

RULE REVIEW

Office of Mental Health

Section 207 of the State Administrative Procedure Act requires that any rule adopted by a State agency after 1996 be reviewed after five years, and, thereafter, at five-year intervals. The purpose of the review is to establish whether or not the rule should be continued or modified. Consensus rule makings, emergency adoptions, rule makings which resulted in the repeal of a Part, and other rules that have expired are not subject to rule review.

In accordance with this statutory requirement, the New York State Office of Mental Health (Office) hereby gives notice of rules which were adopted by this Office during the calendar years 2008, 2003 and 1998.

The public is invited to review and comment on the continuation or modification of the rules listed below. Comments should be submitted in writing, no later than May 1, 2013, to Sue Watson, Office of Counsel, Bureau of Policy, Regulation and Legislation, New York State Office of Mental Health, 44 Holland Avenue, Albany, New York 12229 or via e-mail at Sue.Watson@omh.ny.gov.

#OMH-42-07-00001-A Child and Family Clinic Plus Program. Proposed in State Register on October 17, 2007; Adopted January 9, 2008.

Purpose: Amendment of Part 587 of Title 14 NYCRR to establish the Child and Family Clinic Plus Program.

Analysis of Need: When the amendments were promulgated, the Child and Family Clinic Plus Program had just been developed. Since that time, the program has changed, as have the regulations pertaining to clinic treatment for children and adults. 14 NYCRR Part 599 was promulgated in October 2010, and superseded 14 NYCRR Parts 587, 588 and 592 as related to clinic treatment services operated by or under the auspices of the Office. While no longer formally in existence, the fundamental principles and goals of the Child and Family Clinic Plus Program have been infused into the regulations found at Part 599. These goals include early assessment and identification of childhood emotional disturbance, engaging the child and family in the development of a plan of care that is designed to minimize the symptoms and adverse effects of illness, maximizing wellness, assisting the child in developing a resilient and hopeful approach to school, family, and community, and maintaining the child in his or her natural environment.

Legal base: Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction. Section 31.04 of the Mental Hygiene Law empowers the Commissioner to issue regulations setting standards for licensed programs for the provision of services for persons with mental illness.

#OMH-46-07-00001-A Comprehensive Outpatient Programs. Proposed in State Register on November 14, 2007; Adopted January 30, 2008.

Purpose: Amendment of 14 NYCRR Parts 588 and 592 to equalize comprehensive outpatient programs (COPS) and non-COPS funding.

Analysis of Need: The intent of this regulatory change was to simplify and make more equitable the Medicaid reimbursement received by outpatient mental health providers by establishing two levels of COPS. Level I contains the nine special programmatic standards and deficit funding requirement of COPS. Level II contains the five special programmatic standards for Non-COPS. Both tiers receive the same base fees and operate under the same set of billing rules. The establishment of this initiative was required by the enacted 2006-2007 State Budget. Current regulations reflect the intent of this rule making, although amendments were made in subsequent years to reflect rate changes.

Legal base: Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction. Section 31.04 of the Mental Hygiene Law empowers the Commissioner to issue regulations setting standards for licensed programs for the provision of services for persons with mental illness. Section 43.02 of the Mental Hygiene Law grants the Commissioner the power to set rates for facilities licensed under Article 31 of the Mental Hygiene Law. Sections 364(3) and 364-a of the Social Services Law give the Office of Mental Health the responsibility for establishing and maintaining standards of care and services eligible for Medicaid reimbursement in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of Health. Chapter 54 of the Laws of 2006 provides funding appropriations in support of programs not formerly designated as Comprehensive Outpatient Programs.

#OMH-29-07-00014-A Personalized Recovery Oriented Services (PROS). Proposed in State Register on July 18, 2007; Adopted February 6, 2008.

Purpose: Repeal of 14 NYCRR Part 512 and addition of a new 14 NYCRR Part 512.

Analysis of Need: The PROS initiative created a framework to assist individuals and providers in improving the quality of care and outcomes for people with serious mental illness in New York State. The new Part 512 provided clarification with respect to the reimbursement methodology, documentation requirements, group size, staffing and registration. As a result of reviews of operational PROS programs and feedback from providers of service, Part 512 has been amended twice since 2008 (in 2010 and 2012). Each time, the amendments were designed to provide a more flexible mental health service delivery system and clarify the expectations of the Office with respect to PROS providers of service.

Legal Base: Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction. Section 31.04 of the Mental Hygiene Law empowers the Commissioner to issue regulations setting standards for licensed programs for the provision of services for persons with mental illness. Section 41.05 of the Mental Hygiene Law provides that a local governmental unit shall direct and administer a local comprehensive planning process for its geographic

area in which all providers of service shall participate and cooperate through the development of integrated systems of care and treatment for persons with mental illness. Subdivision (b) of Section 43.02 of the Mental Hygiene Law grants the Commissioner the authority to request from operators of facilities licensed by the Office such financial, statistical and program information as the Commissioner may determine to be necessary. Subdivision (c) of Section 43.02 of the Mental Hygiene Law gives the Commissioner the authority to adopt rules and regulations relating to methodologies used in establishment of schedules of rates for services. Sections 364(3) and 364-a(1) of the Social Services Law give the Office the responsibility for establishing and maintaining standards for medical care and services in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of Health.

#OMH-51-07-00004-A Communication and Patient Visiting Rights. Proposed in State Register on December 19, 2007; Adopted February 27, 2008.

Purpose: To repeal 14 NYCRR Part 21 and amend 14 NYCRR Part 527 regarding the regulations governing patients' rights to communication and visitation.

Analysis of Need: The amendments were necessary to move and update requirements from 14 NYCRR Part 21 to 14 NYCRR Part 527. Part 21 was promulgated in the 1970s by the Department of Mental Hygiene to establish standards for communications and visitation. The regulations were applicable to both the Office of Mental Health and the Office of Mental Retardation and Developmental Disabilities (now known as the Office for People with Developmental Disabilities). In 1978, the Department of Mental Hygiene was split into autonomous offices, and each office established its own statutory framework in the Mental Hygiene Law. Later legislation expanded upon the rights and communication needs of residents. The Office of Mental Retardation and Developmental Disabilities updated its regulations and superseded Part 21 with Part 633; similarly, the Office added provisions regarding communication and visitation to Part 527. However, the Office did not clarify that the provisions of Part 527 partially superseded Part 21, which resulted in unnecessary duplication and confusion, especially since a number of provisions in Part 21 were outdated. The amendment specifically repealed Part 21, and incorporated updated standards governing visiting and communication rights of residents in facilities under the Office's jurisdiction, so they are fully contained in Part 527.

Legal Base: Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction. Section 33.02 of the Mental Hygiene Law establishes statutory rights of persons with mental disabilities and residents of programs licensed or operated by the Office of Mental Health. Section 33.05 of the Mental Hygiene Law requires the Commissioner to establish guidelines to ensure that patients or residents at facilities have full opportunity for conducting correspondence, have reasonable access to telephones, and have frequent and convenient opportunities to meet with visitors.

#OMH-20-08-00026-A Rights of Patients. Proposed in State Register on May 14, 2008; Adopted July 23, 2008.

Purpose: Amendments to 14 NYCRR Part 527 were necessary to make the Part applicable to persons confined/committed to secure treatment facilities operated by the Office of Mental Health as defined in Mental Hygiene Law Section 10.03.

Analysis of Need: In 2007, the Legislature enacted Article 10 of the Mental Hygiene Law to provide for the civil management of sex offenders who suffer from a "mental abnormality." Such offenders who are predisposed to engage in repeated sex offenses may be involuntarily confined or committed to secure treatment facilities. Such secure treatment facilities were newly created by this legislation and could not have been contemplated with Section 527.8 of Part 527 of Title 14 NYCRR was promulgated. Section 527.8 of Part 527 of Title 14 NYCRR was originally promulgated in response to the 1986 Court of Appeals decision in *Rivers v. Katz*, 67 NY2d 485. There the Court held that, absent an emergency, persons held involuntarily at psychiatric facilities could only be treated with antipsychotic medication over

their objection following a judicial finding that, first, the person lacks the mental capacity to make a reasoned decision with respect to proposed treatment, and second, the proposed treatment is narrowly tailored to give substantive effect to the patient's liberty interest. The rights provided by the Court apply with equal force to persons committed to secure treatment facilities under Article 10 as they do to persons committed to psychiatric hospitals under Article 9 of the Mental Hygiene Law. The adopted rule clarifies that such persons are afforded the same rights to object to care and treatment as non-sex offenders who are committed to hospitals.

Legal Base: Section 7.07 of the Mental Hygiene Law gives the Office of Mental Health responsibility for seeing that the personal and civil rights of persons with mental illness who are receiving care and treatment are adequately protected. Section 7.09 of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction. Article 33 of the Mental Hygiene Law establishes statutory rights of mentally disabled persons. Section 33.02 of such law requires the Commissioner to publish regulations informing patients of their rights under the law. Article 29-C of the Public Health Law establishes the right of competent adults to appoint an agent to make health care decisions in the event they lose decision-making capacity. Article 29-C further empowers the Office to establish regulations regarding the creation and use of health care proxies in mental health facilities. The Omnibus Budget Reconciliation Act of 1990 (Public Law 101-508, Sections 42-6 and 4751) requires that institutional providers participating in the Medicare or Medicaid Assistance programs inform patients about their rights under State law to express their preferences regarding health care decisions.

#OMH-27-08-00002-A Placement or Transfer of Patients. Proposed in State Register on July 2, 2008; Adopted September 10, 2008.

Purpose: To amend 14 NYCRR Part 540 pertaining to transfer or placement of patients committed to the custody of the Commissioner of Mental Health pursuant to CPL Article 730.

Analysis of Need: The rule was needed to clarify the placement process for individuals who have open felony charges or warrants outstanding, who have pending parole revocation hearings, who have a history of escape or attempted escape from a psychiatric facility, and who, the Commissioner believes, based upon a review of available information, would meet secure retention standards.

Legal Base: Section 7.09 of the Mental Hygiene Law grants the Commissioner of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction. Section 730.40 of the Criminal Procedure Law provides that a court may issue a "final order of observation" for an individual found incompetent to stand trial, which means the charges against the individual are dropped and the individual is committed to the custody of the Commissioner of the Office of Mental Health for observation and possible care and treatment.

#OMH-31-08-00011-A Operating Certificates. Proposed in State Register on July 30, 2008; Adopted October 8, 2008.

Purpose: Amendments to 14 NYCRR Parts 573, 580, 582 and 584 were needed to permit the Office of Mental Health to issue operating certificates with a duration of three years to certain providers of service.

Analysis of Need: In 2003, the Office undertook a multi-year initiative to strengthen and revise the entire OMH licensing process to promote greater uniformity and consistency across all of the licensing staff in all five field offices for all program categories. In addition to improved training for licensing staff, the Office developed statewide inspection protocols specifically for inpatient programs that brought together not only the standards from the Office's inpatient regulations, but also related regulations applicable to inpatient status, updated physical plant standards and relevant standards of other regulatory agencies such as the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) and the New York State Department of Health. This improved licensing process made the inpatient monitoring system more consistent with that of the non-inpatient programs which had been subject to a maximum three-year duration for several years. As with any program licensed by

the Office, the actual duration of the license is determined by the extent of compliance found during OMH license renewal inspections. Any program demonstrating weaker performance receives less than the maximum duration and is subjected to more frequent monitoring by the Office's staff, whether the program is inpatient, outpatient, or residential. In addition, all surveys now completed by The Joint Commission, CMS and the Office are unannounced, thereby providing a more accurate reflection of a program's true day-to-day functioning.

Legal base: Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction. Subdivision (a) of Section 31.04 of the Mental Hygiene Law provides that the Commissioner has the power to adopt regulations, including those that specify a definite period for which an operating certificate will be issued pursuant to Article 31 of the Mental Hygiene Law.

#OMH-31-08-00012-A Adjudicatory Proceedings. Proposed in State Register on July 30, 2008; Adopted October 8, 2008.

Purpose: To amend 14 NYCRR Part 503 to eliminate a duplicative step in the hearing officer process.

Analysis of Need: An additional procedural step in the hearing officer process had been established in Section 503.4(i)(2) that was not required by statute, was duplicative, and encouraged the opportunity to submit additional evidence outside of the hearing process to the detriment of either party. Further, it did not add value to the process and resulted in delays, during which regulatory violations could have persisted, to the possible detriment of the civil and personal rights of persons from whom the Office is legally responsible. That procedural step was eliminated by this rule making.

Legal base: Section 7.07 of the Mental Hygiene Law charges the Office with the responsibility of seeing that persons with mental illness are provided with care and treatment, and that such care, treatment and rehabilitation is of high quality and effectiveness, and that the personal and civil rights of persons receiving care, treatment and rehabilitation are adequately protected. Section 7.09 of the Mental Hygiene Law grants the Commissioner of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction. Section 31.16 of the Mental Hygiene Law grants the Commissioner the authority to suspect, revoke or limit an operating certificate, or impose fines. Such section further requires the Commissioner to provide the holder of the operating certificate with a notice of such action and an opportunity to be heard prior to any determination, except in cases where the suspension or revocation must be imposed in accordance with statutory emergency suspension procedures. This section also empowers the Commissioner to establish regulations to govern the hearing procedure and the process of determination of the proceeding. Furthermore, in accordance with this section, all orders or determinations are subject to review in accordance with Article 78 of the Civil Practice Law and Rules. Section 31.17 of the Mental Hygiene Law establishes the process for formal hearings that are required to be afforded pursuant to Chapter 27 of the Consolidated Laws of the State of New York. Such section permits the Commissioner of Mental Health to establish regulations governing the hearing procedure and the process of determination of the proceeding. Article 3 of the State Administrative Procedure Act establishes procedures for the conduct of adjudicatory proceedings and requires agencies to adopt rules governing such proceedings.

#OMH-18-08-00003-A Waiver Authority. Proposed in State Register on April 30, 2008; Revised Rule Making in State Register on October 22, 2008; Adopted December 24, 2008.

Purpose: To add provisions that amended 14 NYCRR Part 501 by establishing waiver authority for the Commissioner of Mental Health under certain circumstances.

Analysis of Need: The amendments granted the Commissioner of Mental Health the ability to waive regulatory requirements for purposes of testing innovative programs that may increase the efficiency and effectiveness of operations or providing additional flexibility to meet local service needs while maintaining program quality and integrity. This waiver provision encourages innovated approaches

to service delivery and, in addition, provides the Office with the ability to assess the need for regulatory amendments on a statewide basis. The waiver process is not used to circumvent the regulations process. It enhances the ability of the Commissioner to, on an individual case basis, grant a waiver of regulatory requirements if he or she determines that the rights, health and safety of clients would not be diminished, the best interest of the clients would be served, the benefit of waiving the requirement outweighs the public interest in meeting the requirement, and the purpose of the request is to implement/test innovative programs. Waivers are in effect for no longer than three years or the duration of an entity's operating certificate. The decision of the Commissioner of all waiver applications is posted on the Office's website.

Legal Base: Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction. Section 31.01 of the Mental Hygiene Law charges the Commissioner with the responsibility to promulgate rules and regulations requiring the development of evaluation criteria and methods. Section 31.04 of the Mental Hygiene Law grants the Commissioner the power to adopt regulations setting standards of quality and adequacy of facilities and establishing procedures for the issuance, amendment and renewal of operating certificates.

#OMH-15-03-00005-A Operation of Residential Treatment Facilities for Children and Youth. Proposed in State Register on April 16, 2003; Adopted September 3, 2003.

Purpose: Amendment of Section 584.5(e) of Title 14 NYCRR to continue the temporary increase in the capacity of certain residential treatment facilities (RTF) to serve the needs of emotionally disturbed children and youth.

Analysis of Need: In 2000, the Office of Mental Health determined that an increase was needed in the existing RTF capacity serving children and youth with serious emotional disturbance who reside in New York City. At that time, the regulations in effect specified RTF bed capacity serving primarily New York City residents could be temporarily increased until September 30, 2002, by up to ten additional beds over the maximum of 56 per facility otherwise allowed by the regulation. Due to development delays in the implementation of residential alternatives, the expiration date needed to be changed to September 30, 2003. Therefore, the amendment was required to permit the continued necessary increase in RTF capacity until September 30, 2003. The issue has been the subject of review over subsequent years and has resulted in several changes in the expiration date. The current amendment filed in 2010 extends the expiration date until September 30, 2013.

Legal Base: Sections 7.09(b), 31.04(a)(2) and 31.26(b) of the Mental Hygiene Law grant the Commissioner the power and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction, to set standards of quality and adequacy of facility, and to adopt regulations governing residential treatment facilities for children and youth, respectively.

#OMH-26-03-00008-A Outpatient Programs. Proposed in State Register on July 2, 2003; Adopted December 10, 2003.

Purpose: Amendment of Parts 588 and 592 of Title 14 NYCRR to allow for the conversion of the net deficit financing for intensive psychiatric rehabilitation treatment (IPRT) programs and partial hospitalization programs, to allow for adjustments in the comprehensive outpatient programs (COPS) rates, and increase the community support program unit of service ceiling.

Analysis of Need: The amendments to these regulations streamlined and updated the COPS methodology consistent with the 2001-2002 enacted State budget; permitted IPRT and Partial Hospitalization Programs that met the additional requirements placed upon COPS to receive supplemental Medicaid payments; converted net deficit financing for IPRT and Partial Hospitalization Programs who met these requirements to Medicaid in recognition of the reimbursable costs associated with COPS program requirements; and eliminated the need for yearly amendments to the COPS regulations by changing the rate cap reference to a rate cap as directed by the Commissioner of Mental Health and approved by the Director of the Division of Budget.

The changes allowed providers to achieve efficiencies in the operation of their outpatient treatment programs without a need for a reduction of services. Parts 588 and 592 have been amended several times since 2003, including as referenced above in #OMH-46-07-00001-A. Most recently, both of these Parts were amended in December 2012, to increase the Medicaid fees paid to Partial Hospitalization Programs. That rule clarified that the increase in Medicaid fees reflected the inclusion of all COPS and Medicaid Disproportionate Share funding previously attached to Partial Hospitalization Programs since the Center for Medicare and Medicaid Services has mandated COPS funding to cease effective October 1, 2013.

Legal Base: Section 7.09(b) of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction. Section 31.04(a) of the Mental Hygiene Law provides that the Commissioner shall have the power to adopt regulations to effectuate the provisions and purposes of Article 31. Section 41.13(3) of the Mental Hygiene Law provides that a local government shall direct and administer a local comprehensive plan for mentally disabled residents of its area. Section 41.15(a) of the Mental Hygiene Law provides that net operating costs of programs incurred pursuant to an appropriate plan and approved by the Commissioner shall be eligible for the state aid. Section 43.02(a) of the Mental Hygiene Law provides that payments under the Medical Assistance program for outpatient services at facilities licensed by the Office shall be at rates certified by the Commissioner of Mental Health and approved by the Director of Budget. Sections 364(3) and 364-a(1) of the Social Services Law give the Office responsibility for establishing and maintaining standards for medical care and services in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of Health. Chapter 54 of the Laws of 2001, the enacted budget for New York State Fiscal Year 2001-2002, and Chapter 54 of the Laws of 2002, the enacted budget for Fiscal Year 2002-2003, provide for payment by the Office of state financial assistance, net of disallowances, for community mental health programs pursuant to Article 41 and other provisions of the Mental Hygiene Law.

#OMH-41-03-00003-A Medical Assistance Payment for Outpatient Programs. Proposed in State Register on October 15, 2003; Adopted December 24, 2003.

Purpose: Amendment of Part 588 of Title 14 NYCRR to increase the Medicaid rate schedule associated with outpatient programs licensed under Article 31 of the Mental Hygiene Law.

Analysis of Need: The amendments increased the Medicaid rates associated with outpatient treatment programs consistent with the enacted 2002-2003 State budget. The changes avoided a reduction in services that would have otherwise taken place. Since 2003, there have been a number of amendments to this Part to reflect rate adjustments that were made as a result of the enacted State budget.

Legal Base: Subdivision (b) of Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction. Subdivision (a) of Section 31.04 of the Mental Hygiene Law empowers the Commissioner to issue regulations setting standards for licensed programs of the provision of services for persons with mental illness.

#OMH-11-97-00023-A Rights of Patients. Adopted: January 7, 1998.

Purpose: Amendment to Part 527 of Title 14 NYCRR with regard to the needs of non-English speaking persons seeking or receiving mental health services.

Analysis of Need: The purpose of this rule was to help facilitate the ability of non-English speaking persons seeking or receiving services in facilities licensed or operated by the Office to have full access to mental health services. Since its adoption in 1998, no concerns or issues have been raised with regard to this rule by regulated parties.

Legal Base: Section 7.09(i) of the Mental Hygiene Law directs the Commissioner of Mental Health to promulgate rules and regulations to address the communication needs of non-English speaking individuals seeking or receiving services in facilities operated by or licensed

by the Office. Section 31.04(a) of the Mental Hygiene Law empowers the Commissioner to issue regulations setting standards for licensed programs for rendition of services for persons with mental illness.