

# RULE REVIEW

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## Office of Mental Health

### Rule Review – 2009, 2004 and 1999

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 (OMH) hereby gives notice of rules which were adopted by the agency during the calendar years 2009 and 2004. The only rules that were adopted by OMH in calendar year 1999 were consensus rules; those rules are not subject to rule review.

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 June 30, 2014, 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-09-09-00002-A Operation of Residential Programs for Adults. Proposed in State Register on March 4, 2009; Adopted May 20, 2009.

Purpose: Amendment of Part 595 of Title 14 NYCRR to include a new class of community residences for treatment of eating disorders.

Analysis of Need: The rule amended Part 595 by establishing a new sub-class of community residence for individuals over the age of 18 who have been diagnosed as having an eating disorder such as anorexia nervosa, bulimia, binge eating disorder, or other eating disorder identified as such in generally accepted medical or mental health diagnostic references. The new category of community residences, known as Community Residences for Eating Disorder Integrated Treatment (CREDIT), address the needs of adults who have been referred by a provider who is a participant in a Comprehensive Care Center for Eating Disorders (CCCED) designated by the State Department of Health or by the individual's primary care physician or mental health provider, and whose individual treatment issues preclude being served in a family setting or other less restrictive residential alternative.

Legal Base: Chapter 676 of the Laws of 2007, as amended by Chapter 24 of the Laws of 2008, and codified in Section 31.25 of the Mental Hygiene Law, requires the Commissioner of Mental Health to establish, pursuant to regulation, licensed residential providers of treatment and/or supportive services to individuals with eating disorders. Section 7.09 of the Mental Hygiene Law grants the Commissioner 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 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-09-09-00004-A Operation of Licensed Housing Programs

for Children and Adolescents with Serious Emotional Disturbances. Proposed in State Register on March 4, 2009; Adopted May 20, 2009.

Purpose: Amendment of Part 594 of Title 14 NYCRR to include a new class of community residences for treatment of eating disorders.

Analysis of Need: The rule amended Part 594 by establishing a new sub-class of community residence for children and adolescents who have been diagnosed as having an eating disorder such as anorexia nervosa, bulimia, binge eating disorder, or other eating disorder identified as such in generally accepted medical or mental health diagnostic references. The new category of community residences, known as Community Residences for Eating Disorder Integrated Treatment (CREDIT), address the needs of individuals who have reached at least the 12th birthday but not the 19th, who have been referred by a provider who is a participant in a Comprehensive Care Center for Eating Disorders (CCCED) designated by the State Department of Health or by the individual's primary care physician or mental health provider, and whose individual treatment issues preclude being served in a family setting or other less restrictive residential alternative.

Legal Base: Chapter 676 of the Laws of 2007, as amended by Chapter 24 of the Laws of 2008, and codified in Section 31.25 of the Mental Hygiene Law, requires the Commissioner to establish, pursuant to regulation, licensed residential providers of treatment and/or supportive services to individuals with eating disorders. Section 7.09 of the Mental Hygiene Law grants the Commissioner 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 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-09-09-00003-A Medical Assistance Payments for Community Rehabilitation Services Within Residential Programs for Adults, Children and Adolescents. Proposed in State Register on March 4, 2009; Adopted May 20, 2009.

Purpose: Amendment of Part 593 of Title 14 NYCRR to clarify CREDIT services are not included within the scope of services reimbursed under this Part.

Analysis of Need: The regulation clarified that services provided by Community Residences for Eating Disorder Integrated Treatment (CREDIT) programs do not qualify as rehabilitative services under Part 593 and are not eligible for Medical Assistance (Medicaid) payments. Residential rehabilitative services are intended for individuals who have severe deficits in various life skills and who require an intermediate to long-term period of residential care. The CREDIT program is designed for individuals who do require residential care and do have impairment in life skills but not typically to the extent and duration anticipated in the design of the rehabilitative services program.

Legal Base: Chapter 676 of the Laws of 2007, as amended by Chapter 24 of the Laws of 2008, and codified in Section 31.25 of the Mental Hygiene Law, requires the Commissioner to establish, pursuant to regulation, licensed residential providers of treatment and/or

supportive services to individuals with eating disorders. Section 7.09 of the Mental Hygiene Law grants the Commissioner 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 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. Section 43.02 of the Mental Hygiene Law grants the Commissioner the authority to request operators of facilities licensed by OMH to submit financial, statistical, and program information as the Commissioner may deem to be necessary.

#OMH-22-09-00013 A Comprehensive Outpatient Programs. Proposed in State Register on June 3, 2009; Adopted: August 26, 2009.

Purpose: Amendment of Part 592 of Title 14 NYCRR to adjust the Medicaid reimbursement associated with certain outpatient treatment programs regulated by OMH.

Analysis of Need: The regulation adjusted the Medicaid reimbursement associated with certain outpatient treatment programs regulated by OMH. The changes were consistent with the 2008-2009 enacted State budget, and were targeted in such a way as to provide general fiscal relief to providers most in need and improve the quality and availability of services, all while recognizing the serious fiscal condition of the State at that time. The amendments equalized reimbursement fees for clinic treatment within geographic areas, as approved by the Division of the Budget, and allowed for movement toward the establishment of a more uniform reimbursement system by raising the reimbursement amounts for the lowest paid providers and lowering the reimbursement amounts for providers with the highest rates. In 2010, OMH superseded Part 592 with respect to clinic treatment programs with the creation of a new Part 599 that established standards for the certification, operation and reimbursement of clinic treatment programs serving adults and children. Reimbursement under the methodology established in Part 592, including payment supplements under the Comprehensive Outpatient Provider methodology, were phased out over a four-year period. OMH intends to file amendments to Part 592 to clarify that the transition to a full procedure code based reimbursement system under Part 599 was completed on October 1, 2013. The regulatory provisions in Part 592 regarding clinic treatment programs remain for audit and historical purposes only.

Legal Base: Section 7.09 of the Mental Hygiene Law grants the Commissioner 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 grants the Commissioner the power 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 and 364-a of the Social Services Law give OMH responsibility for establishing and maintaining standards for 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 2008 provides adjusted funding appropriations in support of amendments to Part 594 (Section 1, State Agencies, Office of Mental Health, lines 18-29 on page 393, lines 46-50 on page 403, and lines 1-7 on page 404).

#OMH-22-09-00012-A Prior Approval Review for Quality and Appropriateness. Proposed in State Register on June 3, 2009; Adopted: September 2, 2009.

Purpose: Amendment of Part 551 of Title 14 NYCRR to streamline the process for agencies to obtain OMH project approval.

Analysis of Need: All programs requiring licensure (e.g., inpatient, community residences, outpatient) by OMH are required to obtain prior approval from OMH before a program can be developed or modified. The amendments to Part 551 created three distinct categories of projects, "Administrative Action", "Comprehensive PAR", and "E-Z PAR". This category breakdown has resulted in a reduction in the amount of time it takes for OMH to render a decision with respect to a project and a reduction in the amount of paperwork necessary to be completed by providers. Further, it has enabled OMH to focus

agency resources on substantial projects and has reduced the focus on ministerial projects. Since adoption of this rule in 2009, Part 551 has been further amended to adjust category requirements and ease the regulatory burden on providers.

Legal Base: Section 7.09 of the Mental Hygiene Law grants the Commissioner 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 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. Section 31.05 of the Mental Hygiene Law establishes the criteria for the issuance of an operating certificate. Section 31.23 of the Mental Hygiene Law establishes the criteria for the approval of facility programs, services and sites.

#OMH-41-09-00007-A Medical Assistance Rates of Payment for Residential Treatment Facilities for Children and Youth. Proposed in State Register on October 14, 2009; Adopted December 23, 2009.

Purpose: Amendment of Part 578 of Title 14 NYCRR to reduce the growth rate of Medicaid reimbursement associated with residential treatment facilities for children and youth.

Analysis of Need: The amendments removed the 2009-2010 trend factor from the Medicaid rate calculation for residential treatment facilities (RTF) to children and youth, which are identified as a subclass of hospitals under Section 31.26 of the Mental Hygiene Law. As a result, the rate of growth in Medicaid expenditures was slowed, yet the RTF's quality and availability of services were maintained. This was an Administrative Action consistent with the 2009-2010 enacted State Budget, and reflected the serious fiscal condition of the State. This was consistent with actions taken in the enacted budget applicable to the Department of Health, where trend factors were eliminated from the calculation of Medicaid rates for inpatient services effective April 1, 2009. Similar action was taken in 2013 for RTFs for the rate period effective July 1, 2013 through June 30, 2014.

Legal Base: Section 7.09 of the Mental Hygiene Law grants the Commissioner the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction. Section 43.02 of the Mental Hygiene Law provides that the Commissioner has the power to establish standards and methods for determining rates of payment made by government agencies pursuant to Title 11 of Article 5 of the Social Services Law for services provided by facilities, including residential treatment facilities for children and youth licensed by OMH.

#OMH-41-09-00006-A Medical Assistance Payment for Outpatient Programs. Proposed in State Register on October 14, 2009; Adopted December 23, 2009.

Purpose: Amendment of Part 588 of Title 14 NYCRR to modify reimbursement methodology for continuing day treatment programs and restore funding for certain programs.

Analysis of Need: These regulatory amendments implemented a change in the reimbursement methodology for services provided on or after April 1, 2009, and restored funding, effective April 1, 2009, for continuing day treatment programs licensed solely under Article 31 of the Mental Hygiene Law to the level that existed on December 31, 2008. The regulation was amended two years later to reflect new rates that went into effect on April 1, 2011, that were required to implement a continuation of the 1.1% reduction to Medicaid, as required by the enacted State budget.

Legal Base: Section 7.09 of the Mental Hygiene Law grants the Commissioner 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 and 364-a of the Social Services Law give OMH the responsibility for establishing and maintaining standards for care and services eligible for Medicaid reimbursement in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of Health.

#OMH-48-03-00009-A Operation and Medical Assistance for Outpatient Programs. Proposed in State Register on December 3, 2003; Adopted: May 5, 2004.

Purpose: Amendment of Parts 587 and 588 of Title 14 NYCRR to explicitly permit the provision of family treatment, through the addition of a definition of the service and standards for reimbursement in clinic treatment.

Analysis of Need: 14 NYCRR Parts 587 and 588 have been superseded by a new 14 NYCRR Part 599 with respect to clinic treatment programs and reimbursement. Therefore the provisions in Parts 587 and 588 regarding family treatment in a clinic setting are no longer necessary. OMH will seek to amend Parts 587 and 588 accordingly.

Legal Base: Sections 7.09(b) and 31.04(a) of the Mental Hygiene Law grant the Commissioner the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

#OMH-15-04-00002-A Outpatient Programs. Proposed in State Register on April 14, 2004; Adopted July 7, 2004.

Purpose: Amend Part 540 of Title 14 NYCRR to establish a faster and more appropriate process for determination of fitness to stand trial and return to court of a patient against whom criminal charges are pending.

Analysis of Need: These regulatory amendments streamlined the proper decision-making authority regarding changes in the custody status of patients who have been committed to the custody of an OMH forensic facility by a criminal court after having been found to have a mental illness rendering them incapable of understanding the court proceedings against them or participating in their own defense. In the interest of public safety, OMH has the responsibility to take steps to see that these individuals are kept at the appropriate level of custody and are promptly returned to the court when their mental status changes. The amendments established that the clinical director of the facility is responsible for determining whether a patient remains an incapacitated person or is fit to stand trial. The clinical director may designate certain facility psychiatrists to examine the patient and prepare a report and recommendation to the clinical director. This process meets all the requirements and expectations of the court orders involved.

Legal Base: Section 7.09(b) and (c) and Section 31.04(a) of the Mental Hygiene Law grant the Commissioner the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction, the authority to administer the forensic psychiatric program, and the power to adopt regulations for quality control, respectively. Article 730 of the Criminal Procedure Law establishes the role of the Commissioner of Mental Health in the process of determining the fitness to stand trial.

#OMH-18-04-00010-A Operation of Residential Treatment Facilities for Children and Youth. Proposed in State Register on May 5, 2004; Adopted August 25, 2004.

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, OMH determined that an increase was needed in the existing RTF capacity serving seriously emotionally disturbed children and youth 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, 2003, 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, 2004. Therefore, the amendment was required to permit the continued necessary increase in RTF capacity until September 30, 2004. 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 2013 extends the expiration date until September 30, 2016.

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 responsi-

bility 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-35-04-00010-A Audits of Office of Mental Health Licensed or Operated Facilities, Programs or Units. Proposed in State Register on September 1, 2004; Adopted December 8, 2004.

Purpose: Amendment to Part 552 of Title 14 NYCRR to clarify authority to require financial reports and audits.

Analysis of Need: The Commissioner is granted authority over regulated and funded programs under the Mental Hygiene Law, including the authority to require the maintenance of appropriate financial records and submission of financial reports. While statute clearly provides this authority, the authority was not specifically emphasized in the regulations, which is the legal authority most commonly referenced by regulated parties. The amendments to Part 552 address this concern, and clarify and comprehensively reflect the Commissioner's enforcement authority.

Legal Base: Section 7.09(b) and Section 31.04(a) of the Mental Hygiene Law grant the Commissioner the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction. Section 31.07 of the Mental Hygiene Law grants the Commissioner the power to conduct investigations into the operation of providers and to make inspections and examine records, including, but not limited to, medical, service and financial records of facilities. Section 31.09(a) of the Mental Hygiene Law grants the Commissioner certain powers, including the power to inspect facilities and examine records. Section 31.11 of the Mental Hygiene Law establishes the duty of every holder of an operating certificate to assist the Commissioner by complying with the Mental Hygiene Law and other applicable laws and the regulations of the Commissioner in any investigation or inspection and permitting the Commissioner or an authorized representative to inspect its facility and all books and records. Section 43.02(a) and (b) of the Mental Hygiene Law grant the Commissioner the power to set rates for facilities licensed under Article 31 of the Mental Hygiene Law and to require that such facilities submit such financial, statistical and program information as the Commissioner may determine necessary. Section 43.02(c) authorizes the Commissioner to adopt regulations establishing a uniform system of reports and audits relating to quality of care, utilization and cost of services. Sections 363(3) and 364-a(1) of the Social Services Law give OMH responsibility for establishing and maintaining standards for care and services eligible for Medicaid reimbursement in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of Health.

