

RULE REVIEW

Office for People with Developmental Disabilities

The NYS Office for People With Developmental Disabilities (OPWDD) published in the January 2, 2013 issue of the State Register a Public Notice of the Five-Year Rule Review pursuant to 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 1998, 2003, and 2008.

During calendar year 1998, OPWDD adopted eleven rules. Five of these were proposed and adopted as minor rulemakings identified by the Department of State as MRD-43-97-00020; MRD-43-97-0021; MRD-43-97-00022; MRD-02-98-00027; and MRD-36-98-00007. As minor rulemakings, these are exempted from the review requirements by subdivision (5) of SAPA section 207. The remaining six rulemakings finalized during 1998 were identified and described as follows at the time the respective notices were first published in the State Register:

98-1. MRD-02-98-00026. Amendments to 14 NYCRR section 635-10.5. The purpose of these amendments was to establish a provision allowing the commissioner of OPWDD to authorize a one-time payment to reimburse providers for HCBS waiver prevocational and supported employment services delivered to persons newly eligible to receive such services as a result of the removal of a previous Federal restriction. These provisions were temporary features of the methodology which are no longer necessary. They have already been deleted.

98-2. MRD-03-98-00001. Amendments to 14 NYCRR sections 635-10.5 (HCBS Waiver Services), 671.7 (HCBS Waiver Community Residential Habilitation Services), 680.12 (Specialty Hospitals), 681.12 (Intermediate Care Facilities for persons with developmental disabilities), and 690.7 (Day Treatment Services for persons with developmental disabilities). These amendments established trend factors to be applied (beginning January 1, 1998) within the context of the various rate/fee setting methodologies. Although specific trend factors are calculated annually, they are cumulative. The amendments (with the exception of those made to sections 671.7 and 681.12) 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 671.7 were deleted in 2010 when rate/fee methodologies for Individualized Residential Alternatives (IRAs) and Community Residences (CRs) were consolidated. Also, the entirety of section 681.12 has since been repealed.

98-3. MRD-11-98-00014. Amendments to 14 NYCRR sections 633.1 and 633.4 - Communication needs of non-English speaking persons seeking and/or receiving services under the auspices of OPWDD. The statutory authority for OPWDD's proposal and adoption of these amendments is in Mental Hygiene Law sections 13.07, 13.09(e), and 16.00. These amendments added provisions to ensure that providers of services to persons with developmental disabilities are aware of their responsibilities to meet the language/ communication needs of non-English speaking persons seeking or receiving services from providers operating under the auspices of OPWDD. These amendments must be maintained without modification because the

regulations are required by Mental Hygiene Law section 13.09(e) which remains unchanged.

98-4. MRD-13-98-00004. Amendments to 14 NYCRR sections 635-10.5, 671.7, and 686.13 - Fee setting and financial reporting in OPWDD certified or operated home and community-based (HCBS) waiver services, HCBS waiver community residential habilitation services, and individualized residential alternative (IRA) facilities. These amendments clarified that there can be no billing for therapeutic leave days for HCBS waiver residential habilitation services provided in individualized residential alternative facilities. This clarification was necessary because the Federal Health Care Financing Agency (HCFA) clarified its policy on the reimbursement of such vacancies and held that a State cannot pay for therapeutic leave days for persons who reside in IRAs and receive residential habilitation services. Since this remains the policy of the Federal Centers for Medicare and Medicaid Services (CMS, formerly HCFA), the amendments must be maintained without modification.

98-5. MRD-15-98-00018. Amendments to sections 635-10.5 and 686.13 - Fee setting and financial reporting in home and community-based (HCBS) waiver services and individualized residential alternative (IRA) facilities. These amendments allowed for the voluntary waiver by participating service providers of certain fee appeal and fee-setting provisions in order to facilitate the conversion of other existing facilities and services to IRAs with HCBS waiver services. These provisions are still a necessary part of the methodology and must be maintained without modification.

98-6. MRD-43-98-00006. The addition of new section 681.11 - Rate setting and financial reporting in voluntary agency operated intermediate care facilities for persons with developmental disabilities (ICF/DDs). This section eventually replaced previous section 681.12 for all ICF/DD facilities during the course of the 1998 calendar year. The new section established 1994 as a new base year for under 31-bed ICF/DD facilities and revised the cost category screens and other reimbursement provisions to reflect cost data and changes in spending patterns. OPWDD has since proposed and adopted a new section 681.14 which repeats this cyclical process of establishing a new base year and revised rate setting methodology for under 31-bed ICF/DD facilities. Section 681.11 (added during 1998) needed to remain in effect without modification until June 30, 2003, which is the end of the rate year for ICF/DD facilities in Region I. Effective July 1, 2003, new section 681.14 replaced section 681.11 for all ICF/DD facilities so that the amendment adopted in 1998 became obsolete. It has since been repealed (see item 03-3).

During calendar year 2003, OPWDD adopted and finalized five rules. These five rule makings were identified and described as follows at the time the respective notices were published in the State Register:

03-1. MRD-03-03-0001. Amendment of sections 635-10.5, 671.7, 679.6, 680.12, 681.11, and 690.7 - 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; clinic treatment facilities;

specialty hospitals; intermediate care facilities for persons with developmental disabilities; and day treatment facilities serving persons with developmental disabilities. The amendments revised the methodologies used to calculate rates/fees of the referenced facilities or programs for the periods of Jan. 1, 2003 to Dec. 31, 2003 and July 1, 2003 to June 30, 2004 and establish trend factors to be applied within the context of the referenced reimbursement methodologies, effective January 1, 2003. Although specific trend factors are calculated annually, they are cumulative. The amendments (with exception to those made to sections 671.7, 679.6, and 681.11) 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 671.7 were deleted in 2010 when rate/fee methodologies for IRAs and Community Residences (CRs) were consolidated. The amendments in 679.6 were deleted due to the development of a new reimbursement methodology for clinic treatment facilities. The amendments to section 681.11 were subsequently moved to section 681.14 and all of section 681.11 was repealed.

03-2. MRD-13-03-00002. Amendments to section 633.10 - Regulations to implement the Health Care Decisions Act for Persons with Developmental Disabilities. The statutory authority for this rule making is in Mental Hygiene Law, sections 13.07 and 13.09 and in section 1750-b of the Surrogates Court Procedure Act (SCPA) which required the commissioner of OPWDD to promulgate implementing regulations in order for a specific statutory provision to be effective. The amendments implemented changes to section 1750-b of the SCPA by establishing a specific safeguarding process to ensure that, in accordance with the changes to the SCPA, appropriate health care decisions can be made for persons with developmental disabilities who are terminally ill or who have other extremely serious medical conditions. More specifically, the regulations established a process for OPWDD to determine whether physicians and psychologists are qualified to make decisions or provide consultation to the attending physician and include additional delineation of the responsibility of OPWDD and agencies operating OPWDD-certified residences when they receive notification of health care decisions that involve the withdrawal or withholding of life-sustaining treatment. SCPA section 1750-b and the process implemented by the regulations remain in effect. Therefore, the regulations need to be maintained without modification.

03-3. MRD-16-03-00026. Repeal of section 681.11 and amendment of section 681.14 - Rate setting in voluntary agency operated intermediate care facilities for persons with developmental disabilities. The rule making completed the repeal of 14 NYCRR section 681.11 rendered obsolete by the adoption (in 2002) of new section 681.14 (MRD-44-02-00003-A). This rule making completed the updating of the ICF/DD reimbursement methodology which established calendar 1999 or 1999/2000 as a new base year and calendar 2003 or 2003/2004 as a new base period for under thirty-one bed ICF/DD facilities. The repeal of section 681.11 needs to be maintained since the old methodology is superseded by current section 681.14.

03-4. MRD-28-03-00010. Amendments to 14 NYCRR section 635-10.5. This rule making amended the methodology for reimbursement of Home and Community-Based Waiver services (HCBS) by establishing a unit of service and method for calculating the price of HCBS waiver hourly respite services provided in free-standing respite centers. These elements of the reimbursement methodology remain in effect and OPWDD intends to maintain the regulation without modification.

03-5. MRD-43-03-00046. Amendments to 14 NYCRR section 681.14. The amendments clarified certain provisions of the rate setting methodology for intermediate care facilities for persons with developmental disabilities. This methodology includes a desk audit feature to determine whether a provider's reported costs are atypical or non-recurring (e.g., expended only in the base year). The amendments include language to enable OPWDD to apply appropriate trend factors to the rates in effect on Dec. 30, 2002 and June 30, 2003 pending completion of the desk audit. The methodology also allows for the inclusion of certain day program services costs as add-ons in the ICF/DD rate of reimbursement. The amendments clarify that the appropriate trend factor to be applied to these ICF/DD day program elements shall be the trend factor used by OPWDD for day programs.

Finally, establishment of the ICF/DD day services add-on is limited to the budgeted costs or the actual costs of providing these services. The amendments add language to specify that the add-on derived from actual costs shall be net of any surplus calculated per certified cost reports for that day services program. These changes (with the exception of the amendments pertaining to the desk audit) continue to be effective and OPWDD intends to maintain them without modification. The amendments pertaining to the desk audit were deleted in 2011.

During calendar year 2008, OPWDD adopted and finalized four rules. One of these rules identified by the Department of State as MRD-39-08-00003 was proposed and adopted as a consensus rule-making, and therefore is exempt from the review requirements by subdivision (5) of SAPA section 207. The remaining three rule makings were identified and described as follows at the time the respective notices were published in the State Register:

08-1. MRD-08-08-00008. Amendment of sections 81.10, 635-10.5, 671.7, 680.12 and 681.14 - Rate/fee setting in voluntary agency operated integrated residential community programs (81.10); individualized residential alternative (IRA) facilities and home and community-based (HCBS) waiver services (635-10.5); HCBS waiver community residential habilitation services (671.7); specialty hospitals (680.12); and intermediate care facilities for persons with developmental disabilities (681.14). The amendments revise the methodologies used to calculate rates/fees of the referenced facilities or programs and establish trend factors to be applied within the context of the referenced reimbursement methodologies, effective Feb. 1, 2008. Although specific trend factors are calculated annually, they are cumulative. The amendments (with the exception of those made to section 671.7) 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 671.7 were deleted in 2010 when rate/fee methodologies for IRAs and Community Residences (CRs) were consolidated.

08-2. MRD-20-08-00033. Amendment of sections 671.7, 679.6 and 690.7 - Fee setting in home and community-based (HCBS) waiver community residential habilitation services, clinical treatment facilities, and day treatment facilities for persons with developmental disabilities. The amendments establish cost of living (COLA) adjustments and trend factors applicable to these facilities and services, effective Aug. 1, 2008. 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 sections 671.7 and 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 671.7 were deleted in 2010 when rate/fee methodologies for IRAs and Community Residences (CRs) were consolidated. The amendments in 679.6 were deleted due to the development of a new reimbursement methodology for clinic treatment facilities.

08-3. MRD-43-08-00010. Amendment of section 635-10.5(c)(4) and (e)(5). The amendments established a methodology for reimbursement of property and capital equipment costs in day habilitation and prevocational services. The amendments converted the process for reimbursing capital costs for providers of group day habilitation and prevocational services to be consistent with the process for reimbursing operational costs. As a result, the new process simplified billing procedures and allowed for payment of the entire group day habilitation or prevocational services to be made through eMedNY. Since this process is still in effect, the amendments need to be maintained without modification.

With the exception of the rule makings identified as items 98-3 and 03-2 for which the statutory authority is set forth in these respective paragraphs, the present five-year reviews concern amendments which revise OPWDD's rate/fee setting methodologies. The legal basis for the adoption of these rules is in sections 13.07, 13.09 and 43.02 of the Mental Hygiene Law. In particular, section 43.02 of the Mental Hygiene Law sets forth OPWDD's responsibility for setting Medicaid rates for services in facilities licensed by OPWDD.

The public was invited to review and comment on OPWDD's

proposed disposition regarding these 1998, 2003, and 2008 rule makings beginning January 2, 2013. 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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