

SUMMARY OF EXPRESS TERMS

These proposed regulations amend 18 NYCRR sections 485.14, 486.5, 487.5, 487.7, 487.11, 488.5, 488.7, 488.11, 490.5, 490.7, and 490.11, which pertain to resident rights and services in all adult care facilities (Part 485), including Adult Homes (Part 487), Enriched Housing Programs (Part 488), and Residences for Adults (Part 490). The changes incorporate the residents' rights standards of the final Home and Community-Based Services (HCBS) regulation, promulgated by the Centers for Medicare & Medicaid Services, including the rights of access to visitors, freedom of choice, and community participation. The proposed regulations also amend reporting requirements in the event of a resident death or attempted suicide, or where a felony crime may have been committed by or against a resident, pursuant to Social Services Law section 461-m.

Specific amendments include:

Section 485.14: requires operators to provide unrestricted access to common areas for at least ten hours between 9 a.m. and 8 p.m., and to allow common space visits taking place outside this timeframe and access to visitors at any time.

Sections 487.5(a), 488.5(a), and 490.5(a): require the statement of rights to be provided to each resident at the time of admission and reviewed with the resident annually thereafter, and further amended to expand on residents' rights, including rights to: (a) manage their own personal affairs, including the right to determine from whom medical services are received, provided such services are within the provider's scope of practice; (b) have privacy in their own room and sleeping unit, with only appropriate staff having access; (c) choose a private room if available and affordable or be offered a choice of roommates in a shared unit; (d) decorate their own room; (e) have their dignity preserved

and be free from coercion and restraint; (f) engage in community life, including activities outside of the facility; (g) be afforded the opportunity to seek employment and work in the greater community; and (h) to control their own schedule and activities and have access to reasonably available foods of preference at any time.

Sections 487.7, 488.7, and 490.7: require operators to file a report with the Justice Center for the Protection of People with Special Needs in the event of a resident's death or attempted suicide, or when a felony crime may have been committed by or against a resident, if the resident had at any time received services from a mental hygiene services provider. Amendments further require reporting to the appropriate law enforcement authority when a felony crime may have been committed by or against a resident. These sections will also require case management to include episodic evaluation of the resident's needs and goals; to document each resident's understanding of their rights and responsibilities; and to support residents in making decisions about daily activities to participate in, with whom to interact, and the physical environment in which the resident resides.

Sections 487.11(l)(14), 488.11(h), and 490.11(m)(14)(i): require all bedrooms to be lockable by the resident via an appropriate locking mechanism, with only residents and appropriate staff having access.

Pursuant to the authority vested in the Commissioner of Health by sections 461 and 461-e(5) of the Social Services Law, sections 485.14, 486.5, 487.5, 487.7, 487.11, 488.5, 488.7, 488.11, 490.5, 490.7, and 490.11 of Title 18 (Social Services) of the Official Compilation of Codes, Rules and Regulations of the State of New York, are hereby amended, to be effective upon publication of a Notice of Adoption in the New York State Register.

Section 485.14 is amended to read as follows:

(a) An operator shall not restrict or prohibit access to the facility by:

* * *

(3) an employee or representative of any public or private not-for-profit corporation, community organization or association whose primary purposes for visiting include assisting residents in resolving problems and complaints concerning their care and treatment, and in securing adequate services to meet their needs. The operator shall make available [a] an unrestricted common area of the facility for such visits.

(b) Such unrestricted access in common areas shall be permitted for at least 10 hours between 9 a.m. and 8 p.m. daily.

(c) The operator may require anyone seeking access to the facility to sign a visitor's register or like record but may not inquire as to the reason for the visit.

(1) Residents may have visitors at any time.

* * *

Subparagraph (vi) of paragraph (4) of subdivision (a) of Section 486.5 is amended as follows:

Reference to Section 487.5(a)(3)(ix) is re-lettered to refer to Section 487.5(a)(3)(xi).

Paragraphs (2) and (3) of subdivision (a) of Section 487.5 is amended to read as follows:

(2) A copy of the statement of rights issued by the department shall be posted in a conspicuous location in a public area of the facility, provided to each resident at the time of admission, and reviewed with the resident annually thereafter.

(3) At a minimum, the operator shall afford each resident the following rights and protections:

* * *

(vi) A resident shall have the right to manage [his or her] their own financial and personal affairs, including but not limited to the right to determine from whom medical services are received, provided such services are within the provider's scope of practice.

(vii) A resident shall have the right to privacy in [his/her] their own room or sleeping unit, and in caring for personal needs, with only the resident and appropriate staff having access.

(viii) [A resident shall have the right to confidential treatment of personal, social, financial and health records.] A resident shall be provided the ability to select a private room if one is available and affordable to the resident. Residents in shared rooms shall be afforded a choice of roommates and operators shall take all reasonable steps to accommodate a resident's expressed choice.

(ix) [A resident shall have the right to receive courteous, fair and respectful care and treatment at all times, and shall not be physically, mentally or emotionally abused, or

subject to any occurrence which would constitute a reportable incident.] A resident shall have the right to decorate their room to taste in compliance with all applicable local and state fire and safety codes.

(x) [A resident shall not be restrained nor locked in a room at any time.] A resident shall have the right to confidential treatment of personal, social, financial and health records.

(xi) [A resident shall have the right to receive and send mail or any other correspondence unopened and without interception or interference.] At all times, a resident shall:

(a) have the right to receive courteous, fair and respectful care and treatment;

(b) have their dignity preserved;

(c) be free from coercion and restraint; and

(d) not be physically, mentally or emotionally abused, or subject to any occurrence which would constitute a reportable incident.

(xii) [A resident shall be permitted to leave and return to the facility and grounds at reasonable hours.] A resident shall neither be restrained in any way nor locked in a room at any time.

(xiii) [A resident shall not be obliged to perform work.] A resident shall have the right to receive and send mail or any other correspondence unopened and without interception or interference.

(xiv) [A resident shall not be permitted, or obliged, to provide any operator or agent of the operator any gratuity in any form for services provided or arranged for in accord with law or regulation.] A resident shall be permitted to engage in community life, including life outside of the facility, to the degree that the resident prefers and in full recognition of the resident's safety.

(xv) [A resident must have the right to have his/her version of the events leading to an accident or incident in which such resident is involved included on the reports of such accidents or incidents.] A resident shall not be obliged to perform work for the facility, but must be afforded the opportunity to seek employment, volunteer and work in the greater community if they so choose, and if the resident performs work on behalf of the facility, to receive fair compensation from the operator.

(xvi) A resident shall not be permitted, or obliged, to provide any operator or agent of the operator any gratuity in any form.

(xvii) A resident must have the right to have their version of the events leading to an accident or incident in which such resident is involved included on the reports of such accidents or incidents.

(xviii) A resident shall be afforded the right to control their own schedule and activities and have access to reasonably available foods of preference at any time.

(xix) A resident shall have the right to object if the operator terminates the resident's admission or residency agreement against their will. The operator shall provide instructions for formally making an objection if requested by the resident.

* * *

Subdivision (d) of Section 487.7 is amended to read as follows:

(1) Supervision services shall include, but are not limited to:

* * *

(ii) recording a daily census [(DSS-2900)] using a department-prescribed form;

* * *

(6) (i) In the event that a resident requires emergency assistance because of illness or injury, the operator shall:

* * *

(iii) In the event of illness or injury, the operator shall also:

* * *

(c) upon transfer of a resident to a health, mental health or other residential care facility, send an approved transfer form (or copy of the [DSS-3122] department-prescribed medical evaluation and the personal data sheet) and such other information as the receiving facility requests and the operator is required to maintain;

* * *

(8) In the event of the death of a resident, the operator must:

* * *

(iii) immediately report the death to the appropriate regional office of the Department of Health by telephone and submit a copy of the department-prescribed Incident Report [(DSS-3123)], which must be received by the appropriate regional office of the Department of Health, within 24 hours of the death; and

(iv) submit a report to the [State Commission on Quality of Care for the Mentally Disabled] Justice Center for the Protection of People with Special Needs (“Justice Center”), on a form prescribed by the [Commission] Justice Center, if the resident had at any time received services from a mental hygiene service provider. Such form must be received by the [Commission] Justice Center within twenty-four hours of the death.

(9) If a resident attempts suicide, the operator must:

(i) immediately report the attempted suicide to the appropriate regional office of the department of health by telephone and submit a copy of the department-prescribed

Incident Report [(DSS-3123)], which must be received by the appropriate regional office of the Department of Health, within twenty-four hours of the attempted suicide, and

(ii) submit a report to the [State Commission on Quality of Care for the Mentally Disabled] Justice Center, on a form prescribed by the [Commission] Justice Center, if the resident had at any time received services from a mental hygiene service provider. Such form must be received by the [Commission] Justice Center within twenty-four hours of the attempted suicide.

(10) If [it is believed] an operator discovers an incident where the operator believes, or reasonably should have believed, that a felony crime may have been committed by or against a resident, the operator [must] shall:

(i) immediately report the occurrence to the appropriate regional office of the department of health by telephone and submit a copy of the department-prescribed Incident Report [(DSS-3123)], which must be received by the appropriate regional office of the Department of Health, within twenty-four hours of the occurrence. The operator also must [notify an appropriate law enforcement authority as soon as possible but at least within twenty-four hours.];

(ii) as soon as practicable, but in no event longer than twenty-four hours after the occurrence, notify an appropriate law enforcement authority of the occurrence; and

(iii) submit a report to the Justice Center, on a form prescribed by the Justice Center, if the resident had at any time received services from a mental hygiene service provider.

Such form shall be received by the Justice Center within twenty-four hours of the discovery of the occurrence.

(11) The operator must prepare an Incident Report [(DSS-3123)], using the department-prescribed form, whenever:

* * *

(12) The operator must:

- (i) place a copy of the Incident Report [(DSS-3123)] in the resident's individual record;
- (ii) maintain a chronological log or record of all Incident Reports [(DSS-3123)] prepared, which includes identification of the resident or residents involved and the type of incident; [and]
- (iii) submit a copy of any Incident Reports [(DSS-3123)] required in paragraph (11) of this subdivision to the appropriate regional office of the Department[.]; and
- (iv) contact the Justice Center if that resident had, at any time, received mental hygiene services.

(13) The operator must include the resident's version of the events leading to an accident or incident involving such resident, unless the resident objects, on all required Incident Reports [(DSS-3123)].

* * *

Subdivision (g) of Section 487.7 is amended to read as follows:

(g) *Case management.* (1) Case management services shall include:

- (i) initial [and], episodic, and periodic evaluation, [at least] not less than once in every 12-month[s] period, of the needs and goals of [a] each resident and of the capability of the facility program to meet those needs and expressed goals;

* * *

(ix) assisting the resident in making arrangements to obtain services, examinations and reports needed to maintain or document the maintenance of the resident's health or mental health, including but not limited to:

- (a) health and mental health services;
- (b) dental services; and
- (c) medications;

* * *

(xii) assisting residents in need of alternative living arrangements to make and execute sound discharge or transfer plans; [and]

(xiii) documenting each resident's understanding of their rights and responsibilities afforded under this Part; and

(xiv) [xiii] assisting in the establishment and operation of a system to enable residents to participate in planning for change or improvement in facility operations and programs and to present grievances and recommendations.

(2) Each resident shall be provided such case management services as are necessary to support the resident in maintaining independence of function and personal choice[.], including, but not limited to, decisions regarding which daily activities to participate in, individuals with whom to interact, and the physical environment in which the resident resides.

* * *

Subparagraph (i) of paragraph (14) of subdivision (l) of Section 487.11 is amended to read as follows:

(i) All bedrooms shall be:

- (a) above grade level;
- (b) adequately lighted; [and]
- (c) adequately ventilated[.]; and
- (d) lockable by the resident via an appropriate locking mechanism, with only the resident and appropriate staff having access.

* * *

Subdivision (a) of Section 488.5 is amended to read as follows:

* * *

(2) A copy of the statement of rights issued by the department must be posted in a conspicuous location in a public area of the facility, provided to each resident at the time of admission, and reviewed with the resident annually thereafter.

(3) The following rights and protections must be afforded by the operator to each resident. Each resident has the right:

(i) to, at all times:

(a) receive courteous, fair and respectful care and treatment[.];

(b) have their dignity preserved;

(c) be free from coercion and restraint; and

(d) not be physically, mentally or emotionally abused, or subject to any occurrence which would constitute a reportable incident;

* * *

(v) to present grievances or recommendations on [his/her] their own behalf or the behalf of other residents to the program coordinator or staff, the Department of [Social Services] Health, other government officials, or any other parties without fear of reprisal or punishment;

* * *

(viii) to have privacy in their own room and sleeping unit, and in treatment and in caring for personal needs, with only appropriate staff having access;

(ix) to receive a written statement [(in the form of an admission or residency agreement)], as appropriate, of the services regularly provided by the operator, those additional services which will be provided if needed or requested and the charges (if any) of these additional services;

(x) to manage [his/her] their own financial and personal affairs, including the right to determine from whom medical services are received, provided such services are within the provider's scope of practice;

(xi) [to not be coerced or required to perform the work of staff members or contractual work, and if the resident works, to receive fair compensation from the operator] to select a private room if one is available and affordable to the resident. Residents in shared rooms shall be afforded a choice of roommates and operators shall take all reasonable steps to accommodate a resident's expressed choice;

(xii) [to have security for any personal possessions if stored by the operator] to decorate their room to taste and in compliance with all applicable local and state fire and safety codes;

(xiii) [to have recorded on the program's accident or incident report the resident's version of the events leading to the accident or incident; and] to neither be restrained in any way nor locked in a room at any time;

(xiv) [to object if the operator terminates the resident's admission agreement against his/her will.] to the extent the resident prefers, be permitted to engage in activities outside the facility;

(xv) to control their own schedule and activities and have access to reasonably available foods of preference at any time;

(xvi) to not be coerced or required to perform the work of staff members or contractual work for the facility, but must be afforded the opportunity to seek employment, volunteer and work in the greater community if he or she so chooses, and if the resident performs work on behalf of the facility, to receive fair compensation from the operator;

(xvii) to have security for any personal possessions if stored by the operator;

(xviii) to have recorded on the program's accident or incident report the resident's version of the events leading to the accident or incident; and

(xix) to object if the operator terminates the resident's admission or residency agreement against the resident's will. The operator shall provide instructions for formally making an objection if requested by the resident.

* * *

Subdivision (b) of Section 488.7 is amended to read as follows:

* * *

(2) In the event that a resident is absent from the enriched housing program and the resident's whereabouts are unknown, the operator shall initiate efforts to find the resident and, if the absence exceeds 24 hours:

(i) immediately notify the resident's next of kin or representative;

(ii) immediately notify the appropriate law enforcement agency;

(iii) notify the appropriate regional office of the department on the first available working day; and

(iv) send a copy of the department-prescribed Incident Report [(DSS-3123)] to the appropriate regional office of the department within five working days.

* * *

(6) In the event of illness or injury, the operator must also:

(i) notify the resident's personal physician or, in the event such physician is not available, a qualified alternate;

(ii) notify the resident's representative, or next of kin, if known;

(iii) upon transfer of a resident to a health, mental health or other residential care facility, send an approved transfer form (or a copy of the [DSS-3122] department-prescribed medical evaluation form and the personal data sheet) and such other information as the receiving facility requests and the operator is required to maintain. In emergency transfers, this information may be telephoned to the receiving facility and written information sent within 72 hours of the transfer; and

(iv) make a notation of the illness or injury and transfer, if any, in the resident's record to include all items applicable in this paragraph. The I[i]ncident R[r]eport form may be substituted to record all accidents or illnesses.

* * *

(8) In the event of the death of a resident, the operator must:

(i) immediately take necessary action to notify the resident's next of kin, or representative, if known;

(ii) immediately take necessary action to notify the appropriate local authorities;

(iii) immediately report the death to the appropriate regional office of the department of health by telephone and submit a copy of the Incident Report [(DSS-3123)], which must

be received by the appropriate regional office of the Department of Health, within twenty-four hours of the death; and

(iv) [immediately following the discovery of the death and] submit a written report to the Justice Center, on a form prescribed by the Justice Center, if the resident had at any time received services from a mental hygiene service provider [within 24 months preceding the date of the death]. Such form must be received by the Justice Center within 24 hours of [the discovery of] the death. [Reports by facilities subject to the Justice Center of incidents which would be reportable incidents shall be made pursuant to paragraph (14) of this subdivision and section 488.13 of this Part.]

(9) If a resident attempts suicide the operator must:

(i) immediately report the attempted suicide to the appropriate regional office of the department of health by telephone and submit a copy of the department-prescribed Incident Report [(DSS-3123)], which must be received by the appropriate regional office of the Department of Health, within twenty-four hours of the attempted suicide; and

(ii) [immediately following discovery of the incident, inform the Justice Center of such incident, orally or electronically, as required by the Justice Center, and] submit a written report to the Justice Center, on a form prescribed by the Justice Center, if the resident had at any time received services from a mental hygiene service provider [within 24 months preceding the date of the incident]. Such form must be received by the Justice Center within 24 hours of [the discovery of] the attempted suicide. [Reports by facilities subject to the Justice Center of incidents which would be reportable incidents shall be made pursuant to sections 488.7(b)(14) and 488.13 of this Part.]

(10) [If it is believed that a felony crime may have been committed by or against a resident, the operator must immediately report the occurrence to the appropriate regional office of the department of health by telephone and submit a copy of the Incident Report (DSS-3123), which must be received by the appropriate regional office of the department of health, within twenty-four hours of the occurrence. The operator also must notify an appropriate law enforcement authority as soon as possible but at least within twenty-four hours. In addition, the operator must immediately upon discovery of the occurrence, inform the Justice Center of the occurrence, orally or electronically, as required by the Justice Center, and must submit a written report to the Justice Center, on a form prescribed by the Justice Center, if the resident received services from a mental hygiene service provider within the 24 months preceding the date of the occurrence believed to be a felony crime. Such form must be received by the Justice Center within twenty-four hours of the discovery of the occurrence. Reports by facilities subject to the Justice Center of incidents which would be reportable incidents shall be made pursuant to sections 488.7(b)(14) and 488.13 of this Part.] If an operator discovers an incident that the operator believes, or reasonably should have believed, would constitute a felony crime against a resident, the operator shall:

(i) immediately report the occurrence to the appropriate regional office of the Department of Health by telephone and submit a copy of the Incident Report, using the department-prescribed form, within 24 hours of the occurrence;

(ii) as soon as practicable, but in no event longer than 24 hours after the occurrence, notify an appropriate law enforcement authority of the occurrence; and

(iii) submit a report to the Justice Center, on a form prescribed by the Justice Center, if the resident had at any time received services from a mental hygiene service provider.

Such form shall be received by the Justice Center within 24 hours of the discovery of the occurrence.

(11) The operator must prepare an Incident Report, using the department-prescribed form, [(DSS-3123)] whenever:

* * *

(12) The operator must:

(i) place a copy of the Incident Report [(DSS-3123)] in the resident's individual record;

(ii) maintain a chronological log or file of all Incident Reports [(DSS-3123)] which includes identification of the resident or residents involved and the type of incident; and

(iii) submit a copy of all Incident Reports [(DSS-3123)] required in paragraph (11) of this subdivision to the appropriate regional office of the department; and if the resident is a participant in a service program operated under a cooperative agreement with the operator, to that [program]organization[, and for all residents who had, at any time received services from a mental hygiene service provider, to the State Commission on Quality of Care for the Mentally Disabled.]; and

(iv) contact the Justice Center if that resident had, at any time, received mental hygiene services.

(13) The operator must include the resident's version of the events leading to an accident or incident involving such resident, unless the resident objects, on all required Incident Reports [(DSS-3123)].

* * *

Subdivision (e) of Section 488.7 is amended to read as follows:

(e) *Case management.* (1) Each resident must be provided such case management services as are necessary to support the resident in maintaining independence of function and personal choice, including, but not limited to, decisions regarding which daily activities to participate in, individuals with whom to interact, and the physical environment in which the resident resides.

(2) Case management services must include:

(i) evaluating initially, episodically, and periodically, [at least] not less than once every 12-month[s] period, the needs and goals of [a] each resident and the capability of the program to meet those needs and expressed goals;

* * *

(ix) assisting residents in need of alternative living arrangements to make and execute sound discharge or transfer plans; [and]

(x) assisting residents as needed in shopping for personal items such as toiletries, medical supplies, stationery, books and clothing; and

(xi) documenting each resident's understanding of their rights and responsibilities afforded under this Part.

* * *

Subdivision (h) of Section 488.11 is amended to renumber paragraph (11) as paragraph (12) and add a new paragraph (11) to read as follows:

(11) Living units shall be lockable by the resident via an appropriate locking mechanism, with only the resident and appropriate staff having access.

Subdivision (a) of Section 490.5 is amended to read as follows:

* * *

(2) A copy of the statement of rights issued by the department must be posted in a conspicuous location in a public area of the facility, provided to each resident upon admission, and reviewed with the resident annually thereafter.

(3) The operator of a residence for adults must afford each resident the right:

(i) to, at all times:

(a) receive courteous, fair and respectful care and treatment [and];

(b) have their dignity preserved;

(c) be free from coercion and restraint; and

(d) not be physically, mentally or emotionally abused or neglected in any manner;

* * *

(v) to present grievances or recommendations on [his/her] their own behalf or the behalf of other residents to the administrator or facility staff, the Department of [Social Services] Health, other government officials, or any other parties without fear of reprisal or punishment;

* * *

(viii) to have privacy in their own room and sleeping unit, and in treatment and in caring for personal needs, with only the resident and appropriate staff having access;

(ix) to receive a written [statement (]admission or residency agreement[)] of], detailing the services regularly provided by the facility operator, those additional services which will be provided if the resident needs or asks for them and the charges (if any) of these additional services;

(x) to manage [his/her] their own financial and personal affairs, including the right to determine from whom medical services are received, provided such services are within the provider's scope of practice;

(xi) [to not be coerced or required to perform work; and if the resident works, to receive fair compensation from the operator of the facility] to select a private room if one is available and affordable to the resident. Residents in shared rooms shall be afforded choice of roommates and the operator shall make all reasonable efforts to accommodate such expressed choice;

(xii) [to have security for any personal possessions if stored by the facility] to decorate their room to taste and in compliance with all applicable local and state fire and safety codes;

(xiii) [to have recorded on the facility's accident or incident report the resident's version of the events leading up to the accident or incident] to neither be restrained in any way nor locked in a room at any time;

(xiv) [to object if the operator terminates the admission agreement against the resident's will] to be permitted to engage in activities outside the facility to the degree the resident prefers;

(xv) to control their own schedule and activities and have access to reasonably available foods of preference at any time;

(xvi) to not be coerced or required to perform the work of staff members or contractual work for the facility, but the resident must be afforded the opportunity to seek employment and work in the greater community if he or she so chooses, and if the

resident performs work on behalf of the facility, to receive fair compensation from the operator of the facility;

(xvii) to have security for any personal possessions if stored by the facility;

(xviii) to have recorded on the facility's accident or Incident Report the resident's version of the events leading up to the accident or incident;

(xix) to object if the operator terminates the admission or residency agreement against the resident's will. The operator shall provide instructions for formally making an objection if requested by the resident.

Paragraph (1) of subdivision (c) of Section 490.7 is amended to read as follows:

(1) The agreement developed in satisfaction of subdivision (b) of this section must be reviewed and approved, prior to execution, by the appropriate regional offices of the Department of [Social Services] Health and the appropriate office of the Department of Mental Hygiene, including the Office of Alcoholism and Substance Abuse.

Subdivision (d) of Section 490.7 is amended to read as follows:

* * *

(4) (i) In the event that a resident requires emergency assistance because of illness or injury, the operator must:

* * *

(iii) In the event of illness or injury, the operator must also:

* * *

(c) upon transfer of a resident to a health, mental health or other residential care facility, send an approved transfer form (or copy of the [DSS-3122] department-prescribed

medical evaluation and the personal data sheet) and such other information as the receiving facility requests and the operator is required to maintain except that in emergency transfers, this information may be telephoned to the receiving facility and written information sent within 72 hours; and

* * *

(6) In the event of the death of a resident, the operator must:

* * *

(iii) immediately report the death to the appropriate regional office of the department of health by telephone and submit a copy of the department-prescribed I[i]ncident R[r]eport [(DSS-3123)], which must be received by the appropriate regional office of the Department of Health, within twenty-four hours of the death; and

(iv) submit a written report to the [State Commission on Quality of Care for the Mentally Disabled] New York State Justice Center for the Protection of People with Special Needs (“Justice Center”), on a form prescribed by the [Commission] Justice Center, if the resident had at any time received services from a mental hygiene service provider. Such form must be received by the [Commission] Justice Center within twenty-four hours of the death.

(7) If a resident attempts suicide, the operator must:

(i) immediately report the attempted suicide to the appropriate regional office of the department of health by telephone and submit a copy of the department-prescribed I[i]ncident R[r]eport [(DSS-3123)], which must be received by the appropriate regional office of the Department of Health, within twenty-four hours of the attempted suicide, and

(ii) submit a report to the [State Commission on Quality of Care for the Mentally Disabled] Justice Center, on a form prescribed by the [Commission] Justice Center, if the resident had at any time received services from a mental hygiene service provider. Such form must be received by the [Commission] Justice Center within twenty-four hours of the attempted suicide.

(8) [If it is believed that a felony crime may have been committed by or against a resident, the operator must immediately report the occurrence to the appropriate regional office of the department of health by telephone and submit a copy of the incident report (DSS-3123), which must be received by the appropriate regional office of the Department of Health, within 24 hours of the occurrence. The operator also must notify an appropriate law enforcement authority as soon as possible but at least within 24 hours. In addition, the operator must submit a report to the State Commission on Quality of Care for the Mentally Disabled, on a form prescribed by the Commission, if the resident had at any time received services from a mental hygiene service provider. Such form must be received by the Commission within twenty-four hours of the occurrence.] If an operator discovers an incident that the operator believes, or reasonably should have believed, would constitute a felony crime committed by or against a resident, the operator shall:

(i) immediately report the occurrence to the appropriate regional office of the Department of Health by telephone and submit a copy of the department-prescribed Incident Report, which shall be received by the appropriate regional office of the Department of Health within 24 hours of the occurrence;

(ii) as soon as practicable, but in no event longer than 24 hours after the occurrence, notify an appropriate law enforcement authority of the occurrence; and

(iii) submit a report to the Justice Center, on a form prescribed by the Justice Center, if the resident had at any time received services from a mental hygiene services provider. Such form shall be received by the Justice Center within 24 hours of the discovery of the occurrence.

(9) The operator must prepare an I[i]ncident R[r]eport [(DSS-3123)], using the department-prescribed form, whenever:

* * *

Subdivision (e) of Section 490.7 is amended to read as follows:

(e) *Case management.* (1) Case management services include:

(i) initial, episodic, and periodic evaluation, [at least] not less than once in every twelve-month[s] period, of the needs and goals of [a] each resident and of the capability of the facility program to meet those needs and expressed goals;

* * *

(xv) documenting each resident's understanding of their rights and responsibilities afforded under this Part; and

(xvi) assisting in the establishment and operation of a system to enable residents to participate in planning for change or improvement in facility operations and programs and to present grievances and recommendations.

* * *

Subparagraph (i) of paragraph (14) of subdivision (m) of Section 490.11 is amended to read as follows:

(i) All bedrooms must be:

(a) above grade level;

(b) adequately lighted; [and]

(c) adequately ventilated[.]; and

(d) lockable by the resident via an appropriate locking mechanism, with only the resident and appropriate staff having access.

REGULATORY IMPACT STATEMENT

Statutory Authority:

Social Services Law (SSL) section 461(1) requires the Department of Health (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.

Legislative Objectives:

The legislative objective of SSL section 461 is to promote the health and well-being of adults residing in adult care facilities. SSL section 461-e is intended to ensure that adult care facilities maintain sufficient records to enable the Department to monitor facilities serving residents.

Needs and Benefits:

The proposed regulatory changes set forth additional resident rights and articulate specific instances that must be reported to both the Department and the Justice Center for the Protection of People with Special Needs ("Justice Center"). These amendments will better protect adult care residents and ensure their safety and well-being is improved. For example, the regulation will permit many residents to have greater access to their community, which can lead to greater residential satisfaction. Operators will also benefit from these changes, as they provide clarity and direction for the operation of facilities.

The regulations are also necessary to bring Department regulations in line with policy guidance issued by the Department in response to the promulgation of the federal Home and Community-Based Services (HCBS) final rule at 42 CFR §441.301(c). Previously-issued policy guidance includes Dear Administrator Letter (DAL) 17-09 (dated November 13, 2017), DAL 18-15 (dated November 9, 2018), and DAL 21-12 (dated June 30, 2021) which provided guidance for assisted living programs and adult care facilities to comply with the HCBS final rule. As compliance with the HCBS final rule is required by March 17, 2023, these regulations serve an important purpose to ensure that all covered facilities fully understand the HCBS final rule requirements, and that the Department can effectively enforce those requirements.

Finally, these regulations are needed to effectuate statutory changes to SSL § 461-m in 2017 and 2018. SSL § 461-m now requires operators of adult homes, enriched housing programs, and residences for adults to report (1) any death or attempted suicide of a resident to the Department within 24 hours and (2) any incident that the operator believes or reasonably should believe would constitute a felony crime against a resident to an appropriate law enforcement authority. The statute further requires such operators to send any reports involving a resident who had at any time received services from a mental hygiene service provider to the Justice Center.

COSTS:

Costs to Private Regulated Parties:

The Department anticipates that there will be minimal costs to the regulated parties (that is, operators of Adult Homes, Enriched Housing Programs, and Residences

for Adults). These minimal costs are in the form of increased paperwork due to new reporting requirements of specific incidents to the Justice Center. Additionally, some facilities may need to update policies and retrain staff to ensure that resident rights are respected pursuant to the amended regulations.

Costs to Local Government:

This proposal will not impact local governments unless they operate Adult Homes, Enriched Housing Programs, or Residences for Adults, in which case the impact would be the same as outlined above for private parties.

Costs to the Department of Health:

The Department does not anticipate costs to be incurred as a result of the proposed rule. Any work required by the proposed rule, such as monitoring compliance with new residents' rights standards, will be accomplished using existing resources.

Costs to Other State Agencies:

The proposed regulations will require reporting to the Justice Center. However, the Justice Center is expected to utilize existing resources to receive and review these reports.

Local Government Mandates:

Local governments that operate Adult Homes, Enriched Housing Programs, or Residences for Adults must comply with this regulation. No new local government program, project, or activity is required by the proposed regulations.

Paperwork:

The rule requires reporting of specific incidents to the Justice Center on a form prescribed by the Justice Center. Operators will be required to document additional information under the proposed rules, such as residents' understanding of their rights under the applicable laws as well as residents' needs and goals. However, the Department does not expect this additional documentation to be burdensome, as operators are already required to document multiple aspects of residents' needs under existing regulations.

Duplication:

In some instances, the new Justice Center reporting requirements will duplicate the report submitted to the appropriate regional office of the Department. However, these reporting requirements are mandated pursuant to SSL section 461-m. No other State or federal rules will duplicate, overlap or conflict with the proposed rule.

Alternatives:

This rule is necessary to align Department regulations with the SSL, prior Department guidance, and the HCBS final rule. No other alternatives are viable, as

promulgation of regulatory changes are required to align regulations with existing State and federal laws.

Federal Standards:

Adult care facilities are regulated by the State. However, following the promulgation of the HCBS final rule, the State was required to update regulations to maintain compliance with federal laws. These regulatory changes will therefore work in conjunction with relevant federal laws and will enhance Department guidance documents issued following promulgation of the HCBS final rule, including DAL 17-09 (dated November 13, 2017), DAL 18-15 (dated November 9, 2018), and DAL 21-12 (dated June 30, 2021) which provided guidance for assisted living programs and adult care facilities to comply with the HCBS final rule.

Small Business Guide:

A small business guide, required by State Administrative Procedure Act (SAPA) section 102-a, is unnecessary at this time. Through DAL 17-09, DAL 18-15, and DAL 21-12, the Department previously communicated requirements to comply with the HCBS final rule to all adult care facilities and assisted living programs, and these requirements are incorporated into the proposed amended regulations. Additionally, adult homes and enriched housing programs have already been required to report certain instances regarding resident deaths and suicide attempts to the Justice Center. The Department will also remind adult care facilities of these existing guidance documents and legal requirements prior to the effective date of these regulatory amendments.

Compliance Schedule:

Adult care facilities are expected to be able to comply with these regulations immediately. The proposal shall be effective upon publication of a Notice of Adoption in the New York State Register.

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REGULATORY FLEXIBILITY ANALYSIS
FOR SMALL BUSINESSES AND LOCAL GOVERNMENTS

Effect of Rule:

For purposes of this regulatory flexibility analysis, the Department considers small businesses to be adult care facilities with 100 or fewer full-time staff. Based upon information garnered through licensing and surveys of facilities, 549 adult care facilities employ 100 or fewer full-time staff. Two local governments have been identified as operating an adult care facility, one each in the counties of Chenango and Warren.

Although this proposal will therefore affect small business and local governments that operate adult care facilities, the Department finds that the proposed regulations are necessary to ensure that the health and well-being of all adult care facility residents is best protected. Additionally, many of the proposed regulations are consistent with policy guidance that the Department has previously provided as well as State and federal laws (*i.e.*, the SSL and the HCBS final rule). As such, the Department does not anticipate that small businesses and local governments will be unduly burdened by the proposed regulatory changes given their prior awareness.

Professional Services:

No additional professional services will be required by small businesses or local governments to comply with this rule.

Compliance Costs:

The Department anticipates that there will be minimal costs to all regulated parties, including the 554 adult care facilities identified by the Department as small businesses and the two local governments operating an adult care facility. These minimal costs are in the form of increased paperwork due to new reporting requirements of specific incidents to the Justice Center. Additionally, some facilities may need to update policies and retrain staff to ensure that resident rights are respected pursuant to the amended regulations.

Economic and Technological Feasibility:

The Department does not anticipate that regulated parties will need to invest in new technologies to comply with these regulatory changes. The Department-prescribed Incident Report form will be electronic; however, the Department expects that all regulated parties will be able to submit this electronic form using existing technologies, given that the prescribed form will be completed and submitted via the Health Commerce System. Therefore, the Department anticipates that compliance with the proposed rule will be both economically and technologically feasible.

Minimizing Adverse Impact:

As any compliance costs are expected to be minimal, the Department did not consider any approaches for minimizing adverse economic impact as listed in SAPA section 202-b(1).

Small Business and Local Government Participation:

There was no participation from small businesses or local governments in the drafting of this rule. However, the Department will duly consider any comments submitted by representatives of these entities during the public comment period.

Establishment of a Penalty Associated with a Violation of Standards:

This rule establishes no new penalty associated with a violation of standards contained in the regulations. Under existing law (18 NYCRR 486.1), the Department has authority to cite and seek enforcement against a facility with a violation upon noncompliance with the requirements of this rule.

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 44 counties have a population of less than 200,000 based upon the United States Census estimated county populations for 2020 (<https://www.census.gov/quickfacts/>). Approximately 17% of small health care facilities are located in rural areas.

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

The following counties have a population of 200,000 or greater and towns with population densities of 150 persons or fewer per square mile. Data is based upon the United States Census estimated county populations for 2020.

Albany County	Niagara County	Orange County
Dutchess County	Oneida County	Saratoga County
Erie County	Onondaga County	Suffolk County
Monroe County		

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

The proposed rule requires reporting of certain incidents to the Justice Center. However, regulated parties are already required to report such incidents to the Department, and adult homes and enriched housing programs were previously required to report resident deaths and suicide attempts to the Justice Center. As such, the Department does not anticipate that regulated parties will be burdened by this requirement, nor are they expected to require professional services to comply with the proposed rule.

Costs:

The Department anticipates that there will be minimal costs to all regulated parties statewide, including regulated facilities operating in rural areas. These minimal costs are in the form of increased paperwork due to new reporting requirements of specific incidents to the Justice Center. Additionally, some facilities may need to update policies and retrain staff to ensure that resident rights are respected pursuant to the amended regulations.

Minimizing Adverse Impact:

There are minimal adverse impacts associated with this proposed rule. All facilities statewide will be required to complete additional paperwork due to their new reporting responsibilities to the Justice Center. Additionally, the Department expects that some facilities will be required to update policies and retrain staff to ensure that resident

rights are respected pursuant to the amended regulations. Nevertheless, the proposed rule is anticipated to improve resident safety and well-being in adult care facilities statewide. Additionally, the proposed rule is necessary to bring Department guidance in line with the SSL and the HCBS final rule. As such, the benefits greatly outweigh the minimal adverse impacts on facility operators.

Rural Area Participation:

There was no participation from rural area representatives in the drafting of this rule. However, the Department will duly consider any comments submitted by such representatives during the public comment period.

**STATEMENT IN LIEU OF
JOB IMPACT STATEMENT**

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have a substantial adverse impact on jobs and/or employment opportunities.

ASSESSMENT OF PUBLIC COMMENT

The New York State Department of Health (“Department”) received comments regarding the proposed amendments to Sections 485.14, 486.5, 487.5, 487.7, 487.11, 488.5 488.7 488.11, 490.5, 490.7, and 490.11 of Title 18 of the New York Codes, Rules, and Regulations. The comments received and the Department’s responses are summarized below.

Comment #1: While they coincide with the federal Home and Community Based Settings Final Rule, only the assisted living program is a Medicaid-funded State Plan service that receives Medicaid funding and as such, the proposed rule need not apply to all adult care facilities. Further, the proposed changes will have a profound impact on the surveillance process, and as such the industry needs more time and discussion to appreciate just how New York State intends to survey against the proposed standards.

Response #1: The federal Home and Community Based Settings Final Rule (hereinafter referred to as the “Rule”) is not the sole basis for the proposed regulatory amendments. Moreover, the Rule facilitates improved quality of life in adult care facilities, without regard to reimbursement source. The Department has issued thorough guidance for adult care facilities to adopt principles of the Rule that will then ensure compliance with the proposed regulatory amendment. Such guidance is posted on the Health Commerce System and online from 2019-current at https://health.ny.gov/facilities/adult_care/dear_administrator_letters/; and includes, but is not limited to, the following Dear Administrator Letters (DALs): 23-21, 21-12, and 17-09. Finally, through the surveillance process adult care facilities will continue to be surveyed

for compliance with all of the applicable regulatory standards, including any updated standards adopted in conformity with the Rule.

Comment #2: The proposed regulatory amendments at 487.5(a)(2) and 488.5(a) state that in addition to posting a copy of the residents' rights statement the Operator must provide a copy to each resident at the time of admission and review with the resident "periodically" thereafter. Commenters suggest that the review expectation be more specific and therefore recommend the term "periodically" be changed to "annually."

Response #2: The Department agrees that specificity is needed for accountability purposes and as such has updated the language to reflect that the residents' rights statement must be provided to each resident upon admission and thereafter reviewed with the resident not less than annually.

Comment #3: Commenters state that it is not always possible to accommodate a resident's choice of roommate, particularly when the facility is at capacity or other residents decline the option to move. Accordingly, the suggestion is to quantify the requirement to "whenever possible."

Response #3: The Department agrees that it is not always possible to accommodate a resident's choice of roommate. The regulation requires operators to "take all reasonable steps to accommodate a resident's expressed choice..." The Department acknowledges that there are instances when, after a facility takes all reasonable steps to accommodate a resident's expressed choice, it is nevertheless not possible to accommodate a resident's choice of a roommate. No changes have been made based on this comment.

Comment #4: Adding that foods of preference must be available at any time subjects the adult care facility to unattainable selections. For example, a facility may not be able to accommodate a resident's access to grilled steak at 4:00am, but certainly anticipates the ability of the resident to access available onsite food and food available through the greater community. Accordingly, commenters suggest that the regulation be modified to read "...Individuals have...access to food at any time."

Response #4: Enhanced quality of life in settings irrespective of payer source requires that residents who call adult care facilities their homes feel they can access food of their choice when they choose. The Department agrees that adult care facilities should not be expected to accommodate a request to grill a steak at 4:00am; however, the facility can case manage its residents' individualized expectations and identify what foods are available and how to obtain them. In order to clarify the intent of the regulation, the regulation has been amended to state that a resident has a right to have access to "reasonably available" foods of preference at any time.

Comment #5: Commenters request the Department to specify that reports must be submitted to the Justice Center for the Protection of People with Special Needs only when the resident had, at any time, "...received services from a mental hygiene service provider licensed, certified, or funded by the New York State Office of Mental Health." Commenters believe the terminology within the proposed regulation labels and stigmatizes residents who receive or received such services in the past, and that reporting to the Justice Center for the Protection of People with Special Needs should be limited to those residents in the New York State mental health system for chronic mental health issues.

Response#5: The proposed regulation is consistent with New York State Social Services Law and thus, no changes have been made based on this comment.

Comment #6: Commenters suggest that many aged and aging individuals lack life goals and therefore, there should be no expectation that a resident create a goal simply for regulatory compliance.

Response #6: While commenters misinterpret that residents are regulatorily compelled to identify their needs and goals, the proposed regulation has been updated to refer to the needs and goals of each resident and the capability of the facility program to meet those needs “and expressed goals.”

Comment #7: Case managers may find it difficult to determine each resident’s understanding of their rights and responsibilities, so the language should be updated to reflect that a conversation between the case manager and resident took place regarding their rights and responsibilities.

Response #7: Based on compliance guidance previously provided, including that most recently issued via Dear Administrator Letter 23-21 available on the Health Commerce System and at https://health.ny.gov/facilities/adult_care/dear_administrator_letters/, no changes have been made based of this comment.

Comment #8: Commenters believe that privacy and preferred foods are tied to the rates paid to the facility through the Congregate Care Level 3 and State Supplemental Program rates, both of which have remained static for many years and for which there is active

litigation against the State to compel modifications. Because of the perceived need for structural modifications to facilitate compliance with the requirements, coupled with the funding stream status, the commenters implore the Department to be flexible.

Response #8: This comment is outside the scope of the regulation and therefore no changes have been made based on this comment.

Comment #9: Commenters stated that safety is subjective and while individualized decoration preferences may be accommodated, the Department must educate facilities on how to balance resident choice with safety concerns.

Response #9: The Department does not agree that compliance with all applicable local and State fire and safety codes is subjective. No changes have been made based on this comment.

Comment #10: Enriched housing program and adult home regulations differ. Commenters stated that the Department must justify why the differences should be perpetuated.

Response #10: This comment is outside the scope of the proposed regulatory amendments and as such, no changes have been made based on the comment.

Comment #11: Commenters stated that any regulatory changes must be accurately reflected in the surveillance process to ensure consistent compliance measurement.

Response #11: The Department agrees that regulatory changes must be reflected in compliance measurements. No changes have been made based on the comment.

Comment #12: Commenters challenge the Department of Health’s statutory authority to propose these vague regulatory changes.

Response #12: As stated in the Regulatory Impact Statement, “...Social Services Law (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... The legislative objective of SSL section 461 is to promote the health and well-being of adults residing in adult care facilities...” The proposed amendments are within the Department’s authority.

Comment #13: For many reasons, adult care facilities cannot grant unfettered access to visitors at all times while continuing to maintain each resident’s safety and right to privacy. Further, operators have a well-founded right to inquire the reason for a visit and are permitted to request that visitors check-in and limit access if they have reasonable cause to believe a visitor may jeopardize the safety of residents. Yet, the proposed regulations restrict the operator’s ability to protect residents. As such, the proposed regulatory amendments are incompatible.

Response #13: The commenter appears to misinterpret the proposed regulation, which does not specify that visitors may have unfettered access at any time. In fact, the proposed regulation states that residents may have visitors any time, that unrestricted common areas must be permitted for visits, and that anyone may be asked to sign a visitor’s register but may not be asked the reason for their visit. Through guidance issued since 2016, available

on the Health Commerce System and from 2019-current at https://health.ny.gov/facilities/adult_care/dear_administrator_letters/, especially Dear Administrator Letter #17-09, the Department has shared suggestions regarding the balance of safety and access requirements. No changes have been made based on this comment.