no savings to local governments as a result of these amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

b. Costs to private regulated parties: There are neither initial capital investment costs nor initial non-capital expenses. Overall compliance costs will be lower as costs associated with billing and documenting services will be reduced. The limits on reimbursement imposed by the proposed amendments are expected to result in a decrease of approximately \$6.8 million in aggregate funding to providers of Group Day Habilitation Services, Supplemental Group Day Habilitation Services, and Prevocational Services.

5. Local government mandates: There are no new requirements imposed by the rule on any county, city, town, village, or school, fire, or other special district.

6. Paperwork: The proposed amendments may result in less paperwork as providers will be billing for fewer services. Since fewer services will be billed, documentation requirements will be reduced in some cases. For example, providers that would bill for a full unit of Group Day Habilitation Services for approximately six hours of service, instead of a full unit and a half unit, would only be required to document a minimum of two face-to-face services instead of three services.

7. Duplication: The proposed amendments do not duplicate any existing State or Federal requirements that are applicable to services for persons with developmental disabilities.

8. Alternatives: OPWDD originally considered limiting reimbursement of services to 5 full units or equivalent a week per individual. However, OPWDD considered this insufficient to meet the needs of all individuals, particularly individuals who do not live in supervised residences. OPWDD considers the imposition of a daily limitation to be preferable as it accomplishes virtually the same goal while simplifying compliance.

9. Federal standards: The proposed amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: OPWDD expects to finalize the proposed amendments effective July 1, 2011. OPWDD will be informing providers of the necessary changes in billing procedures with sufficient time in advance of the July 1 effective date so that changes can be made and are in effect on that date.

#### Regulatory Flexibility Analysis

1. Effect on small business: The OPWDD has determined, through a review of the certified cost reports, that most OPWDD-funded Home and Community Based Services (HCBS) Waiver Group Day Habilitation, Supplemental Group Day Habilitation, and Prevocational Services are provided by non-profit agencies which employ more than 100 people overall. However, some smaller agencies which employ fewer than 100 employees overall would be classified as small businesses. Currently, there are estimated to be 165 agencies which receive reimbursement for the provision of services to individuals in excess of the limits that would be imposed by these regulations. OPWDD is unable to estimate the portion of these providers that may be considered to be small businesses.

The proposed amendments have been reviewed by OPWDD in light of their impact on small businesses. The proposed amendments are expected to result in a decrease of approximately \$6.8 million dollars in funding to providers of these services. OPWDD has determined that these amendments will not result in increased costs for additional services or increased compliance requirements.

2. Compliance requirements: The proposed amendments do not impose any additional reporting, recordkeeping or other compliance requirements on providers. Conversely, since fewer services will be billed, documentation requirements will be reduced. For example, providers that would bill for a full unit of Group Day Habilitation for approximately six hours of service, instead of a full unit and a half unit, would only be required to document a minimum of two face-to-face services instead of three services.

The amendments will have no effect on local governments.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no compliance costs since the proposed amendments will not impose any additional compliance requirements on providers or local governments. Overall compliance costs will be lower as costs associated with billing and documenting services will be reduced.

5. Economic and technological feasibility: The proposed amendments do not impose on regulated parties the use of any new technological processes.

6. Minimizing adverse economic impact: The purpose of these proposed amendments is to impose stricter limitations on reimbursement of Group Day Habilitation, Supplemental Group Day Habilitation, and Prevocational Services. OPWDD determined that providers would still be adequately reimbursed for the delivery of services without reducing actual services to individuals. Current methodologies for the reimbursement of these services were established to accommodate a program day duration of four to six hours for a full unit. OPWDD considers that providers which were billing for a full unit and a half unit for approximately six hours of service would more appropriately be compensated for a full unit of services. The proposed amendments better align reimbursement with service delivery.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. The proposed regulations allow providers to request a waiver of the limits if services in excess of the limits are necessary to preserve the health or safety of the individual. Since these amendments otherwise reduce compliance activities required of regulated parties, the other approaches outlined in section 202-b(1) cannot be effectively applied.

OPWDD determined that the reduction in reimbursement proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

7. Small business participation: The proposed regulations were discussed with representatives of providers, including the New York State Association of Community and Residential Agencies (NYSACRA), on March 8, March 16, and March 21, 2011. In addition, the proposed regulations were discussed at a meeting of the Fiscal Sustainability Team, also on March 8. NYSACRA was part of the Fiscal Sustainability Team. Some of the members of NYSACRA have fewer than 100 employees. Finally, OPWDD will be mailing these proposed amendments to all providers, including providers that are small businesses.

#### Rural Area Flexibility Analysis

1. Description of the types and estimation of the number of rural areas in which the rule will apply: OPWDD services are provided in every county in New York State. 44 counties have a population less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. 9 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga and Orange.

The proposed amendments have been reviewed by OPWDD in light of their impact on entities in rural areas. The proposed amendments are expected to result in a decrease of approximately \$6.8 million in funding to providers of HCBS Waiver Group Day Habilitation Services, Supplemental Group Day Habilitation Services and Prevocational Services, for all of New York State. While the reduction in funding will have an adverse fiscal impact on impacted providers, the geographic location of any given program (urban or rural) will not be a contributing factor to any such impact.



2. Compliance requirements: The proposed amendments do not impose any additional reporting, recordkeeping or other compliance requirements on providers. Conversely, since fewer services will be billed, there will be a reduction in required compliance activities associated with documentation. For example, providers that would bill for a full unit of Group Day Habilitation Services for approximately six hours of service, instead of a full unit and a half unit, would only be required to document a minimum of two face-to-face services instead of three services.

The amendments will have no effect on local governments.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no compliance costs since the proposed amendments will not impose any additional compliance requirements on providers or local governments. Overall compliance costs will be lower as costs associated with billing and documenting services will be reduced.

5. Minimizing adverse economic impact: The purpose of these proposed amendments is to impose stricter limitations on reimbursement of Group Day Habilitation, Supplemental Group Day Habilitation, and Prevocational Services. OPWDD determined that providers would still be adequately reimbursed for the delivery of services without reducing actual services to individuals. Current methodologies for the reimbursement of these services were established to accommodate a program day duration of four to six hours for a full unit. OPWDD considers that providers which were billing for a full unit and a half unit for approximately six hours of services would be more appropriately compensated for one full unit of services. The proposed amendments better align reimbursement with service delivery.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-bb(2)(b) of the State Administrative Procedure Act. The proposed regulations establish procedures for providers to request a waiver of the limits when services in excess of the limit are necessary to preserve the health or safety of the individual. Since these amendments otherwise reduce specific compliance activities required of regulated parties, the other approaches outlined in section 202-bb(2)(b) cannot be effectively applied.

OPWDD determined that the reduction in reimbursement proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

6. Participation of public and private interests in rural areas: The proposed regulations were discussed at meetings with representatives of providers, on March 8, March 16, and March 21, 2011. In addition, the proposed regulations were discussed at a meeting of the Fiscal Sustainability Team, also on March 8. The Fiscal Sustainability Team includes self-advocates, family members, and representatives of providers. Provider associations which were present, such as NYSARC, the NYS Association of Community and Residential Agencies, NYS Catholic Conference, and CP Association of NYS, represent providers throughout NYS, including those in rural areas. Finally, OPWDD will be mailing these proposed amendments to all providers in rural areas.

#### **Job Impact Statement**

A job impact statement is not being submitted for these proposed amendments because OPWDD determined that they will not cause a loss of more than 100 full time annual jobs State wide. As described in the Regulatory Impact Statement, the proposed amendments impose stricter limits on the reimbursement of HCBS Waiver Group Day Habilitation Services, Supplemental Group Day Habilitation Services and Prevocational Services by limiting the amount of services that can be reimbursed per individual for a given day. Except in rare circumstances, OPWDD does not expect these amendments to result in any significant reduction in services delivered to individuals. Consequently, any reduction in jobs that might occur would be minimal.

### **PROPOSED RULE MAKING NO HEARING(S) SCHEDULED**

#### **Reimbursement of ICF/DDs**

**I.D. No.** PDD-16-11-00017-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Amendment of section 681.14 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.09(b) and 43.02

**Subject:** Reimbursement of ICF/DDs.

**Purpose:** To modify reimbursement methodology and make associated changes.

**Substance of proposed rule (Full text is posted at the following State website: [www.opwdd.ny.gov](http://www.opwdd.ny.gov)):** OPWDD is proposing to change its methodology for reimbursing ICF/DD facilities that have a certified capacity of under 31 beds. Traditionally, reimbursement has taken the form of site-specific prospective rates. The operating components of those rates have been based on actual costs from providers' annual cost reports in a chosen year to which inflationary multipliers are periodically applied-usually annually. Absent cost year data, approved budgets are utilized in creating the rate. The rates cannot exceed statistically derived screens that represent maximum reimbursement ceilings for each of the operating cost categories reflected in the rate.

The proposed regulations change the methodology for under 31-bed sites to hold rates to the lower of 2008/ 2008-2009 costs (depending on whether the provider reports on a calendar or fiscal year basis) or screen values. For sites that opened after the beginning of the cost reporting period, budgeted costs will be compared to the screens. For the purposes of the rate calculations, OPWDD assumed that providers allocated all expenses matched to their HCE I-III revenues to the fringe benefit costs category in the 2008/ 2008-2009 cost reports. Administrative, clinical and fringe benefit screens have been modified to make them compatible with the new methodology. Once the site-specific rates are recalculated, the proposed regulations consolidate the site-specific rates for each provider resulting in a single weighted average ICF/DD rate for each provider applicable to all its sites. The methodology ensures that the operating funding level reflected in the consolidated rate for each provider will range between an amount equal to the June 30, 2011 operating funding level and an amount equal to the June 30, 2011 operating funding level reduced by 10 percent.

The proposed regulations also add the option for OPWDD to set new site rates for under 31-bed facilities opening after July 1, 2011, using either the current agency rate, agency submitted budgeted costs, or historical data for similar facilities. New site specific rates shall be incorporated into the single weighted average rate for the provider.

In conjunction with these changes for under 31-bed facilities, OPWDD proposes other measures in its amendments. The additional provisions with respect to appeals apply to all ICF/DDs regardless of capacity (both under 31-bed and over 30-bed ICF/DDs). Appeals which have been previously allowed for cost overruns occurring due to a variety of circumstances will be limited to bed vacancies. The loss threshold criterion for providers who submit applications due to bed vacancies shall increase from \$1000 to \$5000. Once OPWDD notifies a provider of an appeal outcome, a provider which resubmits its annual cost report corresponding to that rate appeal year, is not entitled to an increase in that award based on that resubmission. In addition to the vacancy appeals, OPWDD will continue to make corrections to rates in the event of material errors in computations and cost data upon which the rate is predicated as well as adjustments for capacity changes, capital cost changes and audit findings.

A final provision applicable to the under 31-bed facilities prohibits providers from using revenues realized from reimbursement attributable to components of the rate other than the administrative component to fund administrative expenses.

The proposed regulations would become effective July 1, 2011. The new methodology would apply to services delivered on or after that date. Changes to the appeals methodology would apply to rates calculated for rate periods beginning July 1, 2011 and thereafter.

**Text of proposed rule and any required statements and analyses may be obtained from:** Barbara Brundage, Director, Regulatory Affairs Unit, OPWDD, 44 Holland Avenue, Albany, New York 12229, (518) 474-1830, email: [barbara.brundage@opwdd.ny.gov](mailto:barbara.brundage@opwdd.ny.gov)

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

**Additional matter required by statute:** Pursuant to the requirements of the State Environmental Quality Review Act, OPWDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

#### **Regulatory Impact Statement**

##### **1. Statutory authority:**

a. OPWDD has the statutory authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

b. OPWDD has the statutory responsibility for setting Medicaid rates and fees for services in facilities licensed or operated by OPWDD, as stated in section 43.02 of the Mental Hygiene Law.

2. Legislative objectives: These proposed amendments further the legislative objectives embodied in sections 13.09(b) and 43.02 of the Mental Hygiene Law. The proposed amendments are concerning reimbursement of ICF/DD facilities.

3. Needs and benefits: New York State is seeking to achieve efficient-

cies in its Medicaid program including Medicaid funded services overseen by OPWDD. Updating the rate methodology for under 31-bed ICF/DDs serves as one avenue of realizing efficiency. By changing the methodology for the operating component of the rate to utilize more current cost information, it yields rates that more accurately reflect costs. For efficiency's sake, the new methodology will roll rates for multiple sites into one agency rate and with respect to appeals, it will increase thresholds and limit the grounds for appeals to vacancies.

The operating components of under 31 bed ICF/DD rates are based, in part, on actual costs in a base year. The rate methodology also uses screens, which are maximum amounts for each of the cost categories. The current methodology uses 1999 as the base year. Since 1999, the operating component of rates has increased approximately 67 percent. Effective July 1, 2011, site-specific rates will be recalculated using new methodology for under 31 bed sites and it will hold a provider's site rates to the lower of their 2008/2008-2009 costs (depending on whether the provider reports on a calendar or fiscal year basis) or screen values. For sites that opened after the beginning of the cost reporting period, budgeted costs will be compared to the screens. The new methodology strives to more closely match reimbursements to costs and to institute efficiency standards.

Under the current rate methodology, providers are paid site-specific rates. Under the proposed change, an agency with more than one under 31-bed ICF/DD site will have its multiple, site specific rates for the under 31-bed sites rolled into one single weighted average rate for all its sites. This will have the benefit of simplifying administration and billing for providers. The agency-specific rates will range between an amount equal to the June 30, 2011 reimbursed operating levels and an amount equal to the June 30, 2011 operating levels reduced by ten percent.

The third change will apply to rate appeals for both under 31-bed and over 30-bed ICF/DDs. Appeals will be limited to vacancy appeals and the loss threshold will increase from \$1000 to \$5000. In addition, if a provider resubmits its cost report for a rate appeal after OPWDD notified the provider of an appeal outcome, that provider will not be entitled to an increase in the appeal award based on the resubmitted cost data. Inasmuch as the ICF/DD rate setting uses a prospective methodology, this change clearly has a twofold benefit of more closely aligning the appeals process with the prospective rate methodology and of increasing efficiency for OPWDD by eliminating appeals for relatively small amounts of money.

The final change will constrain under 31 bed ICF/DD providers using revenues realized from reimbursement attributable to components of the rate other than the administrative component to fund administrative expenses. This change is intended to ensure that funding intended to directly support individuals is not used for administrative purposes.

All of these changes will assist in achieving Medicaid efficiency for New York State. Since the methodology change is structured in large part to eliminate operating surpluses, OPWDD believes that providers will be able to absorb this reduction while not reducing supports or services or service quality. Additionally, the recent trend factor increases (3.06 percent for 2009 and 2.08 percent for 2010) should help providers absorb the reductions as should the ten percent limitation on the amount of a provider's operating rate decrease.

#### 4. Costs:

a. Costs to the Agency and to the State and its local governments: There is an approximate \$35.5 million savings in Medicaid that will be evenly shared by the State (approximately \$17,750,000) and the federal (approximately \$17,750,000) governments. There will be no savings to local governments as a result of these specific amendments because pursuant to Social Services Law sections 365 and 368-a, either local governments incur no costs for these services or the State reimburses local governments for their share of the cost of Medicaid funded programs and services.

b. Costs to private regulated parties: There are neither initial capital investment costs nor initial non-capital expenses. There are no additional costs associated with implementation and continued compliance with the rule. The proposed amendments are expected to result in a decrease of approximately \$35.5 million in aggregate funding to providers of ICF/DD facilities.

5. Local government mandates: There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

6. Paperwork: The proposed amendments do not require any additional paperwork to be completed by providers.

7. Duplication: The proposed amendments do not duplicate any existing State or Federal requirements that are applicable to services for persons with developmental disabilities.

8. Alternatives: OPWDD considered alternative efficiency methodologies for the reimbursement of ICF/DDs but determined that the updating of cost information was most appropriate as it eliminated surpluses.

9. Federal standards: The proposed amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: OPWDD expects to finalize the proposed amendments effective July 1, 2011. There are no additional compliance activities associated with these amendments.

#### **Regulatory Flexibility Analysis**

1. Effect on small business: The OPWDD has determined, through a review of the certified cost reports, that most OPWDD-funded services are provided by non-profit agencies which employ more than 100 people overall. However, some smaller agencies which employ fewer than 100 employees overall would be classified as small businesses. Currently, there are 102 agencies operating ICF/DDs with a capacity of 30 or less. OPWDD is unable to estimate the portion of these providers that may be considered to be small businesses.

The proposed amendments have been reviewed by OPWDD in light of their impact on small businesses. These amendments are concerning reimbursement of under 31-bed ICF/DDs and the appeals process for both under 31-bed and over 30-bed ICF/DDs. The proposed amendments are expected to result in a decrease of approximately \$35.5 million dollars in funding to those ICF/DD providers. OPWDD has determined that these amendments will not result in increased costs for additional services or increased compliance requirements.

2. Compliance requirements: The proposed amendments do not impose any additional compliance requirements on providers.

The amendments will have no effect on local governments.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no compliance costs since the proposed amendments will not impose any additional compliance requirements on providers.

5. Economic and technological feasibility: The proposed amendments do not impose on regulated parties, the use of any new technological processes.

6. Minimizing adverse economic impact: The purpose of these proposed amendments is to make changes to existing requirements regarding reimbursement of ICF/DDs in order to achieve efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that it could make such changes to encourage efficiencies in operation and still adequately reimburse under 31-bed ICF/DD providers. By targeting reductions at surpluses and administration, the proposed amendments minimize adverse economic impact and represent OPWDD's best effort at making changes in a way which will accommodate the realization of efficiencies where they can best be achieved and afforded, and with the most equitable distribution possible.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. OPWDD determined that the revisions to reimbursement of ICF/DDs proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

Since these amendments require no specific compliance response of regulated parties, the approaches outlined cannot be effectively applied.

7. Small business participation: The proposed regulations were discussed with representatives of providers, including the New York State Association of Community and Residential Agencies (NYSACRA), on March 8, March 16, and March 21, 2011. In addition, the proposed regulations were discussed at a meeting of the Fiscal Sustainability Team, also on March 8. NYSACRA was part of the Fiscal Sustainability Team. Some of the members of NYSACRA have fewer than 100 employees. Finally, OPWDD will be mailing these proposed amendments to all providers, including providers that are small businesses.

#### **Rural Area Flexibility Analysis**

1. Description of the types and estimation of the number of rural areas in which the rule will apply: OPWDD services are provided in every county in New York State. 44 counties have a population less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. 9 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga and Orange.

The proposed amendments have been reviewed by OPWDD in light of their impact on entities in rural areas. The proposed amendments are expected to result in a decrease of approximately \$35.5 million in funding to providers operating ICF/DDs. While the reduction in funding will have an adverse fiscal impact on providers of ICF/DDs, the geographic location



of any given program (urban or rural) will not be a contributing factor to any such impact.

2. Compliance requirements: The proposed amendments do not impose any additional reporting, recordkeeping or other compliance requirements on providers.

The amendments will have no effect on local governments.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no compliance costs since the proposed amendments will not impose any additional compliance requirements on providers or local governments.

5. Minimizing adverse economic impact: The purpose of these proposed amendments is to make changes to existing requirements regarding reimbursement of under 31-bed ICF/DDs and the appeals process for both under 31-bed and over 30-bed ICF/DDs in order to achieve efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that it could make such changes to encourage efficiencies in operation and still adequately reimburse under 31-bed ICF/DD providers. By targeting reductions at surpluses and administration, the proposed amendments minimize adverse economic impact and represent OPWDD's best effort at making changes in a way which will accommodate the realization of efficiencies where they can best be achieved and afforded, and with the most equitable distribution possible.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-bb(2)(b) of the State Administrative Procedure Act. OPWDD determined that the revisions to reimbursement of under 31-bed ICF/DDs proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers. Since these amendments impose no compliance requirements on regulated parties or local governments, the approaches outlined in section 202-bb(2)(b) cannot be effectively applied.

6. Participation of public and private interests in rural areas: The proposed regulations were discussed at meetings with representatives of providers on March 8, March 16, and March 21, 2011. In addition, the proposed regulations were discussed at a meeting of the Fiscal Sustainability Team, also on March 8. The Fiscal Sustainability Team includes self-advocates, family members, and representatives of providers. Provider associations which were present, such as NYSARC, the NYS Association of Community and Residential Agencies, NYS Catholic Conference, and CP Association of NYS, represent providers throughout NYS, including those in rural areas.

#### Job Impact Statement

OPWDD is not submitting a Job Impact Statement for this proposed rulemaking because the rule making will not have a substantial adverse impact on jobs or employment opportunities.

The proposed rule would change the methodology for setting Medicaid rates for under 31 bed ICF/DD facilities by recalculating the operating cost category components of the rates at the lower of costs from a 2008 or 2008-2009 cost report (or budgeted costs for sites that opened after the beginning of the reporting period) or screen values. Thus, these changes target reductions at surpluses. To the extent they have surpluses sufficient to absorb the rate reductions, providers will not have to reduce jobs. Providers that do not have sufficient surpluses to absorb the administrative component of the rate reductions may experience a reduction in administrative funding. The amount of these reductions will be equivalent to less than the cost of salaries and fringe benefits for 100 full time annual jobs.

The other changes in the methodology will consolidate the site-specific rates for under 31-bed ICF/DDs for each provider into a single rate for each provider applicable to all its sites. The provider specific rate will hold the overall operating component of the rate to the June 30, 2011 reimbursed levels or the recalculated operating rate, whichever is less. However, no provider's funding will be reduced by more than ten percent from its June 30, 2011 level. This change should lessen administrative burdens on providers without reducing overall funding, and will therefore not result in any loss in jobs or employment opportunities.

The changes regarding rate appeals for both under 31-bed and over 30-bed ICF/DDs should not result in a decrease of more than 100 full time annual jobs or employment opportunities. Because providers will no longer be able to submit rate appeals for unlimited reasons, they will no longer be able to simply spend more than their revenues and look to OPWDD for compensation. However, this will not impact existing jobs, because it will not affect existing revenue. It may limit new employment opportunities because providers cannot expect that OPWDD will reimburse them for any and all additional spending on staff. However, OPWDD estimates that providers would not have hired more than 100 full time annual employees if this unlimited right to appeal remained in place. Increasing the loss threshold for appeals from \$1000 to \$5000 will only eliminate rate appeals

for an annual increase in funding of between \$1000 and \$5000, and these appeals would be for amounts insufficient to fund over 100 full time annual jobs. Finally, the change preventing a rate increase based on a cost report resubmitted after an appeal award will not result in a loss of jobs as the action involves the reconciliation of retroactive expenditures.

A final change would prohibit providers from financing administrative expenses with revenues for under thirty-one bed ICF/DDs that are attributable to non-administrative cost categories. This change should preserve direct care, clinical and support jobs and employment opportunities by preventing providers from diverting moneys for these staff positions into administrative expenses. Although this change may result in providers reducing staff or new hiring in administration, and thus in a loss in jobs and employment opportunities, it will be more than offset by preventing losses in jobs and employment opportunities in direct care, clinical and support positions.

### PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### Efficiency Adjustment for HCBS Waiver Supported Employment Services

I.D. No. PDD-16-11-00018-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Amendment of section 635-10.5(d) of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, section 13.09(b)

**Subject:** Efficiency adjustment for HCBS waiver supported employment services.

**Purpose:** To implement an efficiency adjustment by modifying the fee schedule for HCBS waiver supported employment services.

**Text of proposed rule:** Subdivision 635-10.5(d) is amended by the addition of a new paragraph (6) as follows and existing paragraphs (6)-(9) are renumbered to be (7)-(10):

(6) Effective July 1, 2011, the fees are as follows:

Level of support	Total support points	NYC fees	Rest of the State fees
1	less than .7534	\$538	\$386
2	greater than or equal to .7534 and less than 2.9505	\$720	\$515
3	greater than or equal to 2.9505	\$812	\$581

Current paragraph 635-10.5(d)(10) is deleted.

[(10) The amendments to this subdivision which were adopted and appeared in the State Register on August 29, 2001 which were to become effective on September 1, 2001 will instead become effective on October 1, 2001.]

**Text of proposed rule and any required statements and analyses may be obtained from:** Barbara Brundage, Director, Regulatory Affairs Unit, OPWDD, 44 Holland Avenue, Albany, New York 12229, (518) 474-1830, email: barbara.brundage@opwdd.ny.gov

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

**Additional matter required by statute:** Pursuant to the requirements of the State Environmental Quality Review Act, OPWDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

#### Regulatory Impact Statement

1. Statutory authority: OPWDD has the statutory authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

2. Legislative objectives: These proposed amendments further the legislative objectives embodied in section 13.09(b) of the Mental Hygiene Law. The proposed amendments are necessary to make adjustments to the reimbursement methodology applicable to Home and Community Based Services (HCBS) waiver supported employment services.

3. Needs and benefits: New York State is seeking to achieve efficiencies in its Medicaid program including Medicaid funded services overseen by OPWDD. One such identified efficiency will be a reduction in HCBS



waiver supported employment services funding. The current HCBS waiver supported employment fee schedule will be reduced by 2 percent for all providers.

Implementation of this decrease in fees will assist in achieving Medicaid efficiency for New York State. It is believed that service providers will be able to absorb this reduction while not reducing supports or services or service quality due to the payment of recent trend factor increases (3.06% for 2009 and 2.08% for 2010) and with the implementation of efficiency measures.

Additionally, OPWDD created a Fiscal Sustainability Team which included individuals, advocates, service providers and OPWDD staff. Although the purpose of the Team was not to discuss the option of reducing HCBS waiver supported employment services funding, there was discussion on approaches to efficiency that would allow support and service levels to be maintained in concert with funding reductions. OPWDD continues to explore various proposals that would offer providers greater mandate relief.

The proposed regulations also delete outdated language.

#### 4. Costs:

a. Costs to the Agency and to the State and its local governments: There is an approximate \$752,000 savings in Medicaid that will be evenly shared by the State (approximately \$376,000) and the Federal (approximately \$376,000) governments. There will be no savings to local governments as a result of these specific amendments. There will be no savings to local governments as a result of these specific amendments concerning some individuals receiving supported employment services because pursuant to Social Services Law sections 365 and 368-a, either local governments incur no costs for these services or the State reimburses local governments for their share of the cost of Medicaid funded programs and services. Concerning the remainder of individuals, for the current State fiscal year, there are no savings to local governments as a result of these specific amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

b. Costs to private regulated parties: There are neither initial capital investment costs nor initial non-capital expenses. There are no additional costs associated with implementation and continued compliance with the rule. The proposed amendments are expected to result in a decrease of approximately \$752,000 in aggregate funding to providers of HCBS waiver supported employment services.

5. Local government mandates: There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

6. Paperwork: The proposed amendments do not require any additional paperwork to be completed by providers.

7. Duplication: The proposed amendments do not duplicate any existing State or Federal requirements that are applicable to services for persons with developmental disabilities.

8. Alternatives: In developing this regulatory proposal, OPWDD consulted with representatives of provider associations and considered alternatives to achieve the desired efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that the 2 percent reduction proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

9. Federal standards: The proposed amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: OPWDD expects to finalize the proposed amendments effective July 1, 2011. There are no additional compliance activities associated with these amendments.

#### **Regulatory Flexibility Analysis**

1. Effect on small business: OPWDD has determined, through a review of the certified cost reports, that most OPWDD-funded Home and Community Based Services (HCBS) waiver supported employment services are provided by non-profit agencies which employ more than 100 people overall. However, some smaller agencies which employ fewer than 100 employees overall would be classified as small businesses. Currently, there are 132 agencies that provide supported employment services. OPWDD is unable to estimate the portion of these providers that may be considered to be small businesses.

The proposed amendments have been reviewed by OPWDD in light of their impact on small businesses. The proposed amendments are expected to result in a decrease of approximately \$752,000 in funding to providers of HCBS waiver supported employment services. OPWDD has determined that these amendments will not result in increased costs for additional services or increased compliance requirements.

2. Compliance requirements: The proposed amendments do not impose any additional reporting, recordkeeping or other compliance requirements on providers.

The amendments will have no effect on local governments.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no compliance costs since the proposed amendments will not impose any additional compliance requirements on providers.

5. Economic and technological feasibility: The proposed amendments do not impose on regulated parties the use of any new technological processes.

6. Minimizing adverse economic impact: The purpose of these proposed amendments is to revise the reimbursement methodologies for HCBS waiver supported employment services in order to achieve efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that it could adjust fees for HCBS waiver supported employment services to encourage efficiencies in operation and still adequately reimburse providers of such services. The proposed amendments represent OPWDD's best effort at adjusting reimbursement in a way which will realize efficiencies where they can best be achieved and afforded, and with the most equitable distribution possible.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. Since these amendments require no specific compliance response of regulated parties, the approaches outlined cannot be effectively applied related to compliance activities.

OPWDD determined that the 2 percent reduction proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

7. Small business participation: The proposed regulations were discussed with representatives of providers, including the New York State Association of Community and Residential Agencies (NYSACRA), on March 8 and March 16, 2011. In addition, the proposed regulations were discussed at a meeting of the Fiscal Sustainability Team, also on March 8. NYSACRA was part of the Fiscal Sustainability Team. Some of the members of NYSACRA have fewer than 100 employees. Finally, OPWDD will be mailing these proposed amendments to all providers, including providers that are small businesses.

#### **Rural Area Flexibility Analysis**

1. Description of the types and estimation of the number of rural areas in which the rule will apply: OPWDD services are provided in every county in New York State. 44 counties have a population less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. 9 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga and Orange.

The proposed amendments have been reviewed by OPWDD in light of their impact on entities in rural areas. The proposed amendments are expected to result in a decrease of approximately \$752,000 in funding to providers of HCBS waiver supported employment services for all of New York State. While the reduction in funding will have an adverse fiscal impact on providers of HCBS waiver supported employment services, the geographic location of any given program (urban or rural) will not be a contributing factor to any such impact.

2. Compliance requirements: The proposed amendments do not impose any additional reporting, recordkeeping or other compliance requirements on providers.

The amendments will have no effect on local governments.

3. Professional services: There are no additional professional services required as a result of these amendments, and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no compliance costs since the proposed amendments will not impose any additional compliance requirements on providers or local governments.

5. Minimizing adverse economic impact: The proposed amendments revise the reimbursement methodologies for HCBS waiver supported employment services in order to achieve efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that it could adjust fees for supported employment services to encourage efficiencies in operation and still adequately reimburse providers of such services, including providers in rural areas. OPWDD determined that the 2 percent reduction proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-bb(2)(b) of the State Administrative Procedure Act. Since these amendments impose no compliance requirements on regulated parties or local governments, the approaches outlined in section 202-bb(2)(b) cannot be effectively applied.

6. Participation of public and private interests in rural areas: The proposed regulations were discussed at meetings with representatives of providers on March 8 and March 16, 2011. In addition, the proposed regulations were discussed at a meeting of the Fiscal Sustainability Team, also on March 8. The Fiscal Sustainability Team includes self-advocates, family members, and representatives of providers. Provider associations which were present, such as NYSARC, the NYS Association of Community and Residential Agencies, NYS Catholic Conference, and CP Association of NYS, represent providers throughout NYS, including those in rural areas.

#### **Job Impact Statement**

A job impact statement is not being submitted for these proposed amendments because OPWDD determined that they will not cause a loss of more than 100 full-time annual jobs State wide. The proposed amendments decrease the supported employment reimbursement fees by 2%. Based on conversations with providers and provider associations, OPWDD expects that any provider without sufficient surpluses to absorb all of the efficiency adjustment will adjust operations and spending in areas other than staffing, so as not to reduce supports or services or service quality. Moreover, the total state-wide impact of the efficiency adjustment is not at a level sufficient to effect a decrease of more than 100 full-time annual jobs. The total decrease in funding to all SEMP providers will be \$752,000, and the average staff salary in the SEMP program, including fringe benefits, is \$42,067. Even if, contrary to OPWDD and providers' expectations, every SEMP provider reduced staffing levels by 2%, there would be a total loss of 17.87 full time annual jobs statewide.

### **PROPOSED RULE MAKING NO HEARING(S) SCHEDULED**

#### **Reimbursement of Specialty Hospitals**

**I.D. No.** PDD-16-11-00019-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Amendment of section 680.12 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.09(b) and 43.02

**Subject:** Reimbursement of Specialty Hospitals.

**Purpose:** To modify the reimbursement methodology for Specialty Hospitals and make associated changes.

**Text of proposed rule:** Clause 680.12(b)(3)(ii)(b) is amended as follows:

(b) NYS Office [of Mental Retardation and] *for People With Developmental Disabilities*, [Division of Revenue Management, 30 Russell Road] *Office of Counsel, 44 Holland Avenue*, Albany, NY [12206-1377] 12229.

Subparagraph 680.12(b)(5)(iii) is amended as follows:

(iii) In the event the provider discovers that the financial reports it has submitted are incomplete, inaccurate or incorrect prior to receiving its new rate, the provider must notify [OMRDD] *OPWDD* that such error exists. The provider will have 30 days from the date such notification is received by [OMRDD] *OPWDD* to submit revised reports or additional data. Such data or report shall meet the certification requirements of the report being corrected. If the corrected data or report are received within a reasonable time before the issuance of the rate, [OMRDD] *OPWDD* shall incorporate the corrected data or report into its computation of the rate without the provider having to file an appeal application. *However, OPWDD will not accept the resubmission of a January 1 - December 31, 2008, cost report, subsequent to January 1, 2011, for the purposes of the calculation of the rate effective July 1, 2011 as described in clause (5)(ii)(f) of subdivision (d) of this section.*

Clause 680.12(d)(5)(ii)(e) is amended as follows:

(e) For the period January 1, 1992, through December 31, 1992, and for each subsequent rate period *through June 30, 2011*, the rate shall be equal to the reimbursable operating costs and appropriate appeal adjustments contained in the Year 4 rate calculated pursuant to clause (i)(d) of this paragraph, as trended, with the addition of appropriately approved property.

Subparagraph 680.12(d)(5)(ii) is amended by the addition of a new clause (f) as follows:

*(f) For the period July 1, 2011, through December 31, 2011, and for each subsequent rate period, rates for other than newly-certified facil-*

*ities for non-ACD clients and for ACD clients when the commissioner has determined that the occupancy of certified beds for the facility and the region is 80 percent or more shall be as follows. The operating component of the rate shall be equal to the allowable operating costs as reported by the provider in its 2008 annual cost report trended to the current rate period. For the period July 1, 2011, through December 31, 2011, and for each subsequent rate period, the capital component of the rate shall be equal to the allowable capital costs as reported in the provider's 2008 annual cost report. However, OPWDD shall update the capital component of the July 1, 2011 - December 31, 2011, rate based upon capital cost information reported in cost reports for years subsequent to the 2008 reporting year subject to a desk audit review by OPWDD.*

Subdivision 680.12(e) is amended as follows:

(e) [First level rate] *Rate appeals and corrections.*

(1) *Rate appeals for rate periods prior to July 1, 2011.*

(i) *First level rate appeals.*

(a) The commissioner shall consider first level rate appeals applications for revisions to the rate, if brought within 120 days of the provider's receipt of the initial rate computation sheet. However, if the appeal is to the ACD rate calculated in accordance with section 680.12(d)(4)(ii) of this Part, the appeal must be from the ACD rate for a group of individuals residing in a physically distinct wing, unit or part of the facility, receiving similar services, having similar characteristics, and for whom the provider can identify discrete costs.

[(2)] (b) For any first level appeal, the provider must demonstrate that the rate requested in the appeal is necessary to ensure efficient and economic operation of the facility. If an appeal pursuant to this section is the ACD rate, the provider must also show that the individuals to whom the appeal pertains require care for which the necessary cost of providing [client] care *to admitted individuals* exceeds the ACD rate.

[(3)] (c) First level rate revision appeal applications shall be made in writing to the commissioner.

[(i)] (1) The application shall set forth the basis for the first level appeal and the issues of fact. Appropriate documentation shall accompany the application and [OMRDD] *OPWDD* may request such additional documentation as it deems necessary.

[(ii)] (2) Actions on first level rate appeal applications will be processed without unjustifiable delay.

[(4)] (d) A rate revised pursuant to an appeal shall not be considered final unless and until approved by the State Division of the Budget. At the conclusion of the first level appeal process [OMRDD] *OPWDD* shall notify the specialty hospital of any proposed revised rate or denial of same. [OMRDD] *OPWDD* shall inform the facility that the facility may either accept the proposed revised rate or request a second level appeal in accordance with section 602.9 of this Title in the event that the proposed revised rate fails to grant some or all of the relief requested.

[(5)] (e) At no point in the first level appeal process shall the provider have a right to any form of interim report or determination made by [OMRDD] *OPWDD* or the State Division of the Budget.

[(6)] (f) If [OMRDD] *OPWDD* approves the revision to the rate and the State Division of the Budget denies the revision, the provider shall have no further right to administrative review pursuant to this section.

[(7)] (g) Any rate revised in accordance with subdivision (d) of this section shall be effective according to the dates indicated in the approval of rate appeal notification. Such notification shall be sent to the provider by certified mail, return receipt requested.

[(8)] (h) Any additional reimbursement received by the facility, pursuant to a rate revised in accordance with this subdivision or section 602.9 of this Title, shall be restricted to the specific purpose set forth in the appeal decision.

[(9)] (ii) Second level rate appeals.

[(i)] (a) [OMRDD's] *OPWDD's* denial of the first level appeal of any or all of the relief requested in the appeals provided for in [paragraph (1) of this subdivision] *subparagraph (i) of this paragraph* shall be final, unless the facility requests a second level appeal to the commissioner in writing within 30 days of notification of denial or proposed revised rate.

[(ii)] (b) Second level appeals shall be brought and determined in accordance with the applicable provision of Part 602 of this Title.

(2) *Rate corrections for rate periods beginning on or after July 1, 2011.*

(i) *The commissioner will correct rates in instances where there are material errors in the information submitted by the provider which OPWDD used to establish the rate or where there are material errors in the rate computation and only in instances which would result in an annual increase of \$5,000 or more in a specialty hospital's allowable costs.*

(ii) *In order to request a rate correction in accordance with subparagraph (i) of this paragraph, the provider must send to OPWDD its request by certified mail, return receipt requested, within 90 days of the provider receiving the rate computation or within 90 days of the first day of the rate period in question, whichever is later.*



(3) *Rate appeals for rate periods beginning on or after July 1, 2011.*

(i) *Threshold. The threshold is \$5,000.*

(ii) *The only appeals that shall be considered are vacancy appeals.*

(iii) *First level rate appeals.*

(a) *Notification of first level appeal. In order to appeal a rate, the provider must send to OPWDD within one year of the close of the rate period in question, a first level appeal application by certified mail, return receipt requested.*

(b) *First level rate appeal applications shall be made in writing to the commissioner.*

(c) *The application shall set forth the issues of fact. Appropriate documentation shall accompany the application and OPWDD may request such additional documentation as it deems necessary.*

(d) *Actions on first level rate appeal applications will be processed without unjustifiable delay.*

(e) *The burden of proof on first level appeals shall be on the provider to demonstrate that the rate requested in the first level appeal is necessary to ensure efficient and economical operation of the specialty hospital.*

(f) *A rate revised by OPWDD pursuant to an appeal shall not be considered final unless and until approved by the State Division of the Budget.*

(g) *At no point in the first level appeal process shall the provider have a right to an interim report of any determinations made by any of the parties to the appeal. At the conclusion of the first level appeal process OPWDD shall notify the provider of any proposed revised rate or denial of same. OPWDD shall inform the provider that it may either accept the proposed revised rate or request a second level appeal in accordance with the provisions of section 602.9 of this Title, in the event that the proposed revised rate fails to grant some or all of the relief requested.*

(h) *At the conclusion of the first level appeal process, OPWDD shall notify the provider of any revised rate or denial of the request. Once OPWDD has informed the provider of the appeal outcome, if the provider submits a revised cost report for the period reviewed, it shall not be entitled to an increase in the award determination based on that resubmission.*

(i) *If OPWDD approves the revision to the rate and the State Division of the Budget denies the revision, the provider shall have no further right to administrative review pursuant to this section.*

(j) *Any rate revised in accordance with this paragraph shall be effective according to the dates indicated in the approval of the rate appeal notification.*

(k) *Any additional reimbursement received by the provider pursuant to a rate revised in accordance with this paragraph shall be restricted to the specific purpose set forth in the first or second level appeal decision. If the provider does not spend such reimbursement on such specific purpose, OPWDD shall be entitled to recover such reimbursement.*

(ii) *Second level rate appeals.*

(a) *OPWDD's denial of the first level appeal of any or all of the relief requested shall be final, unless the provider requests a second level appeal to the commissioner in writing within 30 days of service of notification of denial or proposed revised rate.*

(b) *Second level appeals shall be brought and determined in accordance with the applicable provisions of Part 602 of this Title.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Barbara Brundage, Director, Regulatory Affairs Unit, OPWDD, 44 Holland Avenue, Albany, New York 12229, (518) 474-1830, email: barbara.brundage@opwdd.ny.gov

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

**Additional matter required by statute:** Pursuant to the requirements of the State Environmental Quality Review Act, OPWDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

#### **Regulatory Impact Statement**

1. **Statutory authority:**

a. OPWDD has the statutory authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

b. OPWDD has the statutory responsibility for setting Medicaid rates and fees for services in facilities licensed or operated by OPWDD, as stated in section 43.02 of the Mental Hygiene Law.

2. **Legislative objectives:** These proposed amendments further the legislative objectives embodied in sections 13.09(b) and 43.02 of the Mental Hygiene Law. The proposed amendments concern reimbursement of Specialty Hospitals.

3. **Needs and benefits:** New York State is seeking to achieve efficiencies in its Medicaid program including Medicaid funded services overseen

by OPWDD. One such efficiency will be a change in the rate methodology for the Specialty Hospital. The Specialty Hospital rate will be changed to make use of current cost information. The operating components of the Specialty Hospital rate are based, in part, on 1987 budget costs. The new methodology for the Specialty Hospital will base rates on actual 2008 costs. This will correct any misalignments between costs and reimbursements.

The Specialty Hospital rate methodology will be changed to make use of more current cost information, to establish an appeal threshold of \$5,000, and to limit grounds for appeals to vacancies. In addition, if the provider resubmits its cost report for a rate appeal period after OPWDD notified the provider of an appeal outcome, the provider will not be entitled to an increase in the appeal award based on the resubmitted cost data. Specialty Hospital rates are calculated using a prospective methodology. The benefit of this change is to more closely align the appeals process with the prospective rate methodology.

These changes will assist in achieving Medicaid efficiency for New York State. Since the methodology change is structured to eliminate operating surpluses, OPWDD believes that the provider will be able to absorb this reduction while not reducing supports or services or service quality.

4. **Costs:**

a. **Costs to the Agency and to the State and its local governments:** There is an approximate \$1.1 million savings in Medicaid that will be evenly shared by the State (approximately \$550,000) and the Federal (approximately \$550,000) governments. There will be no savings to local governments as a result of these specific amendments because pursuant to Social Services Law sections 365 and 368-a, either local governments incur no costs for these services or the State reimburses local governments for their share of the cost of Medicaid funded programs and services.

b. **Costs to private regulated parties:** There are neither initial capital investment costs nor initial non-capital expenses. There are no additional costs associated with implementation and continued compliance with the rule. The proposed amendments are expected to result in a decrease of approximately \$1.1 million in funding to the Specialty Hospital provider.

5. **Local government mandates:** There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

6. **Paperwork:** The proposed amendments do not require any additional paperwork to be completed by the provider.

7. **Duplication:** The proposed amendments do not duplicate any existing State or Federal requirements that are applicable to services for persons with developmental disabilities.

8. **Alternatives:** In developing this regulatory proposal, OPWDD considered alternatives to achieve the desired efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that the methodology change for the Specialty Hospital proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

OPWDD considered alternative efficiency methodologies for the Specialty Hospital but determined that the updating of cost information was most appropriate as it eliminated surpluses.

9. **Federal standards:** The proposed amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. **Compliance schedule:** OPWDD expects to finalize the proposed amendments effective July 1, 2011. There are no additional compliance activities associated with these amendments.

#### **Regulatory Flexibility Analysis**

OPWDD is not submitting a Regulatory Flexibility Analysis for Small Business and Local Governments. The only provider impacted by this proposed regulation employs over 100 individuals and is therefore not classified as a small business. It is apparent from the nature and purposes of the amendments that no reporting, recordkeeping or other compliance requirements are imposed on local governments. In addition, as noted in the Regulatory Impact Statement, there is no fiscal impact on local governments.

#### **Rural Area Flexibility Analysis**

A rural area flexibility analysis for these proposed amendments is not being submitted because the amendments will not impose any adverse impact or reporting, record keeping or other compliance requirements on public or private entities in rural areas. The only provider impacted by this proposed regulation is located in an urban area. It is apparent from the nature and purposes of the amendments that no reporting, recordkeeping or other compliance requirements are imposed on local governments. In addition, as noted in the Regulatory Impact Statement, there is no fiscal impact on local governments.



**Job Impact Statement**

OPWDD is not submitting a Job Impact Statement for this proposed rulemaking because the rulemaking will not have a substantial adverse impact on jobs or employment opportunities.

The proposed rule will change the methodology for setting Medicaid rates for specialty hospitals licensed by OPWDD to make use of more current cost information, to establish appeal thresholds, and to limit grounds for appeals to vacancies. The operating components of the Specialty Hospital rate are based, in part, on 1987 budget costs. The new methodology will base rates on actual 2008 costs. Appeals will be limited to vacancy appeals and there will be a loss threshold of \$5,000. In addition, if the specialty hospital resubmits its cost report for a rate appeal period after OPWDD notified the hospital of an appeal outcome, the hospital will not be entitled to an increase in the appeal award based on the resubmitted cost data.

Using actual costs from 2008 to establish rates will not result in a loss of jobs or employment opportunities because the change will essentially only eliminate reimbursement the specialty hospital was receiving in excess of its actual costs. Since the specialty hospital will receive funding based on its actual spending, including actual spending on salaries and benefits, the new rates will reimburse the hospital for its staff costs.

The changes regarding appeals should not result in a decrease of more than 100 full time annual jobs or employment opportunities. Because the specialty hospital will no longer be able to submit appeals for unlimited reasons, and will no longer be able to revise cost reports to increase revenue, it will no longer be able to simply spend more than its revenues and look to OPWDD for compensation. However, as with the use of 2008 cost data, this will not affect existing jobs, because it will not affect existing revenue. It may limit new employment opportunities because the specialty hospital cannot expect that OPWDD will reimburse it for any and all additional spending on staff. However, the specialty hospital has not submitted rate appeals for many years, and OPWDD estimates that it would not have hired more than 100 full time annual employees if this unlimited right to appeal remained in place.

The change establishing a threshold for appeals will not result in a loss of over 100 full time jobs, because the change will only eliminate appeals for under \$5,000, and no full time annual job costs under \$5,000.

---

## Public Service Commission

---

### EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### Commission Adopted an Order to Grant in Whole or in Part on an Emergency Basis, the Transfer of Property Petition

**I.D. No.** PSC-16-11-00005-EP

**Filing Date:** 2011-04-05

**Effective Date:** 2011-04-05

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Proposed Action:** The Public Service Commission adopted an order approving, on an emergency basis, the petition on behalf of Central Hudson Gas & Electric Corporation seeking Commission approval pursuant to Public Service Law section 70 to transfer certain property and property rights located in the City of Poughkeepsie to the State of New York, acting by and through the New York State Office of Parks, Recreation and Historic Preservation (OPRHP), which is required to receive Federal funding to complete the Walkway Over the Hudson project and contribute to the economic development and general welfare of Central Hudson's service territory.

**Statutory authority:** Public Service Law, section 70

**Finding of necessity for emergency rule:** Preservation of general welfare.

**The specific reasons underlying the finding of necessity, above, are as follows:** The Public Service Commission approved, on an emergency basis, the petition on behalf of Central Hudson Gas & Electric Corporation seeking Commission approval pursuant to Public Service Law Section 70 to transfer certain property and property rights located in the City of Poughkeepsie to the State of New York, acting by and through the New York State Office of Parks, Recreation and Historic Preservation (OPRHP), which is required to receive Federal funding, complete the

Walkway Over the Hudson project and contribute to the economic development and general welfare of Central Hudson's service territory.

**Subject:** Commission adopted an order to grant in whole or in part on an emergency basis, the transfer of property petition.

**Purpose:** The Commission adopted an order to grant in whole or in part on an emergency basis, the transfer of property petition.

**Substance of proposed rule:** The Public Service Commission adopted an order approving, on an emergency basis, the petition on behalf of Central Hudson Gas & Electric Corporation seeking Commission approval pursuant to Public Service Law Section 70 to transfer certain property and property rights located in the City of Poughkeepsie to The State of New York, acting by and through the New York State Office of Parks, Recreation and Historic Preservation (OPRHP), which is required to receive Federal funding to complete the Walkway Over the Hudson project and contribute to the economic development and general welfare of Central Hudson's service territory.

**This notice is intended:** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire July 3, 2011.

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

**Data, views or arguments may be submitted to:** Jaclyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.state.ny.us

**Public comment will be received until:** 45 days after publication of this notice.

#### Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

#### Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

#### Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

#### Job Impact Statement

A job impact statement is not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(11-M-0101EP2)

### PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### Rehearing of the Approval of the Transfer of Ownership of the Seneca Lake Gas Storage Facility

**I.D. No.** PSC-16-11-00006-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** The Commission is considering a petition from New York State Electric & Gas Corporation requesting rehearing of the approval of the transfer of the Seneca Lake Gas Storage Facility and related equipment to Inergy Midstream LLC.

**Statutory authority:** Public Service Law, section 70

**Subject:** Rehearing of the approval of the transfer of ownership of the Seneca Lake Gas Storage Facility.

**Purpose:** Consideration of rehearing of the approval of the transfer of ownership of the Seneca Lake Gas Storage Facility.

**Substance of proposed rule:** The Public Service Commission is considering a petition from New York State Electric & Gas Corporation (NYSEG) filed on March 31, 2011 requesting rehearing of certain conditions attending the approval of the transfer of the Seneca Lake Gas Storage Facility, related gas pipelines and appurtenant equipment from NYSEG to Inergy Midstream LLC (Inergy) and certain of its affiliates. The approval upon conditions was granted in an Order issued March 4, 2011 in Case 10-M-0143. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany,

New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

**Data, views or arguments may be submitted to:** Jaclyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.state.ny.us

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(10-M-0143SP2)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Transfer of Ownership of a Generation Facility and Gas Pipeline from Standard to Alliance**

**I.D. No.** PSC-16-11-00007-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** The Commission is considering a petition requesting approval of the transfer of ownership of a 49.3 MW generation facility and a.2 mile gas pipeline from Standard Power LLC (Standard) to Alliance Energy, New York LLC (Alliance).

**Statutory authority:** Public Service Law, sections 2(11), 5(1)(b) and 70

**Subject:** Transfer of ownership of a generation facility and gas pipeline from Standard to Alliance.

**Purpose:** Consideration of the transfer of ownership of a generation facility and gas pipeline from Standard to Alliance.

**Substance of proposed rule:** The Public Service Commission is considering a petition filed on March 28, 2011 requesting approval of the transfer of ownership of a 49.3 MW generation facility, a.2 mile gas pipeline, and related equipment and real property located in the City of Binghamton from Standard Power LLC (Standard) to Alliance Energy, New York LLC (Alliance). The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

**Data, views or arguments may be submitted to:** Jaclyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.state.ny.us

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(11-M-0117SP1)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Water Rates and Charges**

**I.D. No.** PSC-16-11-00008-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** The Public Service Commission is considering a request from Dutchess Estates Water Company, Inc. to increase its annual revenue by about \$14,727 or 24%; and implement a surcharge of \$21 per customer per quarter effective July 1, 2011.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10)

**Subject:** Water rates and charges.

**Purpose:** For approval to increase annual revenue by \$14,727 or 24%, and establish a surcharge of \$21 per customer per quarter.

**Substance of proposed rule:** On March 29, 2011, Dutchess Estates Water Co. Inc. (Dutchess or the Company) filed tariff amendments (13th Revised Leaf No. 18 and Surcharge Statement No.2) to its tariff PSC No. 1—Water to become effective July 1, 2011. The company is requesting to be allowed to increase its base rates by approximately 24% which would produce an increase in annual base rate revenues of approximately \$14,727. The company is also requesting to be allowed to bill its customers a surcharge of \$21.00 per customer per quarter for a one year period. The proposed surcharge would generate about \$10,000 which would be used to pay for an engineering study to examine the condition of the system and produce a plan to make needed improvements (some of which are being required by the Dutchess County Department of Health) in a cost effective manner.

Dutchess provides flat rate water service to 119 residential customers located in a real estate development known as Dutchess Estates in the Town of Hyde Park, Dutchess County. No fire service is provided.

The company's tariff and the pending rate increase request will be available online on the Commission's web site on the World Wide Web ([www.dps.state.ny.us](http://www.dps.state.ny.us)) located under Commission (Documents-Tariffs). The Commission may approve or reject, in whole or in part, or modify the company's rates.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

**Data, views or arguments may be submitted to:** Jaclyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530, email: secretary@dps.state.ny.us

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(11-W-0120SP1)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Flexibility on Measure Types, Pre-Screening for Cost-Effectiveness, Rebate/Incentive Levels and Changes to the Technical Manual**

**I.D. No.** PSC-16-11-00009-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** The Commission is considering whether to adopt, in whole or in part, Department of Public Service Staff proposals to increase flexibility in the administration of Energy Efficiency Portfolio Standard (EEPS) programs.

**Statutory authority:** Public Service Law, sections 4(1), 5(2) and 66(1)

**Subject:** Flexibility on measure types, pre-screening for cost-effectiveness, rebate/incentive levels and changes to the Technical Manual.

**Purpose:** To encourage energy conservation and facilitate cost-effective programs under the Energy Efficiency Portfolio Standard.

**Substance of proposed rule:** The Commission is considering whether to adopt, in whole or in part, to reject, or to take any other action with respect to the following proposals of the Staff of the Department of Public Service to increase flexibility in the administration of Energy Efficiency Portfolio Standard (EEPS) programs:

Types of Measures

1. The many approved EEPS programs should be organized into 27 Classification Groups, as follows:

1. Residential Electric Installation/Rebate Programs
2. Residential Electric Bounty/Recycling Programs
3. Residential Electric Insulation, Exterior Shell Programs
4. Low Income Residential Electric Installation/Rebate Programs
5. Residential Gas Installation/Rebate Programs
6. Residential Gas Insulation, Exterior Shell Programs
7. Low Income Gas Electric Installation/Rebate Programs
8. Low Income Residential Gas Insulation, Exterior Shell Programs

9. Residential Behavior Modification Programs
10. Multifamily Electric Installation/Rebate Programs
11. Multifamily Electric Bounty/Recycling Programs
12. Multifamily Electric Insulation, Exterior Shell Programs
13. Multifamily Electric Custom Measures Programs
14. Low Income Multifamily Electric Installation/Rebate Programs
15. Multifamily Gas Installation/Rebate Programs
16. Multifamily Gas Insulation, Exterior Shell Programs
17. Low Income Multifamily Gas Installation/Rebate Programs
18. Low Income Multifamily Gas Insulation, Exterior Shell Programs
19. Agricultural Electric Installation/Rebate Programs
20. C&I Electric Installation/Rebate Programs
21. C&I Electric Custom Measures Programs
22. C&I Gas Installation/Rebate Programs
23. C&I Gas Insulation, Exterior Shell Programs
24. Large Industrial Electric Custom Measures Programs
25. Large Industrial Gas Installation/Rebate Programs
26. Large Industrial Gas Insulation, Exterior Shell Programs
27. Large Industrial Gas Custom Measures Programs

2. The many EEPS programs should be organized into the Classification Groups in the manner shown in a table entitled "Energy Efficiency Portfolio Program - Classification Groups" dated April 5, 2011. Said table also contains a list of energy efficiency measures for each Classification Group. The Table is too voluminous to be printed here and is available from the New York State Department of Public Service.

3. In administering a program within a Classification Group, the program administrator should be given flexibility to offer any measure on the list of energy efficiency measures established for the Classification Group (subject to the required pre-screening of measures for cost-effectiveness).

4. The measures listed as "Discontinue" should be discontinued by the program administrators.

5. Over time, any amendment to the lists of energy efficiency measures established for each Classification Group should be made by the Commission.

#### Pre-screening of Measures for Cost-Effectiveness

1. To ensure cost-effective investments on behalf of ratepayers, the Commission has required that every energy efficiency measure be pre-screened to ensure that it will likely be cost-effective. Approval by the Commission of a list of measures for a program does not constitute either "pre-screening" or "pre-qualification". Each measure must achieve a resource benefit/cost ratio of at least one (1.0). Each program's implementation protocols should include a total resource cost (TRC) ratio pre-screening analysis at both the site-specific measure level and project level. Both analyses should include a CO<sub>2</sub> adder and use of Commission-approved Long Run Avoided Costs (LRACs), Staff methodologies and the "Technical Manual" (New York Standard Approach for Estimating Energy Savings from Energy Efficiency Programs). The project level analysis should add a factor to represent pro rata program costs, including evaluation, measurement and verification costs. For utilities, the project level analysis should also add a factor to represent pro rata utility shareholder energy efficiency incentives as a resource cost. For NYSEDA, the project level analysis should also add a factor to represent pro rata New York State Cost Recovery Fees as a resource cost. The current rule should be clarified that the pre-screening analysis that must be performed by the program administrators for all measures must be documented in auditable records maintained on file by the program administrators and available for audit by Staff at any time such that if Staff audits the records and has concerns about the cost-effectiveness of a measure and the difference cannot be resolved, either party may refer the issue to the Commission for resolution.

2. The current rule for custom measures is that the pre-screening analysis must be provided to Staff, but the analyses need not be reviewed and approved by Staff prior to implementation. The current rule should be changed so that the pre-screening analysis for custom measures need not be provided to Staff so long as it is documented in auditable records maintained on file by the program administrators and available for audit by Staff at any time.

3. Measures (including some custom measures) that are likely to be cost-effective in most applications based on typical costs and savings in a service territory can be pre-qualified such that a new measure analysis need not be undertaken in every instance. Originally, pre-qualifications had to be approved by the Commission. Pre-qualified measures were identified in various Commission orders where the orders note the measures are likely to achieve a TRC ratio of at least 1.0 under most conditions, either statewide or on a locational basis. The current rule is that program administrators may pre-qualify measures on their own so long as the same methods and criteria employed by Staff in its benefit/cost analyses are used. To implement a pre-qualification, a program administrator is required to provide Staff with its benefit/cost calculations and

documentation of costs and savings estimates. If Staff has concerns about the cost-effectiveness of a measure and the difference cannot be resolved, either party may refer the issue to the Commission for resolution. The current rule should be clarified that the analyses need not be reviewed and approved by Staff prior to implementation. The current rule should also be clarified that "provided to Staff" means a written document provided to the Director of the Office of Energy Efficiency & Environment including an "active" spreadsheet of calculations showing the full formulas and values used.

4. Pre-screening is not required if the measures fall under the multifamily "extremely low cost or incidental" exemption from Total Resource Cost (TRC) analysis. Under the current rule, Program Administrators should provide Staff with a list of planned extremely low-cost measures with estimates and documentation of their costs per multifamily dwelling unit, forecast how many such measures might apply to a multifamily dwelling unit, and cap such expenditures per multifamily dwelling unit. The current rule should be clarified so that the exemption also applies to "extremely low cost or incidental" measures in non-multifamily programs. Program Administrators should provide Staff with a list of planned extremely low-cost measures with estimates and documentation of their costs per project (per unit for projects with more than one dwelling or commercial unit per project), forecast how many such measures might apply to a project (per unit for projects with more than one dwelling or commercial unit per project), and cap such expenditures per project (per unit for projects with more than one dwelling or commercial unit per project). Extremely low-cost measures should be limited to \$15 per extremely low-cost measure and \$50 per project (per unit for projects with more than one dwelling or commercial unit per project). The current rule should also be clarified that "provided to Staff" means a written document provided to the Director of the Office of Energy Efficiency & Environment. If the Director of the Office of Energy Efficiency & Environment has concerns about the implementation of this rule and the difference cannot be resolved, either party may refer the issue to the Commission for resolution.

#### Rebate/Incentive Levels

1. The Commission has in many instances approved specific rebate/incentive levels for specific measures on a program specific basis. For custom measures, the Commission has not approved specific rebate/incentive levels. For "Fast Track" residential electric and gas heating, ventilation and air conditioning (HVAC) appliance rebate programs, the Commission has mandated the use of uniform rebate levels on a Statewide basis. The current rule is that all program administrators, including NYSEDA, are allowed to make adjustments in energy efficiency program or measure rebate/incentive levels of up to plus or minus 20% of Commission-approved levels. Utilities and NYSEDA may propose such reallocations by providing to Staff such information as Staff requires and such adjustments may be implemented if the Director of the Office of Energy Efficiency & Environment certifies that such adjustments (a) do not result in net reductions in aggregate energy savings; (b) make efficient use of ratepayer funds; and (c) do not appear to be detrimental in any other manner to the EEPS program. The current rule should be modified so that no approval is required for any decrease so long as the decrease is applied similarly to all customers and if the Director of the Office of Energy Efficiency & Environment is provided written notification of the change (no review or approval by the Director of the Office of Energy Efficiency & Environment would be needed to implement the change). The current rule should be also be modified so that the downward 20% cap is eliminated. There should be no limit on downward adjustments.

2. The current rule should be clarified to make it clear that the flexibility to make adjustments in energy efficiency program or measure rebate/incentive levels of up to plus 20% with no limit on downward adjustments also applies to the "Fast Track" residential electric and gas HVAC programs and that Statewide uniformity in rebate levels will yield to the need for flexibility in the manner provided by the Commission.

#### Improvements to the Technical Manual

1. The Director of the Office of Energy Efficiency & Environment (OEEE Director) should be authorized by the Commission to make substantive consensus modifications to the "Technical Manual" (entitled "New York Standard Approach for Estimating Energy Savings from Energy Efficiency Programs") to improve the accuracy and appropriateness of the standardized energy savings estimation approaches, calculations and assumptions at the measure level contained therein, as well as to add estimation approaches for new measures, according to the following process:

(a) The exact text of the intended modifications shall be presented in writing to the members of the Implementation Advisory Group (IAG) consisting of designated representatives of all program administrators. A copy shall be provided to members of the Evaluation Advisory Group (EAG).

(b) The IAG and EAG shall be afforded a reasonable opportunity to



review the intended modifications and to advise the OEEE Director as to the proposal.

(c) If any member of the IAG objects to the intended modifications by making a written objection to the OEEE Director within a reasonable period of time established by the OEEE Director for the receipt of objections, the intended modifications may not be implemented without referral to and approval by the Commission.

(d) If no member of the IAG makes a written objection to the intended modifications within a reasonable period of time established by the OEEE Director for the receipt of objections, the intended modifications may be implemented by the OEEE Director, without referral to and approval by the Commission, by filing the exact text of the modifications with the Secretary to the Commission in Case 07-M-0548 and by posting an update or supplement to the Technical Manual on the Commission's website.

(e) Nothing herein shall restrict any party from petitioning the Commission at any time for a redress of grievances regarding the Technical Manual.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, NY 12223-1350, (518) 486-2655, email: [leann\\_ayer@dps.state.ny.us](mailto:leann_ayer@dps.state.ny.us)

**Data, views or arguments may be submitted to:** Jaclyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: [secretary@dps.state.ny.us](mailto:secretary@dps.state.ny.us)

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(07-M-0548SP34)

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Energy Efficiency Portfolio Standard

**I.D. No.** PSC-16-11-00010-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** The Commission is considering an April 6, 2010 petition submitted in Case 08-G-1015 by Niagara Mohawk Power Corporation seeking recovery of incremental costs associated with the company's Energy Efficiency Portfolio Standard (EEPS) programs.

**Statutory authority:** Public Service Law, sections 4(1), 5(2) and 66(1)

**Subject:** Energy Efficiency Portfolio Standard.

**Purpose:** To promote gas and electricity energy conservation programs in New York.

**Substance of proposed rule:** The Commission is considering whether to adopt, modify, or reject, in whole or in part, or to take other action regarding a petition submitted on April 10, 2010 by Niagara Mohawk Power Corporation d/b/a National Grid in Case 08-G-1015. The petition seeks to recover approximately \$3 million in incremental cost associated with the company's "Fast Track" Residential Heating, Water Heating, and Controls Program.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: [leann\\_ayer@dps.state.ny.us](mailto:leann_ayer@dps.state.ny.us)

**Data, views or arguments may be submitted to:** Jaclyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: [Secretary@dps.state.ny.us](mailto:Secretary@dps.state.ny.us)

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(07-M-0548SP36)

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Energy Efficiency Portfolio Standard

**I.D. No.** PSC-16-11-00011-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** The Commission is considering petitions from various utility program administrators seeking clarification, rehearing and/or modifications to the Commission's order issued October 18, 2010 in Cases 07-M-0548 et al.

**Statutory authority:** Public Service Law, sections 4(1), 5(2) and 66(1)

**Subject:** Energy Efficiency Portfolio Standard.

**Purpose:** To promote gas and electricity energy conservation programs in New York.

**Substance of proposed rule:** The Commission is considering whether to adopt, modify, or reject, in whole or in part, or to take other action regarding petitions submitted by: 1) Consolidated Edison Company of New York, Inc. (Con Edison) and Orange and Rockland Utilities, Inc. (O&R); Central Hudson Gas & Electric Corporation (Central Hudson); and Niagara Mohawk Power Corporation d/b/a National Grid, The Brooklyn Union Gas Company d/b/a National Grid NY and KeySpan Gas East Corporation d/b/a National Grid (National Grid companies) on November 17, 2010 in Case 07-M-0548 et al. The petitions seek clarification, rehearing and/or modifications to the Commission's order issued October 18, 2010.

Con Edison/O&R seek rehearing and modification of the equivalent full load hours (EFLHs) for room air conditioners. Con Edison/O&R also seek clarification regarding various issues related to energy savings calculations. Central Hudson requests that the consolidated Technical Manual be used to recalculate savings targets for existing programs and requests that the effective-useful-life values be restored to the technical manual as soon as possible. The National Grid companies seek Commission approval to use the consolidated Technical Manual to calculate energy savings from certain 2010 Energy Efficiency Portfolio Standard (EEPS) programs and clarification of certain alleged inconsistencies and omissions with the consolidated Technical Manual.

The Commission is also considering whether and how the relief sought in these petitions is applied to all other EEPS programs.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: [leann\\_ayer@dps.state.ny.us](mailto:leann_ayer@dps.state.ny.us)

**Data, views or arguments may be submitted to:** Jaclyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: [Secretary@dps.state.ny.us](mailto:Secretary@dps.state.ny.us)

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(07-M-0548SP35)

## Office of Temporary and Disability Assistance

### EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### Standard Allowances for the Food Stamp Program

**I.D. No.** TDA-16-11-00004-EP

**Filing No.** 310

**Filing Date:** 2011-03-31

**Effective Date:** 2011-04-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Proposed Action:** Amendment of section 387.12(f)(3)(v)(a), (b) and (c); and addition of section 387.12(f)(3)(v)(d) to Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d) and 95; 7 USC section 2014(e)(6)(C); and 7 CFR section 273.9(d)(6)(iii)

**Finding of necessity for emergency rule:** Preservation of public health and general welfare.

**Specific reasons underlying the finding of necessity:** If the regulatory amendments setting forth the federally-approved standard allowances for the food stamp program are not implemented as of April 1, 2011, applicants and recipients of food stamp benefits potentially could be subject to an extended period of food stamp recoupments at the rate of 10% of their monthly food stamp benefits to recover the resulting overpayment of food stamp benefits. Approximately 344,000 food stamp households throughout New York State could be affected. Such recoupments would constitute hardships to these households and impact their ability to purchase needed food, for as long as the recoupment is in effect. These regulatory amendments are necessary to set forth the federally-approved standard allowances as of April 1, 2011 and to help prevent future recoupments and hardships.

Further, as the State is currently prevented from implementing the federally mandated adjustment to the standard allowances placing the State out of compliance with federal statutory and regulatory requirements, the State option to use the standard allowance in lieu of actual shelter expenses does not have the required approval of the United States Department of Agriculture. Without federal approval of this State option, the State may be forced to use the actual shelter expenses of each individual food stamp household. This would require all 58 local social services districts in New York State to call all 1.6 million food stamp households into their district offices to provide verification of actual shelter expenses. This would create a tremendous burden on both local districts and recipient households. In addition, as actual shelter expenses are generally significantly less than the standard allowances, food stamp households would have a much smaller shelter deduction resulting in a sizeable reduction in their food stamp benefits. This reduction in food stamp benefits for the approximately 1.6 million food stamp households would result in significant harm to the welfare as well as the health of these households.

**Subject:** Standard Allowances for the Food Stamp Program.

**Purpose:** These regulatory amendments are necessary to set forth the federally approved standard allowances as of April 1, 2011 and to clarify the Office of Temporary and Disability Assistance's process for periodically reviewing and updating the standard allowances.

**Text of emergency/proposed rule:** Clauses (a), (b) and (c) of subparagraph (v) of paragraph (3) of subdivision (f) of section 387.12 of Title 18 NYCRR are amended to read as follows:

(a) The standard allowance for heating/cooling consists of the costs for heating and/or cooling the residence, electricity not used to heat or cool the residence, cooking fuel, sewage, trash collection, water fees, fuel for heating hot water and basic service for one telephone. The standard allowance for heating/cooling is available to households which incur heating and/or cooling costs separate and apart from rent and are billed separately from rent or mortgage on a regular basis for heating and/or cooling their residence, or to households entitled to a Home Energy Assistance Program (HEAP) payment or other Low Income Home Energy Assistance Act (LIHEAA) payment. A household living in public housing or other rental housing which has central utility meters and which charges the household for excess heating or cooling costs only is not entitled to the

standard allowance for heating/cooling unless they are entitled to a HEAP or LIHEAA payment. Such a household may claim actual costs which are paid separately. Households which do not qualify for the standard allowance for heating/cooling may be allowed to use the standard allowance for utilities or the standard allowance for telephone. *As of April 1, 2011, but subject to subsequent adjustments as required by the United States Department of Agriculture ("USDA"), the standard allowance for heating/cooling for food stamp applicant and recipient households residing in New York City is \$718; for households residing in either Suffolk or Nassau Counties, it is \$669; and for households residing in any other county of New York State, it is \$593.*

(b) The standard allowance for utilities consists of the costs for electricity not used to heat or cool the residence, cooking fuel, sewage, trash collection, water fees, fuel for heating hot water and basic service for one telephone. It is available to households billed separately from rent or mortgage for one or more of these utilities other than telephone. The standard allowance for utilities is available to households which do not qualify for the standard allowance for heating/cooling. Households which do not qualify for the standard allowance for utilities may be allowed to use the standard allowance for telephone. *As of April 1, 2011, but subject to subsequent adjustments as required by the USDA, the standard allowance for utilities for food stamp applicant and recipient households residing in New York City is \$284; for households residing in either Suffolk or Nassau Counties, it is \$263; and for households residing in any other county of New York State, it is \$240.*

(c) The standard allowance for telephone consists of the cost for basic service for one telephone. The standard allowance for telephone is available to households which do not qualify for the standard allowance for heating/cooling or the standard allowance for utilities. *As of April 1, 2011, but subject to subsequent adjustment as required by the USDA, the standard allowance for telephone for all food stamp applicant and recipient households residing in New York State is \$33.*

Clause (d) is added to subparagraph (v) of paragraph (3) of subdivision (f) of section 387.12 of Title 18 NYCRR to read as follows:

*(d) ODTA must review the standard utility allowances annually, or at such time as otherwise directed by the USDA, and make adjustments to reflect changes in costs subject to the approval and direction of the USDA. Households whose food stamp benefits are reduced due to such changes shall receive notification of the changes in accordance with section 358-3.3 of this Title.*

**This notice is intended:** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire June 28, 2011.

**Text of rule and any required statements and analyses may be obtained from:** Jeanine Stander Behuniak, New York State Office of Temporary and Disability Assistance, 40 North Pearl Street, Floor 16C, Albany, New York 12243-0001, (518) 474-9779, email: Jeanine.Behuniak@otda.state.ny.us

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

**This action was not under consideration at the time this agency's regulatory agenda was submitted.**

#### Regulatory Impact Statement

##### 1. Statutory authority:

Federal statute at 7 USC § 2014(e)(6)(C) provides that in computing shelter expenses for budgeting under the federal Supplemental Nutrition Assistance Program (SNAP), known as the Food Stamp Program in New York State, a State agency may use a standard utility allowance as provided in federal regulations.

Federal regulation at 7 CFR § 273.9(d)(6)(iii) provides for standard utility allowances in accordance with SNAP. Clause (A) of this subparagraph states that with federal approval from the Food and Nutrition Services (FNS) of the United States Department of Agriculture, a State agency may develop standard utility allowances to be used in place of actual costs in calculating a household's excess shelter deduction. Federal regulations allow for the following types of standard utility allowances: a standard utility allowance for all utilities that includes heating or cooling costs; a limited utility allowance that includes electricity and fuel for purposes other than heating or cooling, water, sewerage, well and septic tank installation and maintenance, telephone, and garbage or trash collection; and an individual standard for each type of utility expense. Clause (B) of the subparagraph provides that a State agency must review the standard utility allowances annually and make adjustments to reflect changes in costs, rounded to the nearest whole dollar. Also State agencies must provide the amounts of the standard utility allowances to the FNS when they are changed and submit methodologies used in developing and updating the standard utility allowances to the FNS for approval whenever the methodologies are developed or changed.

Social Services Law (SSL) § 20(3)(d) authorizes the New York State Office of Temporary and Disability Assistance (OTDA) to promulgate regulations to carry out its powers and duties.

SSL § 95 authorizes OTDA to administer the Food Stamp Program in New York State and to perform such functions as may be appropriate, permitted or required by or pursuant to federal law.

2. Legislative objectives:

It was the intent of the Legislature to provide food stamp households allowances to address their utility needs and thus to better reflect their shelter expenses in the computation of household income.

3. Needs and benefits:

The regulatory amendments, in part, set forth the standard utility allowances within New York State as of April 1, 2011. OTDA has all required approvals from the FNS pertaining to these amounts and is required to apply these allowances in its food stamp budgeting effective April 1, 2011. As of April 1, 2011, OTDA no longer has federal approval to apply past standard utility allowances in its prospective food stamp budgeting.

The regulatory amendments also set forth OTDA's current process for periodically reviewing and updating the standard utility allowances. OTDA's process is consistent with federal requirements.

It is of great importance that the federally approved standard utility allowances are applied effective April 1, 2011 and thereafter. If past standard utility allowances were used in calculating ongoing food stamp benefits, thousands of food stamp households would receive food stamp overpayments each month. Households receiving overpayments could be subject to an extended period of food stamp recoupments at the rate of 10% of their monthly food stamp benefits until the resulting overpayment of food stamp benefits is recovered. Approximately 344,000 food stamp households throughout New York State could be affected. Such recoupments would constitute hardships to these households and impact their ability to purchase needed food, for as long as the recoupment is in effect. Thus it was necessary for the preservation of the public health and the general welfare to set forth the federally-approved standard utility allowances as of April 1, 2011 in order to ensure compliance with federal requirements and to help prevent future recoupments and hardships for food stamp households.

4. Costs:

The amendments will not result in any impact to the State financial plan because food stamp benefits are 100 percent federally funded, and these amendments comply with federal statute and regulation to implement federally approved standard utility allowances.

5. Local government mandates:

The amendments do not impose any mandates upon local social services districts (local districts) since the amendments simply set forth the federally-approved standard utility allowances, effective April 1, 2011, and clarify OTDA's current process for periodically reviewing and updating the standard utility allowances. Also it is noted that the calculation of food stamp budgets, which incorporates the standard utility allowances, and the resulting issuances of food stamp benefits are mostly automated processes in New York City and the rest of the State using OTDA's Welfare Management System.

6. Paperwork:

The amendments do not impose any new forms or new reporting requirements upon the State or the local districts.

7. Duplication:

The amendments do not conflict with any existing State or federal statutes or regulations.

8. Alternatives:

One alternative is not to update State regulations to set forth existing standard utility allowances. However, this alternative is not a viable option because if the State were prevented from implementing the federally-mandated adjustment to the standard utility allowances placing the State out of compliance with federal statutory and regulatory requirements, the State option to use the standard utility allowance in lieu of actual shelter expenses would not have the required approval of the FNS. Without federal approval of this State option, the State may be forced to use the actual shelter expenses of each individual food stamp household. This would require all 58 local social services districts in New York State to have approximately 1.6 million food stamp households provide verification of the actual utility cost portion of their shelter expenses. This would create a tremendous burden on both local districts and recipient households. In addition, as the actual utility cost portion of the shelter expenses are generally significantly less than the standard utility allowances, most food stamp households would have a much smaller shelter deduction resulting in a sizeable reduction in their food stamp benefits. This reduction in food stamp benefits would affect most of the 1.6 million food stamp households and result in significant harm to the welfare as well as the health of these households.

9. Federal standards:

The amendments do not conflict with any federal standards.

10. Compliance schedule:

Since the amendments provide the federally-approved standard utility allowances effective April 1, 2011, and set forth OTDA's current process for periodically reviewing and updating the standard utility allowances, the State and all local districts are in compliance with the amendments.

**Regulatory Flexibility Analysis**

1. Effect of Rule:

The amendments will have no effect on small businesses. The amendments will not impose any mandates upon local districts since the amendments simply set forth existing standard utility allowances, effective April 1, 2011, and OTDA's current process for periodically adjusting these allowances as required by federal regulation.

2. Compliance Requirements:

The amendments do not impose any reporting, recordkeeping or other compliance requirements on the local districts.

3. Professional Services:

The amendments do not require the local districts to hire additional professional services to comply with the new regulations, which simply set forth existing standard utility allowances and OTDA's current process for adjusting these allowances. It is noted that the calculation of food stamp budgets and the resulting issuances of food stamp benefits are mostly automated processes in New York City and the rest of the State using OTDA's Welfare Management System.

4. Compliance Costs:

The amendments do not impose initial costs or any annual costs upon the local districts because food stamp benefits are 100 percent federally funded, and these amendments comply with federal statute and regulation to implement federally approved standard utility allowances.

5. Economic and Technological Feasibility:

All local districts have the economic and technological ability to comply with these regulations.

6. Minimizing Adverse Impact:

The amendments will not have an adverse impact on local districts.

7. Small Business and Local Government Participation:

OTDA previously had conversations with the local districts concerning the adjustments of the standard utility allowances. On February 15, 2011, OTDA provided General Information System (GIS) releases, GIS 11 TA/DC004, to Upstate New York and New York City setting forth the required adjustments to the standard utility allowances for the Food Stamp Program. The local districts have not raised any concerns or objections related to the standard utility allowances set forth in the GIS releases.

**Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas:

The amendments do not impose any mandates on the forty-four rural social services districts (rural districts) in the State, since the amendments simply provide the existing standard utility allowances, effective April 1, 2011, and set forth OTDA's current process for periodically adjusting these allowances as required by federal regulation.

2. Reporting, recordkeeping and other compliance requirements; and professional services:

The amendments do not impose any reporting, recordkeeping or other compliance requirements on the rural districts. Also the rural districts do not need to hire additional professional services to comply with the proposed regulations. It is noted that the calculation of food stamp budgets, which incorporate the standard utility allowances, and the resulting issuances of food stamp benefits are mostly automated processes in New York City and the rest of the State using OTDA's Welfare Management System.

3. Costs:

The amendments will not impose initial capital costs or any annual costs upon the rural districts because food stamp benefits are 100 percent federally funded, and these amendments comply with federal statute and regulation to implement federally approved standard utility allowances.

4. Minimizing adverse impact:

The proposed amendments will not have an adverse impact on the rural districts.

5. Rural area participation:

OTDA previously had conversations with rural districts concerning the adjustments of the standard utility allowances. On February 15, 2011, OTDA provided General Information System (GIS) releases, GIS 11 TA/DC004, to Upstate New York and New York City setting forth the required adjustments to the standard utility allowances for the Food Stamp Program. The rural districts have not raised any concerns or objections related to the standard utility allowances set forth in the GIS release.

**Job Impact Statement**

A Job Impact Statement is not required for the proposed amendments. It is apparent from the nature and the purpose of the proposed amendments that they will not have a substantial adverse impact on jobs and employment opportunities. The proposed amendments will not affect in any real way the jobs of the workers in the social services districts. These regula-



tory amendments are necessary to set forth the federally approved standard allowances for the Food Stamp Program as of April 1, 2011 and to clarify the Office of Temporary and Disability Assistance's process for periodically reviewing and updating the standard allowances. It is noted that the calculation of food stamp budgets, which incorporates the standard allowances, and the resulting issuances of food stamp benefits are mostly automated processes in New York City and the rest of the State using OTDA's Welfare Management System. Thus the changes will not have any adverse impact on jobs and employment opportunities in the State.