

Pursuant to the authority vested in the Commissioner of Health by sections 461 and 461-e(5) of the Social Services Law, sections 487.4 and 487.10 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.

Subparagraph (ii) of paragraph (3) of subdivision (e) of section 487.4 is amended to read as follows:

Where the [D]department's pre-admission screening indicates that the prospective resident may be a person with serious mental illness [or, in the case of a prospective resident for whom recent Medicaid claims data is not available, the operator has advised that an interview and/or medical evaluation indicate the need for a mental health evaluation pursuant to paragraph (3) of subdivision (g) of this section], the operator shall not admit the prospective resident without conducting or obtaining a mental health evaluation, documented on a form prescribed by the [D]department and developed in consultation with the Office of Mental Health, within 30 days prior to the date of admission, pursuant to paragraph (1) of subdivision (k) of this section. The operator may admit the prospective resident only when the mental health evaluation concludes the individual: (a) is not a person with serious mental illness; or (b) is a person with serious mental illness, but the individual is a former resident of a transitional adult home and the operator obtains a waiver approved by the [D]department pursuant to subdivision (g) of section 487.3 of this Part.

Paragraph (4) of subdivision (e) of section 487.10 is amended, and new paragraph (5) is added, to read as follows:

(e) Facility reports. The operator shall submit to the department:

\* \* \*

(4) 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 section 487.2(c) of this Part, including Transitional Adult Homes as defined in section 487.13 of this Part, a monthly admissions report identifying all persons admitted to the facility during the prior calendar month. For the purpose of calculating the reporting threshold in this subdivision, if the facility has ever reported an individual as having Serious Mental Illness, such facility must continue to report that individual as having Serious Mental Illness until the department or its designee has conducted a mental health evaluation of that individual to confirm a change in status, and communicates written approval to the facility to discontinue reporting such individual as having Serious Mental Illness. Nothing in this paragraph shall require the department, or its designee, to conduct an independent mental health evaluation for an individual who resides in an adult home that is not defined as a transitional adult home as of January 1, 2022.

(5) For all facilities, a roster of all residents shall be submitted to the department on a quarterly basis in the manner prescribed by the department.

## **REGULATORY IMPACT STATEMENT**

### **Statutory Authority:**

Social Services Law section 461(1) requires the Department of Health to promulgate regulations establishing general standards applicable to adult care facilities. Social Services Law 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 Social Services Law section 461 is to promote the health and well-being of adults residing in adult care facilities. Social Services Law 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 provide clarity with regard to the pre-admission screening process and the documentation that must be provided quarterly to the Department. These amendments will provide necessary clarification to improve the integrity of data provided by adult homes, which ultimately will benefit residents as the data is used to inform programming and policies aimed at improving the health and safety of adult home residents.

Quarterly, the Department releases a statistical report form with complete instructions, along with a companion guide and slide deck. Facilities whose quarterly census information

necessitates additional reporting receive ad hoc instructions regarding submission of the specific information they must submit. Based on data submissions since the end of the public health emergency, the Department and industry representatives determined that there is a need for more clarity in the report itself and a need for more concise and specific reports particularly for transitional adult homes. This need was identified in communications between Adult Home Settlement liaisons and plaintiffs (see docket# 13-cv-04165, 13-cv-04166, EDNY). As the settlement activities wind down, codifying the clarified expectations will drive more reliable data.

**Costs for the Implementation of and Continuing Compliance with these Regulations to the Regulated Entity:**

The Department anticipates that costs to facilities will be minimal, as the new reporting requirements will be quarterly and can be easily compiled through census information already required of adult homes.

**Cost to State and Local Government:**

Two county governments operate adult homes. The Department anticipates that the costs will be the same as for private regulated parties.

**Cost to the Department of Health:**

There are no expected additional costs to the Department of Health, as surveillance of these revised requirements will be handled through current surveillance staff and protocols.

**Local Government Mandates:**

This amendment does not impose any new programs, services, duties, or responsibilities on local governments, unless they operate an adult home, in which case the compliance requirements will be the same as for private adult home operators.

**Paperwork:**

There are no paperwork requirements associated with this regulation.

**Duplication:**

These amendments do not conflict with any State or federal rules.

**Alternative Approaches:**

An alternative would be to leave existing requirements in place. However, the existing requirements have proven to result in inconsistent results which are not in the best interest of the resident population.

**Federal Requirements:**

No applicable federal requirements exist.

**Compliance Schedule:**

This proposal will go into effect 90 days after the publication of a Notice of Adoption in the New York State Register.

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## **REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESS AND LOCAL GOVERNMENTS**

### **Effect of Rule:**

These regulations would require Adult Homes to adhere to updated reporting requirements that will make such requirements clearer and the resulting reports more consistent. Currently, there are two Adult Homes operated by county governments (Chenango and Warren Counties), and there are 396 Adult Homes that have 100 or fewer employees and therefore qualify as small businesses.

### **Compliance Requirements:**

All Department of Health-regulated Adult Homes must comply with the revised requirements, which include a requirement to 1) continue to qualify, report, and program for a resident with serious mental illness until such time that the Department issues a written notice to the facility that the such reporting is no longer required for that resident; and 2) provide to the Department a list of residents each quarter.

### **Professional Services:**

There are no additional professional services required as a result of this regulation.

### **Compliance Costs:**

The Department anticipates that costs will be none or minimal. The Department will provide the reporting vehicle and format used quarterly by Adult Homes.

**Economic and Technological Feasibility:**

The proposed regulation is expected to be financially and technologically feasible. Currently, all Adult Homes are required to provide quarterly statistical reporting, and as the Department will supply the reporting vehicle for the new report, there should not be any insurmountable compliance breach by the Adult Home.

**Minimizing Adverse Impact:**

The Department will work with facilities to provide guidance on changes and respond to questions relating to the new standards.

**Small Business and Local Government Participation:**

All stakeholders, including individual facilities operated by small businesses and local governments, are invited to submit public comments in response to the filing of the proposed regulation. Additionally, the Department plans to issue guidance via a Dear Administrator Letter to alert Adult Homes, including those operated by small businesses and local governments, of the publication of this regulation and the opportunity to provide public comments.

**Cure Period:**

The regulation does not set forth a cure period as quarterly reporting is already required.

## RURAL AREA FLEXIBILITY ANALYSIS

### Type and Estimated Numbers of Rural Areas:

Although this rule applies uniformly throughout the state, including rural areas, for the purposes of this Rural Area Flexibility Analysis (RAFA), “rural area” means areas of the state defined by Executive Law § 481(7) (SAPA § 102(10)). Per Executive Law § 481(7), rural areas are defined as “counties within the state having less than two hundred thousand population, and the municipalities, individuals, institutions, communities, and programs and such other entities or resources found therein. In counties of two hundred thousand or greater population ‘rural areas’ means towns with population densities of one hundred fifty persons or less per square mile, and the villages, individuals, institutions, communities, programs and such other entities or resources as are found therein.”

The following 44 counties have a population of less than 200,000 based upon the United States Census estimated county populations for 2020:

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	

117 adult homes are located in these rural areas.

The following counties have populations of 200,000 or greater, and towns with population densities of 150 person or fewer per square mile, based upon the United States

Census estimated county populations for 2020:

Albany County	Nassau County	Queens County
Bronx County	New York County	Richmond County
Dutchess County	Niagara County	Rockland County
Erie County	Oneida County	Saratoga County
Kings County	Onondaga County	Suffolk County
Monroe County	Orange County	Westchester County

278 Adult Homes are located in these identified areas.

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

All Department of Health-regulated Adult Homes must comply with the revised requirements, including facilities located in rural areas. There are no additional professional services required as a result of this regulation. The proposed regulation requires that Adult Homes provide the Department quarterly a list of its residents through a Department-provided template on a Department-provided forum.

**Costs:**

The Department anticipates that costs will be none or minimal.

**Minimizing Adverse Impact:**

The Department will work with facilities to provide guidance on changes and respond to questions relating to the new standards.

**Rural Area Participation:**

All stakeholders, including individual facilities located in rural areas, are invited to submit public comments in response to the filing of the proposed regulation. Additionally, the Department plans to issue a Dear Administrator Letter to all adult homes, including those located in rural areas, of the publication of this regulation and the opportunity to provide public comments.

## **JOB IMPACT STATEMENT**

No Job Impact Statement is required pursuant to section 201-a(2)(a) of the State Administrative Procedure Act (SAPA). It is apparent, from the nature of the proposed amendment, that it will have no impact on jobs and employment opportunities.

## ASSESSMENT OF PUBLIC COMMENT

The Department of Health (“Department”) received comments from associations representing both adult care facilities and adult care facility residents on its proposed amendments to sections 487.4 and 487.10 of Title 18 (Social Services) of the Official Compilation of Codes, Rules and Regulations of the State of New York. These comments, along with the Departments responses, are summarized below.

**Comment:** This regulation suggests that the Department is appointing itself as the sole authority to determine whether an individual adult home resident has a Serious Mental Illness. Such determinations should be based upon a mental health evaluation by a qualified mental health professional under 18 NYCRR § 487.4(i).

**Response:** This comment refers to the new language in 18 NYCRR § 487.10(e)(4) stating that “...if the facility has ever reported an individual as having Serious Mental Illness, such facility must continue to report that individual as having Serious Mental Illness until the department or its designee has conducted a mental health evaluation of that individual to confirm a change in status, and communicates written approval to the facility to discontinue reporting such individual as having Serious Mental Illness...” The Department does not agree that this language makes the Department the sole authority to determine whether a resident has a Serious Mental Illness or that this language is inconsistent with the procedure for determining whether a resident has a serious mental illness under 18 NYCRR § 487.4(i). No changes were made as a result of this comment.

**Comment:** The additions to 18 NYCRR § 487.10(e)(4) are limited to an adult home that is “defined as a transitional adult home as of January 1, 2022,” but not others. This leaves the scope of the changes to 18 NYCRR § 487.10(e)(4) unclear and, consequently, which adult homes and residents might be affected.

**Response:** The existing regulation at 487.10(e)(4) refers to 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, i.e., transitional adult homes (see 18 NYCRR § 487.13(b)(1)). The added language indicates that nothing requires the Department, or its designee, to conduct an independent mental health evaluation for an individual who resides in an adult home that was not defined as a transitional adult home as of January 1, 2022. Accordingly, while all adult homes are impacted by the regulation and calculation threshold requirements, the language is clear that neither the Department nor its designee is required to conduct a mental health evaluation for residents of those adult homes not defined as transitional adult homes as of January 1, 2022. The list of transitional adult homes is available online at [https://health.data.ny.gov/Health/Transitional-Adult-Homes/rzxx-9t3e/about\\_data](https://health.data.ny.gov/Health/Transitional-Adult-Homes/rzxx-9t3e/about_data). No changes were made as a result of this comment.

**Comment:** The additional quarterly reporting requirement in 18 NYCRR § 487.10(e)(5) broadly and improperly affects all adult homes. There are many transitional adult homes throughout the State that are not subject to the Federal Court settlement in *O’Toole v. Cuomo* (see docket# 13-cv-04165, 13-cv-04166, EDNY). Further, requiring non-transitional adult homes to undertake the additional administrative work of submitting this data is burdensome, and the data is irrelevant to the stated justification for the change.

**Response:** The roster requirement at 18 NYCRR § 487.10(e)(5) is intended to assist with program development and is not specific to the referenced settlement. The data are already collected in various platforms including the mandatory chronological admission and discharge register (see 18 NYCRR § 487.10(d)(5)). One benefit of this regulation is improved data integrity, which ultimately benefits residents through improved data-driven programming. Accordingly, provision of the data is not burdensome and aligns with the stated goals of this regulation. No changes were made as a result of this comment.

**Comment:** The Department's reliance on facility self-reported data and divesting adult home operators from discretion about the mental health evaluation requirement will allow for more complete and accurate programming and help to ensure that adult care facilities do not warehouse individuals who have serious mental illness.

**Response:** The Department appreciates the commenter's support for these regulations. No changes were made as a result of this comment.

**Comment:** Each quarter, all adult care facilities should be required to provide a complete roster of residents to the Department and that roster should include the residents' mental health status.

**Response:** The new language in 18 NYCRR § 487.10(e)(5) provides that the roster will be submitted in a manner prescribed by the Department. The Department appreciates the commenter's suggestion and anticipates issuing guidance regarding the data required to be included in the roster. No changes were made as a result of this comment.

**Comment:** New York State should establish and maintain a diversion program that ensures individuals with serious mental illness are served in the most integrated setting appropriate to their needs and expressed desires.

**Response:** This comment is outside the scope of the proposed regulation. No changes were made as a result of this comment.

**Comment:** The Department's Quarterly Statistical Information Report should include all of the characteristics that adult care facilities are statutorily mandated to collect, including the residents' names, ages, sexes, races and ethnicities, and prior residences or discharge locations.

**Response:** This comment is outside the scope of the proposed regulation. No changes were made as a result of this comment.

**Comment:** The Department should take this opportunity to remove admission and retention standards for persons with chronic, unmanaged urinary or bowel incontinence (18 NYCRR § 487.4(c)(11)) and/or persons dependent on medical equipment unless six separate conditions are met (18 NYCRR § 487.4(c)(13)). Also, the terms "chronic" and "unmanaged" lack sufficient definition. The commenter believes these admission and retention standards and these undefined terms perpetuate discriminatory practices.

**Response:** This comment is outside the scope of the proposed regulation. No changes were made as a result of this comment.

**Comment:** The Department should remove stigmatizing language from its admission and retention standards that encourage discrimination against individuals with substance use

histories. The commenter believes that 18 NYCRR § 487.4(c)(14) encourages operators to discriminate based on past substance use, which violates laws that prohibit discrimination.

**Response:** This comment is outside the scope of the proposed regulation. No changes were made as a result of this comment.

**Comment:** The Department should clarify that admission procedures do not apply to residents who are already admitted, for example a resident who is returning from a short-term hospitalization.

**Response:** This comment is outside the scope of the proposed regulation. No changes were made as a result of this comment.

**Comment:** The Department should clarify that, when seeking alternative placement for residents, adult care facilities must apply to settings that are the least restrictive appropriate to the resident's needs and are not homeless shelters.

**Response:** This comment is outside the scope of the proposed regulation. No changes were made as a result of this comment.

**Comment:** The Department should require that adult care facilities provide applicants and new residents with information on fair housing rights and reasonable accommodations.

**Response:** This comment is outside the scope of the proposed regulation. No changes were made as a result of this comment.

**Comment:** The Department should require that printed materials provided to residents and applicants are made available in an accessible format. Many individuals seeking residency have visual and/or hearing impairments or have limited English proficiency.

**Response:** This comment is outside the scope of the proposed regulation. No changes were made as a result of this comment.

**Comment:** The Department should require operators to maintain records of requests for and responses to reasonable accommodations.

**Response:** This comment is outside the scope of the proposed regulation. No changes were made as a result of this comment.

**Comment:** This regulation requires, without exception, adult care facilities to continually report to the Department its residents with serious mental illness if such resident was ever reported as having such diagnosis, regardless of the basis for the prior report and even when a licensed medical professional determines that the resident does not meet the definition of serious mental illness at 18 NYCRR § 487.2(c). However, the Department made clarifying changes to its Mental Health Evaluation Form (DOH-5075) due to ambiguity which could have resulted in prior misreporting.

**Response:** To improve data integrity through consistent reporting and the application of a consistent measure, this regulation requires facilities to continue to report an individual as having Serious Mental Illness when the facility has previously reported the individual as having Serious Mental Illness unless the Department, or its designee, has confirmed that there has been a change in status. No changes were made as a result of this comment.

**Comment:** This regulation requires that an adult care facility submit and certify as accurate potentially false information relative to an individual's diagnosis and forces adult care facilities to either improperly complete the required Mental Health Evaluation Form (DOH-5075) by not signing the attestation or risk signing a false attestation.

**Response:** This regulation does not require a facility to submit false information or to complete the DOH-5075 form improperly. The mental health evaluation that is sometimes required to confirm an individual's change in status will improve data integrity. No changes were made as a result of this comment.

**Comment:** This regulation requires that adult care facilities ignore other reporting requirements in 18 NYCRR Part 487.

**Response:** This regulation improves data integrity through consistent reporting that removes subjectivity and/or misinterpretation. No changes were made as a result of this comment.