

Adult Homes

Effective date: 1/16/13

Pursuant to the authority vested in the Commissioner of Health by Sections 460-d, 461, and 461-e of the Social Services Law, Section 486.7 of Part 486 and Part 487 of Title 18 of the Official Compilation of Codes, Rules and Regulations of the State of New York are amended, to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

Section 487.2 is amended to add a new subdivision (c) to read as follows:

(c) *Persons with serious mental illness* means individuals who meet criteria established by the commissioner of mental health, which shall be persons who have a designated diagnosis of mental illness under the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR, American Psychiatric Association, July 2000), and whose severity and duration of mental illness results in substantial functional disability.

Subdivision (d) of Section 487.3 is amended to read as follows:

(d) An operator shall afford any officers, [or] duly authorized employee or agents or any designee of the department access at any time to the residents, grounds, buildings and any records related to resident care and services.

Subdivision (c) of Section 487.4 is amended to read as follows:

(c) An operator shall not admit or retain a number of persons in excess of the capacity specified on the operating certificate. No operator of an adult home with a certified capacity of eighty or more and a mental health census, as defined in section 487.13(b)(4) of this Part, of 25 percent or more of the resident population shall admit any person whose admission will increase the mental health census of the facility.

Subdivision (d) of Section 487.4 is amended to read as follows:

(d) An operator shall not admit an individual before a determination has been made that the facility program can support the physical, psychological and social needs of the resident.

Subdivision (g) of Section 487.4 amended to read as follows:

(g) Each mental health evaluation shall be a written and signed report, from a psychiatrist, physician, registered nurse, certified psychologist or certified social worker who is approved by the department in consultation with the Office of Mental Health, and who has experience in the assessment and treatment of mental illness. The mental health evaluation shall include:

- (1) [significant mental health history and current conditions] the date of examination;
- (2) [a statement that the resident is not mentally unsuited for care in the facility] significant mental health history and current conditions, including whether the resident has a serious mental illness as defined in Section 487.2(c) of this Part;

(3) a statement that the resident's mental health needs can be adequately met in the facility and a statement that the resident does not evidence need for placement in a residential treatment facility licensed or operated pursuant to article 19, 23, 29, or 31 of the Mental Hygiene Law;

(4) a statement that the person signing the report has conducted a face-to-face examination of the resident within 30 days of the date of admission or, for required annual evaluations, within 30 days of the report.

Subdivision (b) of section 487.10 is amended to read as follows:

(b) The department or its designee may examine the books and records of any facility to determine the accuracy of the financial statement, or for any other reason deemed appropriate by the department to effectuate the purposes of these regulations.

Paragraph 4 of subdivision (c) of section 487.10 is amended to read as follows:

(4) At a minimum, the operator shall maintain:

(i) financial records for each resident which contain, at a minimum, a copy of the current admission agreement, documentation of the status of the resident's payment account, personal fund account, and a current inventory of any personal property held in custody for the resident by the operator;

(ii) personal records for each resident which contain, at a minimum: personal data, including identification of the resident's next of kin, family and sponsor, the name and address of the person or persons to be contacted in the event of emergency, copies of the resident's medical evaluations and other medical information, copies of the resident's

mental health evaluations, summaries of the social evaluations, and details of referral and such other correspondence and papers as are available to document the physical, mental and social status of the resident; and

(iii) records which are readily available to food service staff and enable staff to plan for and accommodate prescribed dietary regimens, allergies and individual food preferences.

Subdivision (d) of section 487.10 is amended to add a new paragraph (6) to read as follows:

(6) The records and reports required to be maintained by the operator pursuant to this subdivision shall not be posted or otherwise made available to the public.

Paragraph 2 of subdivision (e) of section 487.10 is amended to read as follows:

(2) A quarterly statistical information report;

(3) for facilities with a certified capacity of 80 beds or more in which twenty percent or more of the resident population are persons with serious mental illness as defined in subsection 487.2(c) of this Part, a quarterly statistical information report which must: (i) identify the quarter being reported on; (ii) contain a census report, which shall include a roster of residents who are persons with serious mental illness as defined in subsection 487.2(c) of this Part; (iii) for any residents admitted during the quarter reported on, the prior residence, and for any residents discharged during the quarter being reported on, the discharge location; and (iv) contain the number of resident deaths which occurred during the quarter being reported on.

Subdivision (f) of section § 487.10 is amended to add a new paragraph (7) to read as follows:

(7) Mental Health Evaluation;

Part 487 is amended by adding a new section 487.13 to read as follows:

487.13 Transitional Adult Homes

(a) This section shall apply to all transitional adult homes.

(b) Definitions

(1) A transitional adult home is an adult home with a certified capacity of 80 beds or more in which 25 percent or more of the resident population are persons with serious mental illness as defined in subsection 487.2(c) of this Part.

(2) An alternative community setting is any setting other than a transitional adult home that is designed to promote independence and economic self-sufficiency. Alternative community settings include, but are not limited to (i) supported housing, including scattered site apartments and single site apartments; (ii) supported single room occupancy; (iii) supportive housing, including community residence single room occupancy; (iv) community residences; (v) apartment treatment, (vi) senior housing; (vii) enriched housing programs; and (viii) such other housing alternatives as are clinically appropriate.

(3) Community services means services and supports provided in New York State that assist individuals with mental illness to live in the community. Such services and supports include, but are not limited to, assertive community treatment, intensive case management, case management, personalized recovery oriented services, continuing day treatment and Medicaid benefits for which a resident is eligible, including home and

community based services waivers, clinic services, certified home health care, personal care assistance, and rehabilitative services.

(4) *Mental health census* means the number of residents in a facility who are persons with serious mental illness as defined in subsection 487.2(c) of this Part.

(5) *Housing contractors* means housing providers that have contracted with the Office of Mental Health to provide residents with information regarding housing alternatives and community services and (ii) make community housing available to residents pursuant to such contracts.

(6) *Community transition coordinator* means a contractor retained by the department to facilitate the transition of residents to alternative community settings.

(c) The operator of every transitional adult home shall submit to the department a compliance plan that is designed to bring the facility's mental health census to a level that is under 25 percent of the resident population over a reasonable period of time, through the lawful discharge of residents with appropriate community services to alternative community settings.

(d) The compliance plan shall be submitted by the deadline set forth in subsection (e) of this section and shall specify:

(1) How and by when the operator will achieve a mental health census that is under 25 percent of the resident population;

(2) How the operator will address the needs of its residents, in particular those residents who are persons with serious mental illness as defined in subsection 487.2(c) of this Part, while the reduction in mental health census is being achieved, including but not limited to:

- (i) fostering the development of independent living skills;
- (ii) ensuring access to and quality of mental health services;
- (iii) encouraging community involvement and integration; and
- (iv) fostering a homelike atmosphere;

(e) The operator shall submit the compliance plan no later than 120 calendar days after the effective date of this regulation.

(f) The department, in consultation with the Office of Mental Health, shall review each compliance plan and within 90 calendar days, shall either:

(1) approve the compliance plan; or

(2) require modification of the compliance plan by the operator. Any such modifications shall be submitted within 30 calendar days of notice by the department and shall be subject to the approval of the department, in consultation with the Office of Mental Health.

(3) If the operator does not submit a compliance plan, or submits a compliance plan that is not acceptable to the department after modification, the department will impose a compliance plan on the operator.

(g) Upon approval of the compliance plan by the department, or, if no compliance plan is submitted or approved, upon the imposition of a compliance plan on the operator by the department, the operator shall implement the compliance plan.

(h) The operator shall cooperate with the community transition coordinator, housing contractors, and health home and managed long term care plan assessors and shall provide, without charge, space for residents to meet privately with such individuals or

entities. The operator shall not attempt to influence or otherwise discourage individual residents from meeting with such entities and individuals.

Subdivision (c) of Section 486.7 is amended to read as follows:

(c) Penalties for Part 487 of this Title.

			<i>Penalty</i>
			<i>per</i>
			<i>violation</i>
<i>Department regulations</i>			<i>per day</i>
	*	*	*
487.10	(d)	(5)	(i) 10
			(ii) 10
			(iii) 10
			(iv) 10
			(v) 10
			(vi) 10
			(vii) 10
			(viii) 10
			(ix) 10
		<u>(6)</u>	<u>100</u>
	*	*	*
487.10	(f)	(1)	10
		(2)	10

(3) 10

(4) 10

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487.13 (c) \$ 1000

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## **REGULATORY IMPACT STATEMENT**

### **Statutory Authority:**

The authority for the promulgation of these regulations is contained in Sections 460-d, 461 and 461-e of the Social Services Law (SSL). SSL Section 460-d (7) requires the Department of Health to adopt regulations establishing civil penalties of up to \$1000 per day to be assessed against adult care facilities found to be in violation of regulations applicable to such facilities. SSL Section 461 (1) requires the Department to promulgate regulations establishing general standards applicable to adult care facilities. SSL Section 461-e (5) authorizes the Department to promulgate regulations to require an adult care facility to maintain certain written records with respect to the facility's residents and the operation of the facility.

Section 122 (e) of Chapter 436 of the Laws of 1997 provides that effective April 1, 1997, the functions, powers, duties and obligations of the former Department of Social Services concerning adult homes, enriched housing programs, residences for adults and assisted living programs are transferred to the Department of Health.

### **Legislative Objectives:**

The proposed regulation, which would limit the percentage of residents with serious mental illness in adult homes with a certified capacity of eighty or more to less than 25 percent of the resident population, is consistent with the objectives the Legislature sought to advance when it enacted SSL Section 461(2), under which the Department of Health and the Offices of the Department of Mental Hygiene are to develop and promulgate standards for the protection of the health and well-being of adult care facility residents with mental disabilities.

**Needs and Benefits:**

The New York State Office of Mental Health (“OMH”) has made a clinical determination that while mixed use, larger scale congregate housing is an important and viable form of community living, certain housing settings in which there are a significant number of individuals with serious mental illness are not conducive to the recovery or rehabilitation of the residents. This is particularly so when the settings: are not specifically designed to serve people with serious mental illness; are not under the license and control of OMH; do not foster independent living due to institutional practices such as of congregate meals or ritualized medication administration; and do not provide specifically designed rehabilitation programs linked to community work settings. OMH will be issuing regulations applicable to all OMH-licensed psychiatric hospitals and units that prohibit the discharge of a patient to a transitional adult home, as defined in the regulations of the Department of Health, unless the patient was a resident of the home immediately prior to his or her current period of hospitalization.

These regulations, which apply statewide, address the large concentration of individuals with serious mental illness in large adult homes by amending Section 487.4 to limit the number of residents with serious mental illness as defined in new subsection 487.2(c) to less than 25 percent of the resident population, in all adult homes with a certified capacity of eighty or more. Section 487.13 requires the operator of every adult home with a certified capacity of 80 or more in which the number of residents with serious mental illness is already 25 percent or more of the resident population (“transitional adult homes”) to create and implement a compliance plan that is acceptable to the Department of Health to reduce that number to a level that is less than 25 percent of the resident population, over a reasonable period of time, through the lawful discharge of residents to alternative community settings with appropriate community services. The

compliance plan must also specify how the operator of a transitional adult home will serve the needs of its mental health population while the reduction in population is being achieved, particularly with regard to fostering the development of independent living skills, ensuring access to and quality of mental health services, encouraging community involvement and integration, and fostering a homelike atmosphere. Operators of transitional adult homes who do not submit a compliance plan, or who submit a compliance plan that is not acceptable to the Department, will have a compliance plan imposed on them by the Department.

Section 487.4 is also revised to set standards for the mental health evaluations that are currently required for some individuals seeking admission to adult homes, by requiring the mental health professionals conducting the evaluations to be approved by the Department of Health in consultation with the Office of Mental Health, and requiring those professionals to collect additional information about each prospective residents as part of the mental health evaluation.

Section 487.10 is also revised to impose additional record-keeping requirements on all operators of adult homes, and to require an enhanced quarterly statistical information report from operators of transitional adult homes and adult homes with a certified capacity of 80 or more in which 20% or more of the resident population is individuals with serious mental illness.

Part 486 is amended to include penalties for failure to comply with the provisions of Part 487 as amended and new Part 487.13.

**Costs:**

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

Revisions to the existing mental health evaluation process and minor changes to reporting and records posting could result in relatively minor additional costs to adult homes. For

transitional adult homes, there are likely to be additional costs associated with the development of compliance plans, but those costs should also be relatively minor. Any additional costs to transitional adult homes associated with implementing compliance plans will be dependent on the specific components of each compliance plan, which is subject to review and approval by the Department of Health. The estimated amount of lost net revenue to an operator of an adult home that is not able to replace a discharged resident is estimated at between four and five dollars per discharged resident per day.

#### **Costs to State and Local Governments:**

As a result of the Compliance Plans required by these regulations, many adult home residents with serious mental illness are expected to transition to alternative community settings, including but not limited to OMH-funded Supported Housing. The annual cost of one Supported Housing unit is approximately \$20,000 per person. However, while OMH is engaged in a multi-year effort to expand development of Supported Housing units to serve individuals with serious mental illness, including adult home residents, it is not possible to project the precise number of Supported Housing units that will be needed for this population, which will depend on factors including resident assessments and the need to target units throughout the state. Moreover, it is expected that when adult home residents with behavioral health needs transition to appropriate community housing, coupled with appropriate supportive services, their overall utilization of Medicaid-funded services will decrease and significant savings will result.

Several local governments operate adult homes on a not-for-profit basis. These local governments will incur the same costs as any other adult home or transitional adult home operator.

**Costs to the Department of Health:**

The Department of Health will utilize existing resources to monitor compliance with this regulation.

**Local Government Mandate:**

Local governments that operate adult homes must comply with this regulation. No new local government program, project or activity is required by the proposed regulations.

**Paperwork:**

All adult home operators are currently required to submit a quarterly statistical information report to the Department of Health. These regulations require operators of transitional adult homes, and adult homes close to becoming adult homes to submit an enhanced quarterly statistical information report that includes a census report with a roster of residents who are persons with serious mental illness, and the discharge location of any resident discharged during the quarter, among other information.

Currently, adult home operators are required to obtain mental health evaluations for some residents. Under the new regulations, these mental health evaluations must be retained by the operators.

Adult home operators must maintain all such information confidentially.

In addition, operators of transitional adult homes are required to submit compliance plans to the Department of Health for approval. (See Needs and Benefits, above).

**Duplication:**

These regulatory amendments do not duplicate existing State or federal requirements.

**Alternatives:**

In light of the Office of Mental Health's clinical determination, it is necessary to address the large concentration of individuals with serious mental illness in large adult homes. It was determined that the most appropriate response was limiting the number of residents with serious mental illness to less than 25 percent of the resident population in adult homes with a certified capacity of eighty or more, and requiring operators of adult homes with a certified capacity of 80 or more in which the number of residents with serious mental illness is currently 25 percent or more of the resident population to submit and implement a compliance plan to reduce that number to a level under 25 percent of the resident population, over a reasonable period of time, through the lawful discharge of residents to alternative community settings with appropriate community services.

**Federal Standards:**

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

**Compliance Schedule:**

All adult homes will need approximately 90 days to come into compliance with new reporting and recordkeeping requirements.

Operators of transitional adult homes will have 120 days to comply with the requirement to submit a compliance plan. The Department of Health will have 90 days in which to review

the compliance plan and either approve it or require modifications. Any modifications required by the Department of Health must be submitted within 30 days. Operators of transitional adult homes that fail to submit a plan or to accept modification requested by the Department of Health will have a plan imposed on them.

The time necessary to implement and complete the plan will depend on the plan submitted by the operator and is difficult to predict at this time.

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**REGULATORY FLEXIBILITY ANALYSIS**  
**FOR SMALL BUSINESSES AND LOCAL GOVERNMENTS**

**Effect of Rule:**

Most of the 384 licensed adult homes in New York State are operated by small businesses as defined in Section 102 of the State Administrative Procedure Act. Approximately 61 licensed adult home operators will be required by the regulations to submit a compliance plan to the Department of Health. Two of these adult homes are operated by local governments.

**Compliance Requirements:**

Compliance requirements are generally the same for all operators of adult homes and transitional adult homes to which these regulations apply. Section 487.4 limits the number of residents with serious mental illness to less than 25 percent of the resident population, in all adult homes with a certified capacity of eighty or more. Section 487.13 requires operators of adult homes with a certified capacity of 80 or more in which the number of residents with serious mental illness is already 25 percent or more of the resident population (“transitional adult homes”) to create and implement a compliance plan that is acceptable to the Department of Health to reduce that number to a level that is less than 25 percent of the resident population, over a reasonable period of time, through the lawful discharge of residents to alternative community settings with appropriate community services. The compliance plan must also specify how the operator of a transitional adult home will serve the needs of its mental health population while the reduction in population is being achieved, particularly with regard to ensuring the development of independent living skills, ensuring access to and quality of mental

health services, encouraging community involvement and integration, and fostering a homelike atmosphere.

All adult home operators will be required to comply with Section 487.4, which is amended to set standards for the mental health evaluations that are currently required for some individuals seeking admission to adult homes, by requiring the mental health professionals conducting the evaluations to be approved by the Department of Health in consultation with the Office of Mental Health, and requiring those professionals to collect additional information about each prospective residents as part of the mental health evaluation. Mental health evaluations must be retained by adult home operators.

All adult home operators are currently required to submit a quarterly statistical information report to the Department of Health. These regulations require that transitional adult homes and adult homes that are close to becoming transitional submit an enhanced quarterly statistical information report which includes a census report with a roster of residents who are persons with serious mental illness and the discharge location of any resident discharged during the quarter, among other information.

Adult home operators must maintain all such information confidentially.

**Professional Services:**

No additional professional services will be required to comply with the proposed regulation.

**Compliance Costs:**

It is anticipated that compliance costs for adult homes and transitional adult homes operated by small businesses will be the same as or proportional to those operated by larger

businesses. Amendments to the existing mental health evaluation process and minor changes to reporting and records posting could result in relatively minor additional costs. For transitional adult homes, there are likely to be additional costs associated with the development of compliance plans, but those costs should also be relatively minor. Any additional costs to transitional adult homes associated with implementing compliance plans will be dependent on the specific components of each compliance plan, which is subject to review and approval by the Department of Health. The estimated amount of lost net revenue to an operator of an adult home that is not able to replace a discharged resident is estimated at between four and five dollars per discharged resident per day.

**Economic and Technological Feasibility:**

No economic or technological barrier to the feasibility of compliance with these regulations by small businesses or local governments is anticipated.

**Minimizing Adverse Impact:**

These regulations will have the same impact on small business and local governments operating adult homes as they will on other operators of adult homes. Adult homes with a certified capacity of less than 80 residents do not qualify as “transitional adult homes.”

**Small Business and Local Government Participation:**

The Department will meet the requirements of SAPA Section 202-b(6), in part, by publishing a notice of proposed rulemaking in the State Register prior to a comment period.

**For rules that either establish or modify a violation or penalties associated with a violation:**

No cure period was included in the rule because existing regulations already provide that all licensed adult home operators are afforded 30 days from the receipt of a written report citing violations to rectify those violations prior to the imposition of penalties.

## RURAL AREA FLEXIBILITY ANALYSIS

### Types and Estimated Numbers of Rural Areas:

This rule applies uniformly throughout the state, including rural areas. Rural areas are defined as counties with a population less than 200,000 and counties with a population of 200,000 or greater that have towns with population densities of 150 persons or fewer per square mile. The following 43 counties have a population of less than 200,000 based upon the United States Census estimated county populations for 2010 (<http://quickfacts.census.gov>). All have adult homes, with the exception of the counties of Hamilton and Tioga.

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

Transitional adult homes as defined in the proposed regulation are located in the following rural counties: Allegany, Cayuga, Genesee, Greene, Herkimer, Rensselaer and Sullivan. No transitional adult homes are located in towns with population densities of 150 persons or fewer per square mile in counties that have a population of 200,000 or greater.

Albany County	Monroe County	Orange County
Broome County	Niagara County	Saratoga County
Dutchess County	Oneida County	Suffolk County

**Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services:**

Section 487.4 limits the number of residents with serious mental illness to less than 25 percent of the resident population, in all adult homes with a certified capacity of eighty or more. Section 487.13 requires operators of adult homes with a certified capacity of 80 or more in which the number of residents with serious mental illness is already 25 percent or more of the resident population (“transitional adult homes”) to create and implement a compliance plan that is acceptable to the Department of Health to reduce that number to a level that is less than 25 percent of the resident population, over a reasonable period of time, through the lawful discharge of residents to alternative community settings with appropriate community services. The compliance plan must also specify how the operator of a transitional adult home will serve the needs of its mental health population while the reduction in population is being achieved, particularly with regard to ensuring the development of independent living skills, ensuring access to and quality of mental health services, encouraging community involvement and integration, and fostering a homelike atmosphere.

All adult home operators will be required to comply with Section 487.4, which is amended to set standards for the mental health evaluations that are currently required for some individuals seeking admission to adult homes, by requiring the mental health professionals conducting the evaluations to be approved by the Department of Health in consultation with the Office of Mental Health, and requiring those professionals to collect additional information

about each prospective residents as part of the mental health evaluation. Mental health evaluations must be retained by adult home operators.

All licensed adult home operators are currently required to submit a quarterly statistical information report to the Department of Health. These regulations require that transitional adult homes and adult homes that are close to becoming transitional submit an enhanced quarterly statistical information report which includes a census report with a roster of residents who are persons with serious mental illness and the discharge location of any resident discharged during the quarter, among other information.

Adult home operators must maintain all such information confidentially.

No professional services will be required to comply with the proposed regulation.

**Costs:**

It is anticipated that compliance costs for adult homes and transitional adult homes in rural areas will be the same as for those in other areas. Amendments to the existing mental health evaluation process and minor changes to reporting and records posting could result in relatively minor additional costs. For transitional adult homes, there are likely to be additional costs associated with the development of compliance plans, but those costs should also be relatively minor. Any additional costs to transitional adult homes associated with implementing compliance plans will be dependent on the specific components of each compliance plan, which are subject to review and approval by the Department of Health. The estimated amount of lost net revenue to an operator of a privately-owned adult home that is not able to replace a discharged resident is estimated at between four and five dollars per discharged resident per day.

**Minimizing Adverse Impact:**

It is not anticipated that compliance with these regulations will be more burdensome for adult home operators in rural areas than for operators of adult home operators in other areas of the State.

**Rural Area Participation:**

The Department will meet the requirements of SAPA § 202-bb(7), in part, by publishing a notice of proposed rulemaking in the State Register prior to a comment period.

## **JOB IMPACT STATEMENT**

A Job Impact Statement is not included because it is apparent from the nature and purpose of this regulation that it will not have a substantial adverse impact on jobs and employment activities.

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## **SUMMARY OF ASSESSMENT OF PUBLIC COMMENTS**

### **Introduction**

The Department of Health received numerous comments on the proposed amendments to Section 486.7 and Part 487 of Title 18, NYCRR. Although the Department has made several technical and clarifying amendments to the regulations in response to the comments, the changes do not substantially alter the regulatory scheme.

### **Clinical Advisory**

On August 8, 2012, OMH issued a clinical advisory prohibiting the discharge of patients from OMH-licensed or operated psychiatric hospitals to “Transitional Adult Homes” or “Impacted Adult Homes” on the ground that they are not clinically appropriate settings for the significant number of persons with serious mental illnesses who reside in such settings, and are not conducive to the rehabilitation or recovery of persons with serious mental illness. OMH issued clarifications to its advisory on October 1, 2012. The clinical advisory will take effect when the Department’s and OMH’s regulations become final.

### **Statutory Authority**

Several commenters argued that the proposed regulations include law and policy changes that can only be made by the legislature, and not by agency rulemaking. The Department disagrees. New York Social Services Law § 461 gives the Department the authority to promulgate regulations establishing standards that apply to all adult care facilities subject to its inspection

and supervision. Authority to set penalties and to impose record-keeping requirements is found in SSL sections 461-e and 460-d respectively.

### **Serious Mental Illness**

Several comments were received on the definition of serious mental illness in Section 487.2(c) of the regulations. These included: the regulations provide insufficient guidance on the criteria to be established by the Commissioner of Mental Health to determine for determining if someone has a serious mental illness; the regulations do not define “substantial functional disability;” the definition of persons with serious mental illness should be limited to individuals with a chronic, persistent mental illness requiring regular treatment over a period of time from an OMH provider; and individuals with dementia, episodic depression or anxiety related to losses associated with aging should be excluded from the definition of persons with serious mental illness.

The definition of serious mental illness was drafted in consultation with OMH. “Seriously mentally ill” is defined in New York Mental Hygiene Law 1.03. 14 NYCRR §599.4(p) provides additional guidance on the meaning of “designated mental illness.” “Substantial functional disability” is defined in OMH supported housing guidelines. The Department and OMH will draft joint guidance on the definition of serious mental illness that incorporates these resources, and post the guidance on their respective public websites. Alzheimer’s disease and other forms of dementia are not included in the definition of “designated mental illness,” and persons with episodic depression or anxiety related to losses associated with aging are not included unless their mental illness results in a substantial functional disability.

Some commenters objected to the definition of serious mental illness because “having received services in the last five years” may include those individuals who saw a mental health practitioner sporadically, or only once, during the last five years and have since recovered. Others maintained that the five-year period was too short. The Department has modified the definition of serious mental illness in its regulations by eliminating Section 487.2(c)(2), which refers to persons who are receiving or have received within the past five years services from a mental hygiene provider which is licensed, operated or funded by OMH.

Because the Department and OMH will provide joint guidance that addresses the concerns expressed by these commenters, the Department declines to change the definition of serious mental illness.

### **Transitional Adult Homes**

Commenters suggested that the 25% figure used to define “transitional adult homes” is far too low to be used as a ceiling. Several commenters noted that this determination was made without any assessment of these facilities or their residents. However, OMH’s clinical opinion is that large scale congregate housing with a concentration of significant numbers of people with mental illnesses are not clinically appropriate for individuals with serious mental illness, nor are they conducive to recovery, and that the 25% figure is appropriate.

Some commenters objected to the limitation of the definition of a Transitional Adult Home to homes with a certified capacity of 80 beds or more, arguing that all adult homes with a mental

health census of 25% or more should be included in the definition of a Transitional Adult Home. The Department declines to make a change based on this comment because OMH's clinical opinion is that the impact of a mental health census of 25% or more is problematic primarily in the larger adult homes.

The Department will publish a list of Transitional Adult Homes, subject to change based on available data, following final adoption of these regulations.

### **Compliance Plan**

The Department received numerous comments to Section 487.13(c) regarding the submission of a compliance plan by operators of Transitional Adult Homes. The most frequent comment was that the creation and implementation of a compliance plan depends on factors outside the control of Adult Home Operators, such as the availability of alternative community housing. As a result, commenters stated, Adult Home operators may find it difficult if not impossible to implement a compliance plan. In addition, numerous commenters expressed a concern that insufficient alternative housing is available to permit operators of Transitional Adult Homes to implement compliance plans.

The intent of the compliance plan requirement is to solicit ideas and proposals from Transitional Adult Home operators, who are in a position to determine the best way of bringing their mental health census to less than 25% of the resident population. As an initial matter, a successful compliance plan should set forth a process or framework setting forth the steps the facility intends to take in order to move toward compliance.

Other commenters recommended longer deadlines for the submission of the compliance plan, the imposition of a deadline by which the Department must review a compliance plan, and a deadline for the implementation of the compliance plan. The Department has modified the regulations to extend the deadline for submission of a compliance plan to 120 days, and to require the Department to review compliance plans within 90 days of their submission. A deadline for the implementation of compliance plans has not been added at this time.

One commenter recommended that each compliance plan should include a due process procedure for any resident who is not offered alternative housing because he or she is not believed to meet the definition of a person with serious mental illness or is not placed in the housing of his or her choice. The Department declines to adopt this recommendation. A due process procedure would be appropriate if the regulations created an individual right to housing or services. However, these regulations are not intended to create individual entitlements.

### **Rights of Adult Home Residents**

Several commenters stated that placing limitations on the admission of persons with serious mental illness to Transitional Adult Homes is unlawful and discriminatory under both State and Federal laws, including the Fair Housing Act and the American with Disabilities Act. The Department does not agree. The Department has the authority to limit the number of individuals admitted to certain types of facilities or units if the attempt to provide services to more than that number of individuals would negatively impact health, safety and well-being, even if the

limitation means that some individuals will not be able to receive services at the facility of their choice. Therefore, the Department declines to modify the regulations based on this comment.

Some commenters also argued that requiring Transitional Adult Homes to reduce their mental health census to less than 25% of the resident population would force the discharge of thousands of adult home residents, resulting in more people becoming homeless or requiring hospitalization. The Department disagrees with these comments. In October, 2012, OMH issued a Request for Proposals for the development and operation of up to 1050 units of Supported Housing in Queens and Brooklyn. These units are being developed to facilitate the transition to alternative community settings for individuals with serious mental illness currently residing in transitional adult homes. Contracts have been awarded and the anticipated start date is January of 2013.

Contrary to concerns expressed by some commenters, the regulations do not alter or conflict with statutory and regulatory requirements governing the discharge of residents from adult homes. Transition to alternative community settings will take place in a manner that is consistent with existing statutory and regulatory requirements

### **Costs to State**

Some commenters argued that there was a lack of data to support the Regulatory Impact Statement as it relates to cost. One commenter noted that the Department did not explain how the state came to the \$20,000 figure for supported housing units; others noted that the state will have to substantially increase funding for supported services for individuals transitioning to

community housing. The cost estimates were provided by OMH, which currently subsidizes community housing, including supported housing. OMH and the Department will be evaluating the community services needed for adult home residents as individuals start the transition to the community.

Commenters also argued that the costs of the regulations to the state will exceed the cost of adult home residence because many current residents of adult homes will be unable to live in an alternative community setting without various supportive services, and in some cases, 24-hour care, which will increase costs. The Department believes that some of these costs will be offset by savings in Medicaid and Medicare spending.

### **Impact on Adult Homes**

Finally, some commenters contend that the costs to Adult Home operators of compliance with the regulations have been significantly underestimated, and that operators of adult homes will be unable to stay in business. It may be the case that some adult homes will no longer be able to stay in business in their current form. However, the Department's primary responsibility is to the health, safety and well-being of AH residents. The Department intends the regulations to provide sufficient flexibility for operators of transitional adult homes so that they can design an appropriate compliance plan, make the transition in an orderly manner while respecting the rights of their residents, and if necessary, adopt a new business model or find another economically viable use of their property if necessary.

### **Penalties**

Several commenters objected to the \$1,000 per day penalty for violation of sections 487.13, noting that the penalty is highest available under the statute and comparable to the penalty imposed for violations that cause serious harm to residents, and recommended that the penalty be lowered. The Department declines to adopt this recommendation. The penalty reflects the importance of these regulations to the health, safety and well-being of residents of Transitional Adult Homes with serious mental illness.

### **Recordkeeping Requirements**

Two commenters noted that maintaining a weekly roster of residents with serious mental illness and preparing a quarterly statistical information report with a roster of such residents is burdensome and unnecessary for most non-transitional adult homes. The Department agrees, and has modified the regulations accordingly.

## **ASSESSMENT OF PUBLIC COMMENTS**

### **Introduction**

The Department of Health received numerous comments on the proposed amendments to Section 486.7 and Part 487 of Title 18, NYCRR. Although the Department has made several technical and clarifying amendments to the regulations in response to the comments, the changes do not substantially alter the regulatory scheme. The Department believes that these regulations are not only warranted, but necessary in light of the expert opinion of the Medical Director of the New York State Office of Mental Health (OMH) that large Adult Homes with a significant concentration of people with serious mental illness are not clinically appropriate settings for those individuals. The regulations are intended to protect the health, safety and well-being of individuals with serious mental illness by requiring each “Transitional Adult Home” to reduce its mental health census, encouraging the transition of residents to alternate living arrangements that are clinically appropriate, are more conducive to recovery, and provide opportunity for maximum privacy, personal development and independence. The Department also believes by requiring operators of affected Adult Homes to submit a plan that sets forth a framework and process for coming into compliance, the regulations offer flexibility to operators of affected Adult Homes and their residents.

### **Clinical Advisory**

On August 8, 2012, OMH issued a clinical advisory prohibiting the discharge of patients from OMH-licensed or operated psychiatric hospitals to “Transitional Adult Homes” or “Impacted Adult Homes” on the ground that they are not clinically appropriate settings for the significant

number of persons with serious mental illnesses who reside in such settings, and are not conducive to the rehabilitation or recovery of persons with serious mental illness. OMH issued clarifications to its advisory on October 1, 2012, clarifying that the prohibition applies only to discharges to Transitional Adult Homes as defined in Section 487.13(b)(1), and that it does not apply to any person with serious mental illness who is being considered for discharge to a Transitional Adult Home from a hospital licensed or operated by the Office of Mental Health, if that individual was a resident of that adult home immediately prior to his or her current period of hospitalization. The clinical advisory will take effect when the Department's and OMH's regulations become final.

### **Statutory Authority**

Several commenters argued that the proposed regulations include law and policy changes that can only be made by the Legislature, and not by agency rulemaking. The Department disagrees. New York Social Services Law § 461 gives the Department the authority to promulgate regulations establishing standards that apply to all adult care facilities subject to its inspection and supervision. Authority to set penalties and to impose record-keeping requirements is found in SSL sections 461-e and 460-d respectively. 18 NYCRR § 485.3(a)(3) gives the Commissioner the “authority and responsibility to . . . prescribe and promulgate regulations, standards, policies and procedures governing the establishment and operation of adult care facilities which assure the protection of the health, safety and well-being of the residents in the least restrictive environment available and which provide residents with the opportunity for maximum privacy, personal development and independence.” These regulations fall within that authority.

## **Serious Mental Illness**

One commenter noted that the definition of serious mental illness in Section 487.2(c) of the regulations does not adequately define what the criteria established by the Commissioner of Mental Health will be in order to determine if someone has a serious mental illness. One commenter noted that the definition does not specify how a practitioner should determine whether a particular mental illness has the “severity and duration that results in substantial functional disability.”

The definition of serious mental illness was drafted in consultation with OMH. “Seriously mentally ill” is defined in New York Mental Hygiene Law 1.03. Additionally, 14 NYCRR §599.4(p) provides the following definition:

Designated mental illness: means a disruption of normal cognitive, emotional, or behavioral functioning, which can be classified and diagnosed using the current edition of the Diagnostic and Statistical Manual of Mental Illness other than: alcohol or drug disorders, organic brain syndromes, developmental disabilities or social conditions (V codes), and whose severity and duration of mental illness results in substantial functional disability.

Substantial functional disability is defined in OMH supported housing guidelines as:

“Extended impairment in Functioning Due to Mental Illness:

- a) Documentation that the individual has experienced two of the following four functional limitations due to a designated mental illness over the past 12 months on a continuous or intermittent basis:
- i. Marked difficulties in self care
  - ii. Marked restriction of activities of daily living
  - iii. Marked difficulties in maintaining social functioning
  - iv. Frequent deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner

Or

- b. Reliance on Psychiatric Treatment, Rehabilitation and Supports

A documented history shows that the individual at some prior time met the threshold for extended impairment in functioning due to mental illness, but the symptoms and/or functioning problems are currently attenuated by medication or psychiatric rehabilitation and supports. Medication refers to psychotropic medications which may control certain primary manifestations of mental disorder; e.g. hallucinations, but may or may not affect functional limitations imposed by the mental disorder

In response to these comments, the Department and OMH will draft joint guidance on the definition of serious mental illness, and post the guidance on their respective public websites.

Some commenters objected to the definition of serious mental illness because “having received services in the last five years” may include those individuals who saw a mental health

practitioner sporadically, or only once, during the last five years and have since recovered. The Department generally agrees with this comment because the definition of persons with serious mental illness is limited to individuals who have a chronic mental illness. The Department has modified the definition of serious mental illness in its regulations by eliminating Section 487.2(c)(2), which refers to persons who are receiving or have received within the past five years services from a mental hygiene provider which is licensed, operated or funded by OMH.

Several commenters also maintained that the definition of “serious mental illness” in Section 487.2(c) is too broad. Most of these commenters recommended that the definition should be limited to individuals with a chronic, persistent mental illness requiring regular treatment over a period of time from an OMH provider. In particular, several commentators commented that individuals with dementia, episodic depression or anxiety related to losses associated with aging should be excluded. The Department generally agrees that the definition of SMI should be limited to individuals with a chronic and persistent mental illness. Currently, the Department provides guidance to operators of Adult Homes to assist them in compiling the facility’s annual census report. That guidance provides that residents whose sole diagnosis is Alzheimer’s or another form of dementia are not to be included in the facility’s annual mental health census. Moreover, Alzheimer’s disease and other forms of dementia are “organic brain syndromes” and therefore are not “designated mental illnesses” under 14 NYCRR §599.4(p). The Department also agrees that episodic depression alone does not constitute a serious mental illness unless it results in a substantial functional disability. Joint guidance issued by the Office of Mental Health and the Department will reflect this position.

Some commenters recommended that the definition of serious mental illness should not be limited to individuals who have received mental health services during the past five years, but should include individuals who have received mental health services within a longer time period. The Department does not agree. Section 487.2(c)(2) was initially included as a way to identify individuals whose mental health diagnosis had resulted in a substantial functional disability, and an extension of the time period would likely capture many people whose mental illness did not result in a substantial functional disability. However, after considering the comments and preparing joint guidance on the definition of serious mental illness with OMH, the Department has concluded that Section 487.2(c) is unnecessary, and has modified the regulations to eliminate this section.

Because the Department and OMH will provide joint guidance that addresses the concerns expressed by these commenters, the Department declines to change the definition of serious mental illness.

### **Transitional Adult Homes**

Commenters suggested that the 25% figure used to define “transitional adult homes” is far too low to be used as a ceiling. Several commenters noted that this determination was made without any assessment of these facilities or their residents. However, OMH’s clinical advisory expresses the opinion that large scale congregate housing with a concentration of significant numbers of people with mental illnesses are not clinically appropriate for individuals with serious mental illness, nor are they conducive to recovery, and the 25% figure is appropriate.

Some commenters objected to the limitation of the definition of a Transitional Adult Home to homes with a certified capacity of 80 beds or more, arguing that all adult homes with a mental health census of 25% or more should be included in the definition of a Transitional Adult Home. The Department declines to make a change based on this comment because OMH's clinical opinion is that the impact of a mental health census of 25% or more is problematic primarily in the larger adult homes. For the same reason, the Department declines to accept the recommendation of a commenter that a Transitional Adult Home should be defined as an adult home in which 25% or 25 individuals, whichever is less, are persons with serious mental illness.

Several commenters recommended that Assisted Living Programs (ALPs) be carved out of the definition of Transitional Adult Homes. The Department declines to accept this recommendation.

The Department will publish a list of Transitional Adult Homes, subject to change based on available data, following final adoption of these regulations.

### **Compliance Plan**

The Department received numerous comments to Section 487.13(c) regarding the submission of a compliance plan by operators of Transitional Adult Homes. The most frequent comment was that the creation and implementation of a compliance plan depends on factors outside the control of Adult Home Operators, such as the availability of alternative community housing. As a result, commenters stated, Adult Home operators may find it difficult if not impossible to implement a compliance plan. In addition, numerous commenters expressed a concern that insufficient

alternative housing is available to permit operators of Transitional Adult Homes to implement compliance plans.

The intent of the compliance plan requirement is to solicit ideas and proposals from Transitional Adult Home operators, who are in a position to determine the best way of bringing their mental health census to less than 25% of the resident population. As an initial matter, a successful compliance plan should set forth a process or framework setting forth the steps the facility intends to take in order to move toward compliance. Such steps could include, for example: 1) the steps the facility will take to identify and contact appropriate housing and service providers to determine the range of alternative community housing and community services available to individuals with serious mental illness, a list of the providers that have been identified and how the facility will liaise with them ; 2) how the facility will to give residents with serious mental illness who wish to move access to information about such housing and services, and how the facility intends to cooperate with any “inreach” efforts by housing and service providers; 3) steps the facility will take to facilitate the discharge of residents who desire to move to alternative community housing, such as discharge planning, cooperating in the enrollment of individuals into appropriate Health Homes and Managed Long Term Care Plans, and assessments of residents by representatives of those plans; 4) describing any physical alterations that may be required and any new permits that may be necessary for approval of new uses of existing facilities. The Department anticipates engaging with Adult Home operators in the development of acceptable compliance plans. After reviewing the initial proposals, the Department will be in a position to provide more additional guidance and to set a deadline for the implementation of the compliance plans.

Other comments included the following: that the 60-day deadline for the submission of a compliance plan is too short; that there should be a deadline for the Department's review of the plan; and that there should be a deadline for the completion of the plan once it is approved by the Department. The Department agrees that the 60-day deadline for submission of a compliance plan is too short and has modified the regulations to provide for a deadline of 120 days. The regulations have also been modified to require the Department to review compliance plans within 90 days of their submission. A deadline for the implementation of compliance plans has not been added at this time.

One commenter recommended that each compliance plan should include a due process procedure for any resident who is not offered alternative housing because he or she is not believed to meet the definition of a person with serious mental illness or is not placed in the housing of his or her choice. The Department declines to adopt this recommendation. A due process procedure would be appropriate if the regulations created an individual right to housing or services. However, these regulations are not intended to create individual entitlements. Rather, they are intended to implement OMH's clinical determination that Transitional Adult Homes are in general not clinically appropriate residences for individuals with serious mental illness, and restrict the capacity of these homes accordingly. These regulations are not intended to guarantee that every individual will receive the exact housing of his or her choice.

### **Rights of Adult Home Residents**

Several commenters stated that placing limitations on the admission of persons with serious mental illness to Transitional Adult Homes is unlawful and discriminatory under both State and

Federal laws, including the Fair Housing Act and the American with Disabilities Act. The Department does not agree. The Department has the authority to limit the number of individuals admitted to certain types of facilities or units if the attempt to provide services to more than that number of individuals would negatively impact health, safety and well-being, even if the limitation means that some individuals will not be able to receive services at the facility of their choice. The limitation applies to transitional adult homes only. Once a transitional adult home reduces its mental health census to under 25% of the resident population, it may again admit persons with serious mental illness provided its mental health census stays below the 25% figure. The limitation is designed to implement the clinical opinion of OMH's Medical Director and does not improperly discriminate against individuals with serious mental illness. Therefore, the Department declines to modify the regulations based on this comment.

Some commenters also argued that requiring Transitional Adult Homes to reduce their mental health census to less than 25% of the resident population would force the discharge of thousands of adult home residents, resulting in more people becoming homeless or requiring hospitalization. The Department disagrees with these comments. In October, 2012, OMH issued a Request for Proposals for the development and operation of up to 1050 units of Supported Housing in Queens and Brooklyn. These units are being developed to facilitate the transition to alternative community settings for individuals with serious mental illness currently residing in transitional adult homes. Contracts have been awarded and the anticipated start date is January of 2013.

Contrary to concerns expressed by some commenters, the regulations do not alter or conflict with statutory and regulatory requirements governing the discharge of residents from adult homes. Transition to alternative community settings will take place in a manner that is consistent with existing statutory and regulatory requirements. The regulations are designed to provide all current transitional adult home residents with serious mental illness a choice to either stay in the adult home or transition to a community setting. For those who stay in transitional adult homes, the regulations require that compliance plans include a plan to provide residents with rehabilitative and recovery oriented programs.

### **Costs to State**

Some commenters argued that there was a lack of data to support the Regulatory Impact Statement as it relates to cost. One commenter noted that the Department did not explain how the state came to the \$20,000 figure for supported housing units; others noted that the state will have to substantially increase funding for supported services for individuals transitioning to community housing. The cost estimates were provided by OMH, which currently subsidizes community housing, including supported housing. OMH provides a State Stipend of \$14,493 per person for each Supported Housing unit in New York City. This funding is for rent stipends, housing case management services and contingency funds. The remaining cost is an estimate for other community based mental health services. OMH and the Department will be evaluating the community services needed for adult home residents as assessments are completed and individuals start the transition to the community.

Commenters also argued that the costs of the regulations to the state will exceed the cost of adult home residence because many current residents of adult homes will be unable to live in an alternative community setting without various supportive services, and in some cases, 24-hour care, which will increase costs. The Department believes that any potential increase in expenditures is justified in light of OMH's clinical advisory, and added costs for supported apartments and anticipated support services are included in the Budget. The Department believes that some of these costs may be partially offset by savings in Medicaid spending. When transitional adult home residents move to alternative community settings, some service savings could accrue through better management of chronic disease, including mental illness.

Two commenters expressed the belief that as a result of the regulations, there will be increased hospitalizations or placements into more costly treatment settings. Another commenter believed that the regulations would result in higher criminal justice costs and more returns to homeless shelters. The Department regards these comments as opinions rather than recommendations for amendments to the Regulatory Impact Statement. Accordingly, no changes were made to the Regulatory Impact Statement to as a result of these comments.

### **Impact on Adult Homes**

Finally, some commenters contend that the costs to Adult Home operators of compliance with the regulations have been significantly underestimated, and that operators of adult homes will be unable to stay in business. It may be the case that some adult homes will no longer be able to stay in business in their current form. However, the Department's primary responsibility is to the health, safety and well-being of AH residents. The Department believes these regulations are

necessary, in light of OMH's clinical advisory, despite the potential hardships to adult home operators. The Department intends the regulations to provide sufficient flexibility for operators of transitional adult homes so that they can design an appropriate compliance plan, make the transition in an orderly manner while respecting the rights of their residents, and if necessary, adopt a new business model or find another economically viable use of their property if necessary.

### **Penalties**

Several commenters objected to the \$1,000 per day penalty for violation of sections 487.13, noting that the penalty is highest available under the statute and comparable to the penalty imposed for violations that cause serious harm to residents, and recommended that the penalty be lowered. The Department declines to adopt this recommendation. The penalty reflects the importance of these regulations to the health, safety and well-being of residents of Transitional Adult Homes with serious mental illness.

### **Recordkeeping Requirements**

Two commenters noted that maintaining a weekly roster of residents with serious mental illness and preparing a quarterly statistical information report with a roster of such residents is burdensome and unnecessary for most non-transitional adult homes. The Department agrees, and has modified the regulations accordingly. The requirement of a weekly roster of individuals with serious mental illness has been eliminated, and an enhanced quarterly statistical information report with a roster of residents with serious mental illness is now required only of operators of Adult Homes with a resident capacity of 80 or more beds and a mental health census of 20 % or

more of the resident population, i.e., Adult Homes that meet or come close to meeting the criteria for Transitional Adult Homes. Other adult homes will continue to submit their statistical information reports as required by the Department.