

# RULE REVIEW

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## Office for People with Developmental Disabilities

The NYS Office for People With Developmental Disabilities (OPWDD) published in the January 4, 2012 issue of the State Register a Public Notice of the Five-Year Rule in satisfaction of the requirements of the State Administrative Procedure Act (SAPA) section 207. The purpose of this Notice was to identify and discuss OPWDD rule makings finalized during calendar years 1997, 2002, and 2007 which are subject to the cited SAPA section 207 five-year review of rules.

During calendar year 1997, OPWDD finalized nine rules. Five of these were proposed and adopted as consensus rulemakings and are, therefore, exempted from the review requirements by subdivision (5) of SAPA section 207. The remaining four rulemakings finalized during 1997 were identified and described as follows at the time the respective notices were first published in the State Register:

97-1.MRD-03-97-00003-A (State Register of 9/10/97). Amendments to 14 NYCRR sections 635-10.5 (Home and Community-Based Waiver Services), 671.7 (Home and Community-Based Waiver Community Residential Habilitation Services), 680.12 (Specialty Hospitals), 681.12 (Intermediate Care Facilities for persons with developmental disabilities), and 690.7 (Day Treatment Services for persons with developmental disabilities). These amendments establish trend factors to be applied (beginning January 1, 1997) within the context of the various rate/fee setting methodologies. Although specific trend factors are calculated annually, they are cumulative. These amendments need to be maintained, without modification, to define how OPWDD establishes current rates/fees of reimbursement for the affected facilities or services. The amendments to section 681.12 have been subsequently moved to section 681.14 and all of section 681.12 was repealed. Current section 681.14 contains this amendment which needs to be maintained, without modification, to define how OPWDD establishes current rates of reimbursement for ICF/DD facilities.

97-2.MRD-15-97-00023-A (State Register of 7/25/97). Amendments to 14 NYCRR section 671.7. The purpose of these amendments was to establish a revised fee calculation add-on for voluntary agency operators of home and community-based (HCBS) waiver community residential habilitation services. Due to a change in rate methodology, these amendments have since been repealed as they are outdated and no longer necessary.

97-3.MRD-28-97-00034-A (State Register of 9/24/97). Amendments to 14 NYCRR section 681.12 - Rate Setting and Financial Reporting for voluntary agency operated Intermediate Care Facilities for persons with developmental disabilities. The amendments revise the method of calculating reimbursement for ICF/DD facilities by adding a transportation component to the ICF/DD rate when a consumer's active treatment needs and individual program plan require a day service to which transportation is necessary. The amendments to section 681.12 have been subsequently superseded by section 681.14 and all of section 681.12 was repealed. Current section 681.14 contains the transportation component as it is still part of the ICF/DD rates and therefore these amendments must be maintained without modification.

97-4.MRD-41-97-00006-A (State Register of 12/24/97). Amend-

ments to 14 NYCRR section 671.7 - Reimbursement and fiscal reporting for voluntary agency operated providers of home and community-based (HCBS) waiver community residential habilitation services. The purpose of these amendments was to provide a one percent trend factor for these operators of community residences, and to structure the fees of reimbursement for the affected fee periods so that the amendments would result in the equivalent of a one percent increase when annualized. Due to a change in rate methodology, these amendments have since been repealed as they are outdated and no longer necessary.

During calendar year 2002, OPWDD adopted ten rules. These ten rulemakings were identified and described as follows at the time the respective notices were published in the State Register:

02-1.MRD-03-02-0005-A (State Register of 3/20/02). Amendment of section 681.11 of Title 14 NYCRR- Rate setting and financial reporting in voluntary agency operated intermediate care facilities for persons with developmental disabilities (ICF/DD). The amendments institute an additional subsequent (i.e., not base) period in the rate cycle for under 31-bed ICF/DD facilities beginning Jan. 1, 2002 for Region II and III facilities and July 1, 2002 for Region I facilities. The amendment to section 681.11 has been subsequently superseded by section 681.14 and all of section 681.11 was repealed. Current section 681.14 contains this amendment which needs to be maintained, without modification, to preserve the progression of rate years within cycles of the ICF/DD rate setting methodology and define how OPWDD establishes current rates of reimbursement for ICF/DD facilities.

02-2.MRD-04-02-00001-A (State Register of 4/10/02). Amendment of sections 635-10.5, 671.7, 680.12, 681.11 and 690.7 of Title 14 NYCRR- Rate/fee setting in voluntary agency operated individualized residential alternative (IRA) facilities and home and community-based (HCBS) waiver services; HCBS waiver community residential habilitation services; specialty hospitals; intermediate care facilities for persons with developmental disabilities; and day treatment facilities serving persons with developmental disabilities. The amendments revise the methodologies used to calculate rates/fees of the referenced facilities or programs for the periods of Jan. 1, 2002 to Dec. 31, 2002 and July 1, 2002 to June 30, 2003 and establish trend factors to be applied within the context of the referenced reimbursement methodologies, effective January 1, 2002. Although specific trend factors are calculated annually, they are cumulative. The amendments need to be maintained, without modification, to define how OPWDD establishes current rates/fees of reimbursement for the affected facilities or services. The amendments to section 681.12 have been subsequently moved to section 681.14 and all of section 681.12 was repealed. Current section 681.14 contains this amendment which needs to be maintained, without modification, to define how OPWDD establishes current rates of reimbursement for ICF/DD facilities.

02-3.MRD-04-02-00020-A (State Register of 12/31/02). Amendments of sections 681.11 and 681.14 of Title 14 NYCRR. Rate setting in voluntary agency operated intermediate care facilities for persons with developmental disabilities. The amendments allow for inclusion of day program services costs in the reimbursement rate of ICF/DD

facilities. The amendments to section 681.11 were subsequently superseded by section 681.14 and all of section 681.11 was repealed. Current section 681.14 continues to allow for inclusion of day program services costs in the reimbursement rate of ICF/DD facilities and these amendments must therefore be maintained without modification.

02-4.MRD-08-02-00006-A (State Register of 5/1/02). Amendment of sections 635-10.5 and 681.11 of Title 14 NYCRR- Rate/fee setting in voluntary agency operated individualized residential alternative (IRA) facilities and home and community-based (HCBS) waiver services and intermediate care facilities for persons with developmental disabilities. The amendments implement payments to reflect adjustments to the trend factors to be applied within the context of the referenced reimbursement methodologies. Although specific trend factors are calculated annually, they are cumulative. The amendments need to be maintained, without modification, to define how OPWDD establishes current rates/fees of reimbursement for the affected facilities or services. The amendments to section 681.12 have been subsequently moved to section 681.14 and all of section 681.12 was repealed. Current section 681.14 contains this amendment which needs to be maintained, without modification, to define how OPWDD establishes current rates of reimbursement for ICF/DD facilities.

02-5.MRD-09-02-00006-A (State Register of 11/27/02). Amendments to 14 NYCRR Parts 603 and 604 to revise public access to records pursuant to the Freedom of Information Law. The amendments make necessary technical corrections and revise standards to ensure consistency of OPWDD's regulations with State regulations implementing the Freedom of Information Law. The revisions continue to be necessary to ensure consistency of OPWDD's regulations with 21 NYCRR Part 1401, the regulations of the NYS Committee on Open Government responsible for oversight of implementation of the Freedom of Information Law, and will therefore be maintained without modification.

02-6.MRD-15-02-00012-A (State Register of 6/26/02). Amendments of sections 81.10, 635-4.4, 635-10.5, 635-99.1, 686.13 and 686.99 of Title 14 NYCRR to revise rate and fee setting for various developmental disabilities services provided under the auspices of OPWDD. The amendments revise the provisions governing the reimbursement of home and community-based (HCBS) waiver residential habilitation services provided in individualized residential alternatives (IRAs) and make various other technical corrections, clarifications, or conforming amendments. OPWDD has since modified these amendments and the current regulatory provisions are still necessary.

02-7.MRD-29-02-00008-A (State Register of 9/25/02). Amendment of section 635-10.5 of Title 14 NYCRR to revise the price setting methodology governing the reimbursement of home and community-based (HCBS) waiver residential habilitation services provided in individualized residential alternatives (IRAs). These amendments allow for the reimbursement of IRA residential habilitation services in the event that all residents of an IRA are relocated to an alternative site approved by OPWDD due to an emergency or for the health and safety of individuals receiving services. These regulatory provisions remain necessary and OPWDD intends to maintain the regulation without modification.

02-8.MRD-42-02-00005-A (State Register of 12/31/02). Amendment of section 635-10.5 of Title 14 NYCRR to revise the provisions determining the prices for home and community-based (HCBS) waiver services provided in individualized residential alternatives (IRAs). These amendments institute an efficiency adjustment to be applied to the administration costs portion of the IRA price. The efficiency adjustment is carried forward into subsequent years and these price setting and reimbursement provisions remain necessary to describe how IRA prices were adjusted. OPWDD intends to maintain the regulation without modification.

02-9.MRD-43-02-00007-A (State Register of 12/24/02). Amendment of sections 681.11 and 690.7 of Title 14 NYCRR to revise rate and fee setting for voluntary agency operated day treatment programs and intermediate care facilities for persons with developmental disabilities (ICF/DD). The amendments revise the provisions governing the management of real property and capital indebtedness. Specifi-

cally, the amendments enable the use of a combination of a provider agency's lock box accounts for the purpose of retiring mortgage indebtedness on a single facility. These provisions continue to be relevant and necessary so that OPWDD intends to maintain them without modification. The amendments to section 681.11 have been subsequently moved to section 681.14 and all of section 681.11 was repealed. Current section 681.14 contains this amendment which needs to be maintained, without modification.

02-10. MRD-44-02-00003-A (State Register of 12/31/02). Addition of section 681.14 to Title 14 NYCRR. Rate setting in voluntary agency operated intermediate care facilities for persons with developmental disabilities. The amendments establish calendar 1999 or 1999/2000 as a new base year, and calendar 2003 or 2003/2004 as a new base period for under 31 bed facilities, and revise cost category screens and regional values in the ICF/DD reimbursement methodology. The amendments constitute the basis of the current ICF/DD reimbursement methodology for under 31 bed facilities and need to be maintained, without modification, to define how OPWDD establishes current rates of reimbursement for ICF/DD facilities.

With the exception of the rulemaking discussed in item 02-5, all of the mandated five-year reviews for 1997 and 2002 concern amendments which revise OPWDD's rate/fee setting methodologies. The legal basis for the adoption of these rules is in sections 13.07, 13.09 and 43.02 of the Mental Hygiene Law. In particular, section 43.02 of the Mental Hygiene Law sets forth OPWDD's responsibility for setting Medicaid rates for services in facilities licensed by OPWDD. As concerns item 02-5, the statutory authority for promulgating and maintaining regulations to implement the Freedom of Information Law can be found in Article 6 of the Public Officers Law and in the regulations of the Committee on Open Government found at 21 NYCRR Part 1401.

During calendar year 2007, OPWDD adopted nine rules. These nine rulemakings were identified and described as follows at the time the respective notices were published in the State Register:

07-01. MRD-46-06-00015-A (State Register of 7/25/07). Repeal of Subpart 635-7; addition of new Subpart 635-7; and amendment of sections 635-99.1, 686.15 and 686.16 of Title 14 NYCRR pursuant to sections 13.07, 13.09(b) and 16.00 of the Mental Hygiene Law. The amendments revise and update environmental requirements for OPWDD certified residential and non-residential facilities, including family care homes. Specifically, the amendments require the application of the 2002 edition of the NYS Uniform Fire Prevention and Building Code and the application of the 2000 edition of the Life Safety Code. The amendments also update other physical plant requirements. These requirements are still in effect and are necessary to protect the health and safety of individuals receiving services.

07-02. MRD-46-06-00017-A (State Register of 1/24/07). Addition of Subpart 635-11 and amendment of section 635-99.1 of Title 14 NYCRR pursuant to sections 13.07(a), (c), 13.09(b), and 13.15(a) of the Mental Hygiene Law. The amendments identify and authorize those parties who may enroll or act for a person who does not have the ability to enroll or act for him/herself in a Medicare prescription drug plan. These amendments are still in effect and are necessary to ensure that individuals are enrolled in a plan that is suitable for them and that their rights are protected in these plans.

07-03. MRD-52-06-00010-A (State Register of 3/7/07). Addition of sections 633.22 and 633.98 and amendment of sections 633.5, 633.99, 635-10.5, 679.6, 680.12, 681.14, 687.4, and 687.8 and 690.7 of Title 14 NYCRR pursuant to sections 13.07, 13.09(b), and 16.33 of the Mental Hygiene Law and section 845-b of the Executive Law. The amendments are concerning criminal history record checks. The regulation requires that agencies, sponsoring agencies and providers of services request criminal history record checks for specified employees, volunteers, family care providers and parties who are to reside in a family care home. This requirement is still in effect and is necessary for the protection of individuals receiving services.

07-04. MRD-08-07-00002-A (State Register of 5/2/07). Amendment of sections 81.10, 635-10.5, 671.7, 680.12, 681.14 of Title 14 NYCRR pursuant to sections 13.07, 13.09(b), and 43.02 of the Mental Hygiene Law. The amendments revise the methodologies used to

calculate rates/fees for integrated residential community (IRC) programs, individualized residential alternative (IRA) facilities, home and community based (HCBS) waiver services, HCBS waiver community residential habilitation services, specialty hospitals, and intermediate care facilities for persons with developmental disabilities. More specifically the amendments are concerned with establishing trend factors to be applied within the context of the referenced methodologies. Although specific trend factors are calculated annually, they are cumulative. They need to be maintained, without modification, to define how OPWDD establishes current rates/fees of reimbursement for the affected facilities or services.

07-05. MRD-12-07-00003-A (State Register of 5/30/11) Amendment of sections 671.7, 679.6 and 690.7 of Title 14 NYCRR pursuant to sections 13.07, 13.09(b), and 43.02 of the Mental Hygiene Law. The amendments are concerning fee setting in home and community-based (HCBS) waiver community residential habilitation services, clinic treatment facilities, and day treatment facilities for persons with developmental disabilities. The amendments establish a cost of living adjustment (COLA) and trend factors applicable to these facilities and services. Although specific trend factors are calculated annually, they are cumulative. COLAs are also important elements of the reimbursement methodologies. The amendments (with the exception of those made to section 679.6) need to be maintained without modification to define how OPWDD establishes current rates/fees of reimbursement for the affected facilities or services. The amendments in section 679.6 have since been deleted due to the development of a new reimbursement methodology for clinic treatment facilities.

07-06. MRD-29-07-00022-A (State Register of 11/21/07) Repeal of sections 633.14 and 633.15; addition of new 633.15 and amendment of sections 633.99, 635-9.1 and 635-99.1 of Title 14 NYCRR pursuant to sections 13.07, 13.09(b), and 16.00 of the Mental Hygiene Law. The amendments pertain to the management of personal allowance funds. They consolidate, reorganize and update the previous requirements into a regulation to make it easier to use; place more of an emphasis on individual choice; and add new features such as electronic recordkeeping, money management assessments, personal expenditure planning and person-owned bank accounts. The requirements are still in effect and are necessary to promote choice and encourage individuals receiving services to participate in managing their own funds. OPWDD is planning to make minor modifications to these requirements in the future.

07-07. MRD-36-07-00005-A (State Register of 12/26/07). Amendment of sections 635-10.4 and 635-10.5 of Title 14 NYCRR pursuant to sections 13.07, 13.09(b), and 16.00 of the Mental Hygiene Law. These amendments update definitions of residential habilitation to parallel the wording in the Federal Home and Community-Based (HCBS) Waiver agreement; and include the billing requirement of a face-to-face contact for at home residential habilitation and for family care residential habilitation. The amendments continue to be relevant and are still in effect. Therefore, OPWDD intends to maintain the amendments without modification.

07-08. MRD-41-07-00019-A (State Register of 12/26/07). Amendment of sections 635-10.5, 671.7, 679.6, 680.12, 681.14, 686.13 and 690.7 of Title 14 NYCRR pursuant to sections 13.07, 13.09(b) and 43.02 of the Mental Hygiene Law. The amendments revise the reimbursement methodology for various facilities and services provided under the auspices of OPWDD to include a Health Care Enhancement (HCE III) funding initiative. The amendments implement a new phase of a funding initiative that will enable agencies which operate facilities and provide services under the auspices of OPWDD to address the health care costs of their employees. OPWDD has been consistently building on this funding initiative so that the regulations remain an indispensable element of the reimbursement methodologies and OPWDD intends to maintain these amendments (with the exception of those in section 679.6) without modification. The amendments in section 679.6 have since been deleted due to the development of a new reimbursement methodology for clinic treatment facilities.

07-09. MRD-42-07-00007-A (State Register of 12/26/07). Amendment of section 633.10 of Title 14 NYCRR pursuant to sections 13.07 and 13.09(b) of the Mental Hygiene Law; the Surrogate's Court Pro-

cedure Act, section 1750-b; and L. 2007, Chapter 105. The amendments revise certain regulatory provisions implementing the Health Care Decisions Act consistent with Chapter 105 of the Laws of 2007. The amendments include a prioritized list of family members who may be qualified to make a decision to withhold or withdrawal life sustaining treatment in certain circumstances. These regulations are still in effect and are necessary to enhance and safeguard the rights of individuals with developmental disabilities to refuse life-sustaining treatment. OPWDD intends to maintain these amendments without modification.

The public was invited to review and comment on OPWDD's proposed disposition regarding these 1997, 2002, and 2007 rule makings beginning January 4, 2012. OPWDD received no comment on this Notice of Five-Year Rule Review, so that it will abide by its intended disposition with regard to these regulations.

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