

Pursuant to the authority vested in the Commissioner of Health by Section 2808(2-c)(d) of the Public Health Law, section 86-2.9 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended, to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

Paragraph (3) of subdivision (c) of section 86-2.9 is amended by adding new subparagraphs (i) and (ii), to read as follows:

(i) Notwithstanding any provision to the contrary, effective January 1, 2015, for leases originating prior to December 31, 2018 and being renewed beyond such date, residential health care facilities that lease property from a non-related organization in order to operate an adult day health care program consistent with this section shall receive reimbursement from the department related to the cost of such lease. In the event that there is no historic cost, the department shall reimburse such adult day health care program for the lesser of the aggregate lease costs reported to the department during calendar year 2013, or the amount actually paid to the lessor for such lease in the calendar year two years prior to the claim for reimbursement pursuant to this subdivision, provided that such reimbursement shall not exceed any applicable maximum daily rate as provided for in this section. If the lease reported for that year does not span the calendar year, the first twelve months of the lease shall constitute the amount paid for such lease in a calendar year for the calculation above.

(ii) Beginning January 1, 2019, any residential health care facility that seeks to be reimbursed for costs related to newly leased property from a non-related organization in order to operate an adult day health care program consistent with this section shall, prior to entering into the lease,

demonstrate to the satisfaction of the commissioner that: the adult day health care program meets a public need; such program would enable participants to remain in the community, in the least restrictive setting, and avoid institutionalization; and the leased property is the most cost effective option for the facility to operate the adult day health care program. Upon determination that the proposed or existing program satisfactorily meets each of these requirements, the commissioner may grant reimbursement for the lease payment. In the event that no historic cost is available, such adult day health care program will receive the lesser of the lease cost reported during the calendar year 2013 or the actual lease payment for the first twelve months of operation, regardless of any subsequent changes or renewals to such lease or ownership of the facility operations or the leased premises, provided that such reimbursement shall not exceed any applicable maximum daily rate as provided for in this section. If the lease reported for that year does not span the calendar year, the first twelve months of the lease shall constitute the amount paid for such lease in a calendar year for the calculation above.

## **REGULATORY IMPACT STATEMENT**

### **Statutory Authority:**

The statutory authority for this regulation is contained in Public Health Law §2808 which permits the Commissioner of Health to establish rates of payment for residential health care facilities. Subdivision 2-a of section 2808 provides that the rates of payments for residential health care facilities will include real property costs which shall be based on historical costs.

### **Legislative Objectives:**

The objective is to recognize the real property costs to adult day health care programs.

### **Needs and Benefits:**

The Department has allowed residential health care facilities to operate within leased facilities at different levels for years but ended that practice with regard to nursing homes. When the property is used for an Adult Day Health Care (ADHC) program, however, the Department continued to allow for reimbursement of certain real property leases at the discretion of the Commissioner. This regulation would codify this best practice by the Department, providing clear standards for the ADHC programs. ADHC programs enable participants to remain in the community in the least restrictive setting, thereby avoiding institutionalization and creating savings to the Medicaid program.

### **Costs:**

The cost of the practice is \$3 million for both State and Federal share, an amount that has been historically budgeted for so will have no fiscal impact on the program. The \$3 million is the sum of all non-related ADHC leases reported in the 2017 RHCF cost report.

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

There will be no costs to regulated entities for this change in regulation.

**Costs to Local Governments:**

There will be no additional costs to Local Governments for this change in regulation.

**Costs to the State and the Department of Health:**

The total cost per year is estimated at \$3 million; however, by encouraging new ADHC programs and reducing nursing home admissions, the Medicaid program may realize significant savings.

**Local Government Mandates:**

There are no local government mandates due to this change in regulation.

**Paperwork:**

There will be no change in reporting requirements due to this change in regulation as leases that fall under the purview of this regulation are currently captured in the current cost reports.

**Duplication:**

There is no duplication, overlap, or conflict with any other rules or legal requirements by State and Local governments.

**Alternatives:**

While this has been established past practice for reimbursement of leases for ADHC programs, the Department believes by formalizing the past practice into regulation, it will clarify established standards for the ADHC programs. Therefore, no other alternatives were considered during development of this proposal.

**Federal Standards:**

This regulation does not exceed any minimum standard of the federal government for the same or similar subject areas.

**Compliance Schedule:**

The residential health care facilities are already in compliance with reporting requirements. The regulations will be effective upon publication of a Notice of Adoption in the New York State Register.

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**STATEMENT IN LIEU OF  
REGULATORY FLEXIBILITY ANALYSIS**

No regulatory flexibility analysis is required pursuant to section 202-b(3)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse economic impact on small businesses or local governments, and it does not impose reporting, record keeping or other compliance requirements on small businesses or local governments.

**STATEMENT IN LIEU OF  
RURAL AREA FLEXIBILITY ANALYSIS**

A Rural Area Flexibility Analysis for these amendments is not being submitted because amendments will not impose any adverse impact or significant reporting, record keeping or other compliance requirements on public or private entities in rural areas. There are no professional services, capital, or other compliance costs imposed on public or private entities in rural areas as a result of the proposed amendments.

**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 Department of Health (Department) received one comment regarding the proposed amendment to sections 86-2.9 of Title 10 NYCRR.

The comment, from the Adult Day Health Care Council (ADHCC), supported the proposed amendment, and strongly recommend this regulation be adopted.

The Department acknowledges the Adult Day Health Care Council's support for this regulation which will codify reimbursement of real property leases of off-site ADHC programs.