

SUMMARY OF EXPRESS TERMS

This proposal would amend various provisions within Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR) to reflect the enactment of legislation: (1) requiring criminal history record checks (CHRCs) for adult homes, enriched housing programs, and residences for adults licensed pursuant to Article 7 of the Social Services Law (SSL); (2) requiring CHRCs for hospice programs certified pursuant to Article 40 of the Public Health Law (PHL); (3) authorizing the performance of advanced tasks by advanced home health aides supervised by registered professional nurses employed by home care services agencies, hospice programs, and enhanced assisted living residences (EALRs); (4) requiring the inclusion of information related to workers employed by hospice programs in the Home Care Worker Registry (Registry); and (5) requiring the inclusion of information related to the training and testing of advanced home health aides in the Registry.

Part 402 (Criminal History Record Check)

This proposal would amend 10 NYCRR Part 402 to provide for CHRCs for individuals employed by adult homes, enriched housing programs, residences for adults, and hospice programs. Specifically, this proposal would amend:

- Section 402.1 to update the statement of legislative requirements related to CHRCs to refer to adult homes, enriched housing programs, and residences for adults, consistent with Chapters 60 and 94 of the Laws of 2014, and hospice programs, consistent with Chapter 471 of the Laws of 2016 and Chapter 206 of the Laws of 2017;

- Section 402.2, which identifies the entities to which Part 402 is applicable, to include adult homes, enriched housing programs, residences for adults, and hospice programs;
- Section 402.3 to: (1) expand the definition of “employee in direct care or supervision” to include each unlicensed person employed by or used by an adult home, enriched housing program, or residences for adult who provides face-to-face care or has physical access to resident living quarters; (2) expand the definition of “employee in direct care or supervision” to include unlicensed persons employed by or used by a hospice program to provide face-to-face care; and (3) expand the definition of “provider” to include any adult home, enriched housing program, residence for adults, or hospice program;
- Section 402.4 to include provisions for the supervision of temporary employees by adult homes, enriched housing programs, residences for adults, or hospice programs pending determination of their CHRCs;
- Section 402.9 to require documentation of supervision of temporary employees by adult homes, enriched housing programs, residences for adults, and hospice programs; and
- Section 402.10 to authorize reimbursement for adult homes, enriched housing programs, residences for adults, and hospice programs for the costs of securing CHRCs of prospective employees.

Part 403 (Home Care Services Worker Registry)

This proposal would amend 10 NYCRR Part 403 to add workers employed by hospice programs and home health aides and advanced home health aides employed by EALRs to the Registry and to indicate in the Registry when individuals are qualified to work as advanced home health aides. Specifically, this proposal would amend:

- Section 403.1 to include advanced home health aides within the list of workers and to include EALRs and hospice programs within the list of entities to which Part 403 is applicable;
- Section 403.2 to define an “Advanced Home Health Aide” as a certified home health aide who has met all requirements pursuant to Education Law § 6908(2) and is listed in the Registry; and
- Section 403.5 to prohibit home care services entities from permitting advanced home health aides to provide advanced home health aide services unless they are listed in the Registry.

Part 700 (State Hospital Code – General Provisions)

This proposal would amend 10 NYCRR § 700.2 to define an “advanced home health aide” as a certified home health aide who is qualified to carry out advanced tasks, subject to supervision by a registered professional nurse, and is listed in the Registry, and to add other references to advanced home health aides where appropriate.

Part 763 (Certified Home Health Agencies, Long Term Home Health Care Programs and AIDS Home Care Programs Minimum Standards)

This proposal would amend 10 NYCRR Part 763 to set forth provisions pertaining to advanced home health aides employed by certified home health agencies (CHHAs) and long term home health care programs (LTHHCPS) and the supervision thereof by registered professional nurses. Specifically, this proposal would amend:

- Section 763.2, which lists the rights of patients served by CHHAs/LTHHCPS, to provide that a patient has the right to refuse the provision of advanced tasks by an advanced home health aide, in which case the CHHA/LTHHCP must ensure that such tasks are provided by a registered professional nurse;
- Section 763.4 to set forth requirements for CHHAs/LTHHCPS pertaining to the supervision of advanced home health aides;
- Section 763.7 to set forth requirements for CHHAs/LTHHCPS pertaining to reports made by advanced home health aides to supervising registered professional nurses; and
- Section 763.13 to set forth requirements for CHHAs/LTHHCPS pertaining to in-service education for advanced home health aides.

Part 765 (Approval and Licensure of Home Care Services Agencies)

This proposal would amend 10 NYCRR § 765.2-1, which provides that home care services agencies must obtain approval by the Public Health and Health Planning Council and be issued a license pursuant to PHL Article 36, to include a reference to advanced home health aides.

Part 766 (Licensed Home Care Services Agencies – Minimum Standards)

This proposal would amend 10 NYCRR Part 766 to set forth provisions pertaining to advanced home health aides employed by licensed home care services agencies (LHCSAs) and the supervision thereof by registered professional nurses. Specifically, this proposal would amend:

- Section 766.1, which lists the rights of patients served by LHCSAs, to provide that a patient has the right to refuse the provision of advanced tasks by an advanced home health aide, in which case the LHCSA must ensure that such tasks are provided by a registered professional nurse;
- Section 766.2(b) to include “advanced home health aide services” in the list of services that constitute “health care services;”

- Section 766.4 to provide that a LHCSA must ensure that there is an order for advanced home health aide services from the patient's authorized practitioner;
- Section 766.5(c)(4) to set forth requirements for the clinical supervision of advanced home health aides by supervising registered professional nurses;
- Section 766.6(a)(6) and (7) to provide for reports by advanced home health aides to supervising registered professional nurses; and
- Section 766.11 to: (1) provide that LHCSAs must ensure that qualifications for advanced home health aides, as set forth in 700.2, are satisfied; and (2) require that advanced home health aides participate in 18 hours of in-service education each year.

Part 793 (Hospice Patient/Family Care Services)

This proposal would amend Part 793 to set forth provisions related to services provided by advanced home health aides supervised by registered professional nurses employed by hospice programs. Specifically, this proposal would amend:

- Section 793.1 to reflect that a patient of a hospice program has the right to refuse the provision of advanced tasks by an advanced home health aide, in which case the hospice program must ensure that such tasks are provided by a registered professional nurse;

- Section 793.7(k) to provide that services must be provided by an aide with appropriate training which, in the case of an advanced home health aide, means a training program as required by section 700.2(b)(54);
- Section 793.7(l) to provide that services provided by an advanced home health aide must be ordered by a physician, assigned by the supervising registered professional nurse, and included in the plan of care and consistent with training and advanced tasks permitted to be performed by advanced home health aides; and
- Section 793.7(o) to include within the responsibilities of a hospice program the supervision of an advanced home health aide by a registered professional nurse.

Part 794 (Hospice Organization and Administration)

This proposal would amend 10 NYCRR Part 794 pertaining to advanced home health aides employed by hospice programs and the supervision thereof by registered professional nurses. Specifically, this proposal would amend section 794.3(k) to provide that, at a minimum, advanced home health aides shall participate in 18 hours of in-service education per year.

Part 1001 (Assisted Living Residences)

This proposal would amend 10 NYCRR Part 1001 to set forth provisions pertaining to advanced home health aides employed by EALRs and the supervision thereof by registered professional nurses. Specifically, this proposal would amend:

- Section 1001.8(b)(2) to reflect that a resident of an EALR has the right to refuse the provision of advanced tasks by an advanced home health aide, in which case the operator must ensure that such tasks are provided by a registered professional nurse; and
- Section 1001.11(r) to provide that advanced home health aides in an EALR must be listed on the Registry, trained, and supervised by registered professional nurses.

Pursuant to the authority vested in the Public Health and Health Planning Council and the Commissioner of Health by sections 2899-a(4), 3602(17), 3612(5), and 4010(4) of the Public Health Law and section 845-b(12) of the Executive Law, sections 402.1, 402.2, 402.3, 402.4, 402.9, 402.10, 403.1, 403.2, 403.5, 700.2, 765-2.1, 763.2, 763.4, 763.7, 763.13, 766.1, 766.2, 766.4, 766.5, 766.6, 766.11, 793.1, 793.7, 794.3, 1001.8, and 1001.11 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR) are hereby amended, to be effective upon publication of a Notice of Adoption in the New York State Register:

10 NYCRR Part 402 (Criminal History Record Checks)

Subdivision (a) of section 402.1 is amended to read as follows:

(a) (1) Chapter 769 of the Laws of 2005, as amended by Chapters 331 and 673 of the Laws of 2006, imposed the requirement for review of the criminal history record of certain prospective employees of residential health care facilities licensed under Article 28 of the Public Health Law and certified home health agencies, licensed home care services agencies or long term home health care programs certified, licensed, or authorized under Article 36 of the Public Health Law who are hired or used on or after September 1, 2006 and who will provide direct care or supervision to patients, residents or clients of such providers.

(2) Chapter 60 of the Laws of 2014, Part A, sections 22 and 24, as amended by Chapter 94 of the Laws of 2014, imposed the requirement for review of the criminal history record of certain employees of adult homes, enriched housing programs, and residences for adults licensed under

Article 7 of the Social Services Law who are hired or used on or after January 1, 2015 and who will provide direct care or supervision to residents of such providers.

(3) Chapter 471 of the Laws of 2016, as amended by Chapter 206 of the Laws of 2017, imposed the requirement for review of the criminal history record of certain employees of providers certified under Article 40 of the Public Health Law who are hired on or after April 1, 2018 and who will provide direct care or supervision to patients of such providers.

Section 402.2 is amended to read as follows:

This part shall apply to every provider of services to patients, residents, or clients that is:

(a) a residential health care facility [which is] licensed under Article 28 of the Public Health Law [, and any];

(b) a certified home health agency, licensed home care services agency, or long term home health care program certified, licensed, or authorized under Article 36 of the Public Health Law[, to provide services to patients, residents or clients];

(c) an adult home, enriched housing program, or residence for adults licensed under Article 7 of the Social Services Law; or

(d) a hospice program licensed, certified, or authorized under Article 40 of the Public Health Law.

Subdivisions (i), (j), and (k) of section 402.3 are amended to read as follows:

(i) "Employee in direct care and supervision" means

(1) any unlicensed person employed by or used by a nursing home, licensed pursuant to Article 28 of the Public Health Law, who has physical access to a resident's living quarters, or

any unlicensed person providing face-to-face care following the resident's care plan in accordance with Section 410.2(h) of this Title; [or]

(2) any unlicensed person employed by or used by a certified home health agency, licensed home [health] care [program] services agency, or long term home health care [services] program pursuant to Article 36 of the Public Health Law, providing face-to-face care following the professional or paraprofessional plan of care developed for the individual patient in accordance with section 766.3 or 763.6 of this Title[.];

(3) any unlicensed person employed by or used by an adult home, enriched housing program, or residence for adults who provides residents face-to-face care or has physical access to a resident's living quarters; or

(4) any unlicensed person employed by or used by a hospice program certified under Article 40 of the Public Health Law who provides patients face-to-face care following the professional or paraprofessional plan of care developed for the individual patient in accordance with section 793.4 of this Title.

(j) "Prospective employee" means any person to be employed or used by a provider [beginning on or after September 1, 2006], including those persons provided by a temporary employment agency, to provide direct care or supervision to patients, residents or clients, and whom the provider reasonably expects to hire, employ or use, where such person is hired, employed or used by:

(i) a residential health care facility on or after September 1, 2006;

(ii) a certified home health agency, licensed home care services agency, or long term home health care program on or after September 1, 2006;

(iii) an adult home, enriched housing program, or residence for adults on or after January 1, 2015; or

(iv) a hospice program on or after April 1, 2018.

Persons licensed pursuant to Title 8 of the Education Law or Article 28-D of the Public Health Law are excluded from the meaning of the term. Such term shall not include volunteers.

(k) "Provider" means [any residential health care facility licensed under Article 28 of the Public Health Law; or any certified home health agency, licensed home care services agency, or long term home health program licensed, certified, or authorized under Article 36 of the Public Health Law] any entity subject to this Part as enumerated in section 402.2 of this Part.

New subparagraphs (iv) and (v) are added to paragraph (2) of subdivision (b) of section 402.4 to read as follows:

(iv) Adult homes, enriched housing programs, and residences for adults shall provide appropriate direct observation and evaluation of the temporary employee by utilizing an individual employed by the provider to conduct on-site supervision. Such individual must know the identity and assignment of each temporary employee so supervised in the adult home, enriched housing program, or residence for adults at all times. Supervision must be documented in writing on a weekly basis and maintained in the temporary employee's personnel folder.

(v) Hospice programs certified under Article 40 of the Public Health Law shall provide appropriate direct observation and evaluation of the temporary employee by utilizing an individual employed by such provider with a minimum of one year's experience working for a provider certified, licensed or approved under Article 40 the Public Health Law or through a contract with another provider certified, licensed or approved under Article 36 of the Public

Health Law. Such observation and evaluation shall occur on a weekly basis provided, however, that such direct observation and evaluation shall occur on-site in the home the first week by a licensed health care professional, senior aide or other paraprofessional who meets the one year requirement of employment in home care or hospice and at least once every other week thereafter by an individual meeting the minimum one year experience as set forth in this subparagraph. On alternate weeks direct observation and evaluation may be on-site in the home or by phone call to the patient or the patient's representative. The results of such observations shall be documented in the temporary employee's personnel file and shall be maintained.

Subparagraphs (iv) and (v) of paragraph (1) of subdivision (a) of section 402.9 are amended and a new subparagraphs (vi) and (vii) are added to paragraph (1) of subdivision (a) of section 402.9 to read as follows:

(iv) for each such name recorded pursuant to subparagraph (ii) hereof, the results of the criminal history record check and determination of the Department with regard to the employment; [and]

(v) for certified home health care agencies, licensed home care services agencies or long term home health care programs licensed or certified under Article 36 of the Public Health Law, the onsite supervision and alternate week contacts made for assessment of temporary employees as set forth in Section 402.4(b)(2)(ii) of this Title;

(vi) for adult homes, enriched housing programs, and residences for adults licensed under Article 7 of the Social Services Law, the onsite supervision of temporary employees as set forth in section 402.4(b)(2)(iv) of this Title; and

(vii) for hospice programs certified under Article 40 of the Public Health Law, the onsite supervision and alternate week contacts made for assessment of temporary employees as set forth in section 402.4(b)(2)(v) of this Title.

Subdivisions (a) and (b) of section 402.10 are amended to read as follows:

(a) In the event that funds are appropriated in any given fiscal year for reimbursement for the costs of obtaining criminal history information required by this Part, reimbursement shall be made available in an equitable and direct manner for the projected cost of the fee established pursuant to law by the Division for processing a criminal history record check, the fee imposed by the FBI for a national criminal history check, and costs associated with obtaining the fingerprints to all providers licensed, but not certified, under Article 36 of the Public Health Law, and all adult homes, enriched housing programs, and residences for adults licensed under Article 7 of the Social Services Law, including those that are subject to this Part and are unable to access direct reimbursement from state and/or federally funded health programs.

(b) Residential health care facilities licensed pursuant to Article 28 of the Public Health Law, [and] certified home health care agencies and long-term home health care programs certified or approved pursuant to Article 36 of the Public Health Law, and hospice programs certified pursuant to Article 40 of the Public Health Law, may, subject to the availability of federal financial participation, claim as reimbursable costs under the medical assistance program, costs reflecting the fee established pursuant to law by the Division for processing a criminal history information check, the fee imposed by the FBI for a national criminal history check, and costs associated with obtaining the fingerprints, provided, however, that for the purposes of determining rates of payment pursuant to Article 28 of the Public Health Law for residential

health care facilities, such reimbursable fees and costs shall be reflected as timely as practicable in such rates within the applicable rate period.

10 NYCRR Part 403 (Home Care Worker Registry)

Subdivisions (a) and (b) of section 403.1 are amended to read as follows:

(a) This part shall apply to every home care services agency certified, licensed or authorized under Article 36 of the Public Health Law, including agencies exempt under Public Health Law Section 3619; to every hospice program certified under Article 40 of the Public Health Law; to every enhanced assisted living residence licensed under Article 7 of the Social Services Law and certified under Article 46-B of the Public Health Law; and any education or training program for advanced home health aides or home health aides or personal care aides that is authorized, licensed or approved by either the Department or the New York State Education Department; and any person who has successfully completed a state approved education or training program.

(b) Nothing in this part shall be construed to amend, supersede or otherwise modify any requirements of the regulations of the Department of Health relating to the education or training of advanced home health aides or home health aides or personal care aides by New York State authorized education or training programs.

A new subdivision (a) is added to section 403.2 and existing subdivisions (a), (b), (c), (d), (e), (f), (g), (h), and (i) are renumbered to read as follows:

(a) “Advanced home health aide” is a certified home health aide who has satisfied all requirements to perform advanced tasks set forth in subdivision two of section 6908 of the

Education Law and regulations issued by the state education department thereunder and who is currently listed in the home care services worker registry maintained by the department pursuant to subdivision nine of section 3613 of the Public Health Law as having satisfied all applicable requirements for performing advanced tasks as an advanced home health aide. An advanced home health aide shall have successfully completed a training program for advanced home health aides that is approved by the department or the state education department.

[(a)](b)"Commissioner" means the Commissioner of Health of the State of New York.

[(b)](c)"Department" means the New York State Department of Health.

[(c)](d)"Home care services entity" or "entity" means: (i) a home care services agency or other entity providing home care services subject to Article 36 of the Public Health Law or exempt under section 3619 of such law; (ii) for purposes of compliance with the home care worker registry, an enhanced assisted living residence licensed under Article 7 of the Social Services Law and certified under Article 46-B of the Public Health Law and providing enhanced assisted living services; and (iii) for purposes of compliance with the home care worker registry, a hospice program certified under Article 40 of the Public Health Law and providing hospice care.

[(d)](e)"Home care services worker" or "worker" means any person engaged in or applying to become engaged in providing home health aide services, as defined in Public Health Law section 3602(4); [or] personal care aide services, as defined in Public Health Law section 3602(5); or advanced home health aide services, as defined in subdivision (a) of this section.

[(e)](f)"Home care services worker registry" or "registry" means the home care services worker registry established by Public Health Law section 3613.

[(f)](g)"Home care services worker trainee" or "trainee" means an individual who has applied for and been accepted into a state approved education or training program.

[(g)](h)"State approved education or training program" or "program" means a program that provides education or training for persons to meet any requirement established by the Department for providing home health aide services or personal care services, or advanced home health aide services, which program is approved by the Department or the New York State Education Department.

[(h)](i)"Successfully completed" or "successful completion" means, in connection with home health aide training, compliance with 10 NYCRR section 700.2(b)(9); in connection with personal care aide training, it means compliance with [18 NYCRR section 505.14(e)] 10 NYCRR section 700.2(b)(14); in connection with advanced home health aide training, it means compliance with 10 NYCRR section 700.2(b)(54).

[(i)](j)"Senior official" means an individual with responsibility for oversight of a training program and who is authorized to execute a legally binding instrument on behalf of the operator of the program. The senior official may be the operator if the operator is a natural person.

Subdivision (a) of section 403.5 is amended to read as follows:

(a) A home care services entity will have the following responsibilities with respect to home care services workers employed on or after September 25, 2009:

(1) For any home care services worker who began their training on or after September 25, 2009, a home care services entity shall access the worker's registry information prior to the worker beginning to provide home care services for that entity.

(2) A person who successfully completed a state approved education or training program for home health aides or personal care aides that began on or after September 25, 2009, may not

provide home care services unless the person's information has been posted to the registry by the education or training program.

(3) within 10 business days after the worker has been employed by the home care services entity, enter the information required by section 3613(3)(f) of the Public Health Law into the registry in the form and manner required by the Department;

(4) A person who successfully completed a state approved education or training program for advanced home health aides may not provide advanced home health aide services unless the person's information has been posted to the registry by the department.

Part 700 (State Hospital Code – General Provisions)

Paragraph (6) of subdivision (a) of section 700.2 is amended to read as follows:

(6) Home care services agency shall mean an organization primarily engaged in arranging and/or providing, directly or through contract arrangement, one or more of the following: nursing services, home health aide services, advanced home health aide services, medical supplies, equipment and appliances, and other therapeutic and related services which may include, but shall not be limited to, physical and occupational therapy, speech pathology, nutritional services, medical social services, personal care services, homemaker services and housekeeper services which may be of a preventive, therapeutic, rehabilitative, health guidance and/or supportive nature to persons at home.

A new paragraph (54) is added to subdivision (b) of section 700.2 to read as follows:

(54) Advanced home health aide shall mean a certified home health aide who has satisfied all requirements to perform advanced tasks set forth in subdivision two of section 6908 of the

education law and regulations issued by the state education department thereunder and who is currently listed in the home care worker registry maintained by the department pursuant to subdivision nine of section 3613 of the Public Health Law as having satisfied all applicable requirements for performing advanced tasks as an advanced home health aide. An advanced home health aide shall have successfully completed a training program for advanced home health aides that is approved by the department or the state education department.

Paragraphs (14), (15), (16) and (17) of subdivision (c) of section 700.2 are amended to read as follows:

(14) [Reserved.] Home care services shall mean one or more of the following services provided to persons at home:

(i) those services provided by a home care services agency;

(ii) home health aide services;

(iii) personal care services;

(iv) advanced home health aide services;

(iv) homemaker services; or

(v) housekeeper services.

(15) Home health aide services shall mean health care tasks, personal hygiene services, housekeeping tasks and other related supportive services essential to the patient's health.

(16) [Home care services shall mean one or more of the following services provided to persons at home:

(i) those services provided by a home care services agency;

(ii) home health aide services;

(iii) personal care services;

(iv) homemaker services;

(v) housekeeper services.] Personal care services shall mean assistance to the patient with personal hygiene, dressing, feeding and household tasks essential to his/her health.

(17) [Personal care services shall mean assistance to the patient with personal hygiene, dressing, feeding and household tasks essential to his/her health.] Advanced home health aide services shall mean assistance to the patient with advanced tasks defined in subdivision two of section 6908 of the education law and regulations issued by the state education department thereunder and assigned by the supervising registered professional nurse.

Part 763 (Certified Home Health Agencies, Long Term Health Care Programs and AIDS Home Care Programs Minimum Standards)

Paragraphs (10) and (11) of subdivision (a) of section 763.2 is amended and a new paragraph (12) is added to read as follows:

(10) privacy, including confidential treatment of patient records, and refusal of their release to any individual outside the agency except in the case of the patient's transfer to a health care facility, or as required by law or third-party payment contract; [and]

(11) be advised in writing of the availability of the Department of Health toll-free hotline, the telephone number, the hours of its operation and that the purpose of the hotline is to receive complaints or answer questions about home care agencies; and

(12) refuse consent to advanced tasks performed by an advanced home health aide, in which case the agency shall provide for the performance of such tasks by a registered professional nurse.

Paragraph (7) of subdivision (h) of section 763.4 is amended and new paragraphs (8), (9) and (10) are added to read as follows:

(7) in-home supervision, by professional personnel, of home health aides and personal care aides takes place:

(i) to demonstrate to and instruct the aide in the treatments or services to be provided, with successful [redemonstration] re-demonstration by the aide during the initial service visit, or where there is a change in personnel providing care, if the aide does not have documented training and experience in performing the tasks prescribed in the plan of care;

(ii) where any of the changes in paragraph (4) of this subdivision occur, to evaluate the change and initiate any revision in the plan of care which may be needed; and

(iii) to instruct the aide as to the observations and written reports to be made to the supervising community health nurse or therapist[.];

(8) direct supervision of an advanced home health aide is conducted by a registered professional nurse who:

(i) provides training, guidance, direction and oversight, and evaluation related to the performance of advanced tasks by the advanced home health aide;

(ii) assigns advanced tasks to be performed by the advanced home health aide after completing a nursing assessment to determine the patient's current health status and care needs;

(iii) provides case specific training to the advanced home health aide to verify and ensure the advanced home health aide can safely and competently perform the advanced tasks for the patient;

(iv) provides written, patient specific instructions for performing advanced tasks, including the criteria for identifying, reporting, and responding to problems, errors or complications;

(v) conducts a comprehensive medication review including evaluation of the patient's current medication use, and prescribed drug regimen and identifies and resolves any discrepancies prior to assigning the advanced home health aide to administer medications;

(vi) determines direct supervision of the advanced home health aide based on the complexity of advanced tasks, the skill and experience of the advanced home health aide assigned to perform the advanced tasks, and the health status of the patient for whom the advanced tasks are being performed;

(vii) while on duty is continuously available to communicate with the advanced home health aide by phone or other means;

(viii) conducts home visits or arranges for another qualified registered professional nurse whenever necessary to protect the health and safety of the patient;

(ix) performs an initial and ongoing assessments of the patient's needs; and

(x) conducts a home visit at least every two weeks and more frequently as determined by the registered professional nurse, to observe, evaluate, and oversee services provided by the advanced home health aide;

(9) a process is in place to document the limitation or revocation of the assignment of advanced tasks by an advanced home health aide when deemed appropriate by a supervising

registered professional nurse and to ensure that such information is available to other registered professional nurses that may supervise such aide; and

(10) any failure by a supervising registered professional nurse to comply with the requirements of paragraph eight of this subdivision shall be reported to the department.

Paragraph (7) of subdivision (a) of section 763.7 is amended to read as follows:

(7) observations and reports made to the registered professional nurse, licensed practical nurse or supervising therapist by the advanced home health aide, home health aide or personal care aide, including activity sheets;

Subdivision (1) of section 763.13 is amended to read as follows:

(1) that all personnel receive orientation to the policies and procedures of the agency operation, in-service education necessary to perform his/her responsibilities and continuing programs for development and support. At a minimum:

(1) home health aides shall participate in 12 hours of in-service education per year; [and]

(2) personal care aides shall participate in six hours of in-service education per year; and

(3) advanced home health aides must participate in 18 hours of in-service education per year, which must include medication management, infection control, and injection safety, and which must be directly supervised by a registered professional nurse.

Part 765 (Approval and Licensure of Home Care Services Agencies)

Subdivision (a) of section 765-2.1 is amended to read as follows:

(a) No home care services agency, other than those exempt from licensure requirements as provided in subdivision (c) of this section, shall provide nursing, advanced home health aide, home health aide, or personal care services to persons in their home unless it has been approved by the Public Health and Health Planning Council and has been issued a license pursuant to the provisions of Article 36 of the Public Health Law and this Part.

Part 766 (Licensed Home Care Services Agencies – Minimum Standards)

Paragraphs (10) and (11) of subdivision (a) of section 766.1 is amended and a new paragraph (12) is added to read as follows:

(10) be treated with consideration, respect and full recognition of his/her dignity and individuality; [and]

(11) privacy, including confidential treatment of patient records, and to refuse release of records to any individual outside the agency except in the case of the patient's transfer to a health care facility, or as required by law or third-party payment contract; and

(12) refuse consent to advanced tasks performed by an advanced home health aide, in which case the agency shall provide for the performance of such tasks by a registered professional nurse.

Subdivision (b) of section 766.2 is amended to read as follows:

(b) For purposes of this Part, health care services shall include nursing, advanced home health aide services, home health aide services, personal care, physical therapy, occupational therapy, speech/language pathology, nutrition services, social work, respiratory therapy, physician services and medical supplies, equipment and appliances.

Paragraph (3) of subdivision (a) of section 766.4 is amended to read as follows:

766.4 Medical orders. (a) The governing authority or operator shall ensure that an order from the patient's authorized practitioner is established and documented for the health care services the agency provides to those patients who:

(1) are being actively treated by an authorized practitioner for a diagnosed health care problem;

(2) have a health care need or change in physical status requiring medical intervention; or

(3) are advanced home health aide, home health aide, or personal care services patients of a certified home health agency.

Subdivision (c) of section 766.5 is amended and new subdivisions (e), (f) and (g) are added to read as follows:

(c) home health aides or personal care aides are supervised, as appropriate, by a registered professional nurse [or licensed practical nurse], or a therapist if the aide carries out simple procedures as an extension of physical therapy, occupational therapy or speech/language pathology; [and]

(d) in-home supervision by professional staff of home health aides and personal care aides occurs:

(1) to demonstrate to and instruct the aide in the treatments or services to be provided with successful [redemonstration] re-demonstration by the aide during the initial service visit or where there is a change in personnel providing care, if the aide does not have documented training and experience in performing the tasks prescribed in the plan of care;

(2) where any of the conditions set forth in paragraph (3) of subdivision (b) of this section occur, to evaluate the condition and initiate any revision in the plan of care which may be needed; and

(3) to instruct the aide as to the observations and written reports to be made to the supervising nurse or therapist; and

(e) direct supervision of an advanced home health aide is conducted by a registered professional nurse who:

(i) provides training, guidance, direction and oversight, and evaluation related to the performance of advanced tasks by the advanced home health aide;

(ii) assigns advanced tasks to be performed by the advanced home health aide after completing a nursing assessment to determine the patient's current health status and care needs;

(iii) provides case specific training to the advanced home health aide to verify and ensure the advanced home health aide can safely and competently perform the advanced tasks for the patient;

(iv) provides written, patient specific instructions for performing advanced tasks, including the criteria for identifying, reporting, and responding to problems, errors or complications;

(v) conducts a comprehensive medication review including evaluation of the patient's current medication use, and prescribed drug regimen and identifies and resolves any discrepancies prior to assigning the advanced home health aide to administer medications;

(vi) determines direct supervision of the advanced home health aide based on the complexity of advanced tasks, the skill and experience of the advanced home health aide assigned to perform the advanced tasks, and the health status of the patient for whom the advanced tasks are being performed;

(vii) while on duty is continuously available to communicate with the advanced home health aide by phone or other means;

(viii) conducts home visits or arranges for another qualified registered professional nurse whenever necessary to protect the health and safety of the patient;

(ix) performs an initial and ongoing assessments of the patient's needs; and

(x) conducts a home visit at least every two weeks and more frequently as determined by the registered professional nurse, to observe, evaluate, and oversee services provided by the advanced home health aide;

(f) a process is in place to document the limitation or revocation of the assignment of advanced tasks by an advanced home health aide when deemed appropriate by a supervising registered professional nurse and to ensure that such information is available to other registered professional nurses that may supervise such aide; and

(g) any failure by a supervising registered professional nurse to comply with the requirements of paragraph (e) of this subdivision shall be reported to the department.

Paragraph (6) and (7) of subdivision (a) of section 766.6 are amended to read as follows:

(6) supervisory reports of the registered professional nurse, licensed practical nurse or the therapist, if applicable, of the advanced home health aide, home health aide, or personal care aide;

(7) observations and reports made to the registered professional nurse, licensed practical nurse or therapist by the advanced home health aide, home health aide, or personal care aide, including activity sheets;

Paragraph (1) of subdivision (b) of section 766.11 is amended to read as follows:

(b) (1) that qualifications for advanced home health aides, home health [aide]aides, and personal care [aide]aides as specified in section 700.2 of this Title are met; and

Subdivision (i) of section 766.11 is amended to read as follows:

(i) that all personnel receive orientation to the policies and procedures of the home care services agency operation and in-service education necessary to perform his/her responsibilities.

At a minimum:

(1) home health aides must participate in 12 hours of in-service education per year; [and]
(2) personal care aides must participate in six hours of in-service education per year; and
(3) advanced home health aide must participate in 18 hours of in-service education per year which must include medication management, infection control, and injection safety, and must be directly supervised by a registered professional nurse;

Part 793 (Hospice Operation - Patient/Family Care Services)

Paragraphs (18) and (19) of subdivision (a) of section 793.1 is amended and a new paragraph (20) is added to read as follows:

(18) exercise his or her rights without fear of discrimination or reprisal; [and]
(19) have his or her person and property treated with respect and to be free from mistreatment, neglect, or verbal, mental, sexual and/or physical abuse, including injuries of unknown source, and misappropriation of property; and

(20) refuse consent to advanced tasks performed by an advanced home health aide, in which case the hospice shall provide for the performance of such tasks by a registered professional nurse.

Subdivisions (k) and (l) of section 793.7 are amended to read as follows:

(k) All aide services must be provided by individuals who:

(1) have successfully completed a home health aide training and competency evaluation program as required by paragraph (9) of subdivision (b) of section 700.2 of this Part or an advanced home health aide training program as required by paragraph (54) of subdivision (b) of section 700.2 of this Part; and

(2) are currently listed in good standing on the Home Care Registry in the State.

(l) Aide services must be ordered by a member of the interdisciplinary team, included in the plan of care and consistent with training and tasks permitted to be performed by home health aides, including but not limited to personal care and simple procedures as an extension of nursing or therapies or, in the case of advanced home health aide services, ordered by a physician, assigned by the supervising registered professional nurse, included in the plan of care and consistent with training and advanced tasks permitted to be performed by advanced home health aides.

Paragraphs (8) and (9) of subdivision (o) of section 793.7 are amended, and new paragraphs (10), (11) and (12) are added to read as follows:

(8) supervision of a home health aide is conducted by a registered professional nurse; [and]

(9) in-home supervision, by professional personnel, of home health aides takes place:

(i) to demonstrate to and instruct the aide in the treatments or services to be provided, with successful [redemonstration] re-demonstration by the aide during the initial service visit, or where there is a change in personnel providing care, if the aide does not have documented training and experience in performing the tasks prescribed in the plan of care;

(ii) to evaluate changes in patient condition reported by the aide and initiate any revision in the plan of care which may be needed; and

(iii) to instruct the aide as to the observations and written reports to be made to the supervising nurse; and

(10) direct supervision of an advanced home health aide is conducted by a registered professional nurse who:

(i) provides training, guidance, direction and oversight, and evaluation related to the performance of advanced tasks by the advanced home health aide;

(ii) assigns advanced tasks to be performed by the advanced home health aide after completing a nursing assessment to determine the patient's current health status and care needs;

(iii) provides case specific training to the advanced home health aide to verify and ensure the advanced home health aide can safely and competently perform the advanced tasks for the patient;

(iv) provides written, patient specific instructions for performing advanced tasks, including the criteria for identifying, reporting, and responding to problems, errors or complications;

(v) conducts a comprehensive medication review including evaluation of the patient's current medication use, and prescribed drug regimen and identifies and resolves any discrepancies prior to assigning the advanced home health aide to administer medications;

(vi) determines direct supervision of the advanced home health aide based on the complexity of advanced tasks, the skill and experience of the advanced home health aide assigned to perform the advanced tasks, and the health status of the patient for whom the advanced tasks are being performed;

(vii) while on duty is continuously available to communicate with the advanced home health aide by phone or other means;

(viii) conducts home visits or arranges for another qualified registered professional nurse whenever necessary to protect the health and safety of the patient;

(ix) performs an initial and ongoing assessments of the patient's needs; and

(x) conducts a home visit at least every two weeks and more frequently as determined by the registered professional nurse, to observe, evaluate, and oversee services provided by the advanced home health aide;

(11) a process is in place to document the limitation or revocation of the assignment of advanced tasks by an advanced home health aide when deemed appropriate by a supervising registered professional nurse and to ensure that such information is available to other registered professional nurses that may supervise such aide; and

(12) any failure by a supervising registered professional nurse to comply with the requirements of paragraph ten of this subdivision shall be reported to the department.

Part 794 (Hospice Operation – Organization and Administration)

Subdivision (k) of section 794.3 is amended to read as follows:

(k) that all personnel, including hospice employees, volunteers and contract staff with direct patient and family contact, receive orientation to the concept of hospice care, his or her specific job duties, and the policies and procedures for the hospice operation, in-service education necessary to perform his/her responsibilities and continuing programs for development and support.

(1) At a minimum home health aides shall participate in 12 hours of in-service education per year, which may occur while the aide is furnishing care. In-service may be offered by any organization and must be supervised by a registered nurse; and

(2) advanced home health aides shall participate in 18 hours of in-service education per year which must include medication management, infection control, and injection safety, and must be directly supervised by a registered professional nurse.

Part 1001 (Assisted Living Residences)

A new subparagraph (xviii) is added to paragraph (2) of subdivision (b) of section 1001.8 to read as follows:

(xviii) Every resident of an enhanced assisted living residence shall have the right to refuse consent to advanced tasks performed by an advanced home health aide, in which case the operator shall provide for the performance of such tasks by a registered professional nurse.

A new subdivision (r) is added to section 1001.11 to read as follows:

(r) If an enhanced assisted living residence employs or uses advanced home health aides, the operator must ensure that every advanced home health aide:

(1) is listed on the home care worker registry maintained by the department; and

(2) is trained as specified in section 700.2 of this title and receives 18 hours of in-service education annually to include medication management, infection control, injection safety and other topics relevant to their responsibilities which must be directly supervised by a registered professional nurse; and

(3) is directly supervised by a registered professional nurse who:

(i) provides training, guidance, direction and oversight, and evaluation related to the performance of advanced tasks by the advanced home health aide;

(ii) assigns advanced tasks to be performed by the advanced home health aide after completing a nursing assessment to determine the resident's current health status and care needs;

(iii) provides case specific training to the advanced home health aide to verify and ensure the advanced home health aide can safely and competently perform the advanced tasks for the resident;

(iv) provides written, patient specific instructions for performing advanced tasks, including the criteria for identifying, reporting, and responding to problems, errors or complications;

(v) conducts a comprehensive medication review including evaluation of the resident's current medication use, and prescribed drug regimen and identifies and resolves any discrepancies prior to assigning the advanced home health aide to administer medications;

(vi) determines direct supervision of the advanced home health aide based on the complexity of advanced tasks, the skill and experience of the advanced home health aide assigned to perform

the advanced tasks, and the health status of the resident for whom the advanced tasks are being performed;

(vii) while on duty is continuously available to communicate with the advanced home health aide by phone or other means;

(viii) conducts home visits or arranges for another qualified registered professional nurse whenever necessary to protect the health and safety of the resident;

(ix) performs an initial and ongoing assessments of the resident's needs; and

(x) visits the resident in the residence at least every two weeks and more frequently as determined by the registered professional nurse, to observe, evaluate, and oversee services provided by the advanced home health aide;

(4) a process is in place to document the limitation or revocation of the assignment of advanced tasks by an advanced home health aide when deemed appropriate by a supervising registered professional nurse and to ensure that such information is available to other registered professional nurses that may supervise such aide; and

(5) any failure by a supervising registered professional nurse to comply with the requirements of paragraph three of this subdivision shall be reported to the department.

REGULATORY IMPACT STATEMENT

Statutory Authority:

This proposal will implement amendments to Public Health Law (PHL) Article 28-E requiring certain providers licensed by the Department of Health (Department) to request criminal history record checks (CHRCs) of prospective employees in conformance with Executive Law § 845-b. PHL § 2899-a(4) requires the Commissioner of Health (Commissioner) to promulgate regulations implementing PHL Article 28-E, and Executive Law § 845-b(12) requires the Department to promulgate regulations to implement criminal history information requests.

This proposal also will implement Chapter 471 of the Laws of 2016, which authorized advanced home health aides to perform advanced tasks under the supervision of registered professional nurses employed by home care services agencies, hospice programs, and enhanced assisted living residences (EALRs). PHL § 3602(17), added by Chapter 471, requires the Commissioner to issue regulations pertaining to advanced home health aides.

PHL § 3612(5) authorizes the Public Health and Health Planning Council (PHHPC) to adopt and amend regulations pertaining to certified home care services agencies and long term home health care programs approved pursuant to PHL Article 36, subject to approval of the Commissioner. PHL § 4010(4) authorizes PHHPC to adopt and amend regulations for hospice providers approved pursuant to PHL Article 40, subject to approval of the Commissioner.

Legislative Objectives:

PHL Article 28-E requires “providers” to request that the Department conduct a CHRC of each “prospective employee.” PHL § 2899(3) provides that an “employee” means any person

to be employed or used by a “provider” to provide “direct care or supervision” to patients or residents. Individuals licensed under Education Law Title 8 (various health care professionals) or PHL Article 28-D (nursing home administrators) or who are volunteers are excluded from the definition of “employee.” A “prospective employee,” as defined by PHL § 2899(5), is an individual who files an employment application and the provider expects to hire as an employee.

Chapters 60 and 94 of the Laws of 2014 amended PHL § 2899(6) to include within the definition of “provider” adult homes, enriched housing programs, and residences for adults licensed under Social Services Law (SSL) Article 7. SSL § 461-t similarly states that these entities must request CHRCs of their prospective direct care employees. PHL § 2899(10) was also amended to permit such employees to be temporarily approved to work pending the results of their CHRCs under the condition that the provider conducts direct observation and evaluation of the employee.

The definition of “provider” in PHL § 2899(6) was again expanded by Chapter 471 of the Laws of 2016 to include hospice programs certified under PHL Article 40 with respect to employees hired on or after April 1, 2018. Chapter 206 of the Laws of 2017 amended PHL § 2899(10) to permit these employees to be temporarily approved to work pending the results of their CHRCs under the direct observation and evaluation of the provider.

Chapter 471 also added Education Law § 6908(2) to permit advanced tasks to be performed by advanced home health aides with appropriate training and under supervision by registered professional nurses employed by home care services agencies, hospice programs, and EALRs. Regulations issued by the State Education Department in consultation with the Department will specify the types of advanced tasks that can be performed by advanced home health aides and set forth the qualifications, training and competency requirements for advanced

home health aides. This proposal will implement other provisions of the law by amending regulations applicable to home care services agencies, hospice programs, and EALRs to address the supervision of advanced home health aides.

These provisions will further the statutory goal of enabling more people to live in home and community based settings and provide support to family caregivers and their loved ones.

See Built to Lead, 2016 State of the State, Governor Andrew M. Cuomo, at

https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2016_State_of_the_State_Book.pdf (p. 271-72).

Needs and Benefits:

The proposed changes to Part 402 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR) will implement laws requiring CHRCs for adult homes, enriched housing programs, residences for adults, and hospice programs. As reflected in the regulations, these entities must request that the Department obtain criminal history information from the Division of Criminal Justice Services and a national criminal history check from the Federal Bureau of Investigation (FBI) concerning each prospective unlicensed employee who will provide direct care or supervision. Before such employees can begin working, they must consent to a digital scan of their fingerprints, which will be electronically transmitted to the Division of Criminal Justice Services (Division) for processing. The Division will subsequently provide criminal history information back to the Department.

Consistent with PHL Article 28-E, the Department will then review the information based on criteria in Executive Law § 845-b. The Department will advise the provider whether the applicant has a criminal history, and, if so, whether the history is of such a nature that the

Department disapproves eligibility for employment. The individual will have 30 days to provide rehabilitation documentation in support of their application before the Department makes a final disapproval determination. In some cases, a person may have a criminal background, but any convictions may not rise to the level requiring disapproval of eligibility for employment based on Executive Law § 845-b criteria. In other cases, there may be open charges that, if they resulted in a conviction, would result in denials, and the Department will hold such applications in abeyance until the charges are resolved.

Individuals are afforded an opportunity to explain, in writing, why their eligibility for employment should not be disapproved before the Department makes its final determination disapproving eligibility for employment. If the Department makes a final determination disapproving eligibility, the provider must notify the person that the criminal history information is the basis for such disapproval.

The proposed regulations set forth certain responsibilities of providers in implementing the CHRC requirements. Providers also must ensure that prospective employees who will be subject to the CHRC requirement are notified of the provider's right to request their criminal history information, and that they have the right to obtain, review, and seek correction of such information in accordance with regulations of the Division or, with regard to federal criminal history information, to seek correction of information with the FBI.

This proposal will also implement PHL § 3602(17), added by Chapter 471 of the Laws of 2016, defining advanced home health aides as home health aides who are authorized to perform advanced tasks as set forth in Education Law § 6908(2). The regulations also reflect the inclusion of hospice programs and EALRs in the definition of "home care services entity" set forth in PHL § 3613(1)(a) for purposes of the Home Care Services Worker Registry (Registry).

PHL§ 3613(9) provides that the Department must indicate within the Registry when a home health aide is qualified to serve as an advanced home health aide because he or she has satisfied all applicable training and competency requirements. Accordingly, this proposal will amend 10 NYCRR Part 403 to add advanced home health aides, advanced home health aide training programs, EALRs, and hospice programs to the Registry.

This proposal further will amend Part 700 to define an “advanced home health aide” as a certified home health aide who has met all requirements to perform advanced tasks and is listed in the Registry. Parts 763, 766, 793, 794, and 1001 also will be amended to reflect requirements related to advanced home health aides and the supervisions thereof by registered professional nurses employed by home care agencies – meaning certified home health agencies (CHHAs), long term home health care programs (LTHHCs), and licensed home care services agencies (LHCSAs) – as well as EALRs and hospice programs.

COSTS:

Costs to Private Regulated Parties:

The proposed regulatory changes related to CHRCs would apply to adult homes, enriched housing programs, residences for adults, and hospice programs. As explained above, when such an entity determines to hire or otherwise use an individual who is unlicensed and will have access to patients or residents or their living quarters, it must request a CHRC pursuant to PHL Article 28-E. The entity must include with the request a fee, currently \$99. Of this amount, \$75 covers the fee established by the Division for processing a State criminal history record check and \$12.00 is for a national criminal history record check. Further, obtaining the fingerprints used for CHRC requests, which is accomplished through a vendor, costs approximately \$12.00 per individual. Pursuant to PHL § 2899-a(9)(a) and as reflected in the

proposed amendments to 10 NYCRR § 402.10, providers will be reimbursed for such fees and costs when funds are appropriated in the state budget.

The proposed regulatory changes related to advanced home health aides apply to home care services agencies (CHHAs, LTHHCPs, and LHCSAs), EALRs, and hospice programs only to the extent they desire to use such aides. The registered professional nurses who supervise advanced home health aides will spend additional time carrying out the supervisory obligations set forth in the law and proposed regulations, but to some extent this will be offset by the ability to use such aides to carry out many of the tasks that otherwise would be carried out directly by the nurses.

Costs to Local Government:

The proposed changes are not expected to impose any costs upon local governments, unless they operate one of the afore-referenced entities. In such cases, the impact will be the same as for regulated parties, discussed above.

Costs to the Department of Health:

The proposed regulations will not impose costs upon the Department in addition to any imposed as a result of the statutory changes enacted with respect to CHRCs and advanced home health aides. Additional work by Department staff that process CHRC requests or participate in regulatory activities involving adult homes, enriched housing programs, residences for adults, home care services agencies, or hospice programs, is being managed within existing resources.

Costs to Other State Agencies:

Due to the legislative enactments reflected in this proposal, the volume of CHRC requests fulfilled by the Division will be higher but should be managed within existing resources.

Similarly, the State Education Department, in consultation with the Department of Health, will approve programs that train advanced home health aides, which is expected to be managed within existing resources.

Local Government Mandate:

The proposed regulations do not impose any new mandates on local governments, except where they operate local providers such as a home care services agency or a hospice program. In such cases, the impact will be the same as for regulated parties, discussed above.

Paperwork:

Consistent with the statutory provisions, the proposed regulations will require the completion of additional paperwork by adult homes, enriched housing programs, residences for adults, and hospice programs that request CHRCs. For example, providers will need to complete and submit a form to notify the Department of a prospective employee needing to be fingerprinted. A provider may also be asked to submit information not known to the Department to assist the Department in vetting and perfecting the criminal history of a prospective employee. Further, providers will need to document the supervision of employees that they temporarily approve to work pending the results of the CHRC.

Home care service agencies, EALRs, and hospice programs are already required to establish written policies and procedures related to various operational requirements, including

the training and supervision of employees. Therefore, although additional paperwork will be required to ensure that advanced home health aides are properly trained and supervised, this type of documentation should be familiar to these providers. Accessing the Registry is new for EALRs and hospice programs, but the Department has and will continue to make training and assistance available to guide them through these changes.

Duplication:

This rule does not duplicate any other law, rule or regulation.

Alternatives:

There are no alternatives to this proposal, which is necessary to implement legislative enactments expanding the provider types subject to the CHRC program and authorizing the use of advanced home health aides.

Federal Standards:

The proposed regulations do not duplicate or conflict with any federal regulations.

Compliance Schedule:

The regulations will 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:

To the extent this proposal implements statutory requirements related to criminal history record checks (CHRCs), it will be applicable to adult homes, enriched housing programs, residences for adults, and hospice programs. The provisions of the proposal related to advanced home health aides will apply to certified home health agencies (CHHAs), long term care home health care programs (LTHHCPs), or licensed home care services agencies (LHCSAs), hospice programs, or enhanced assisted living residences (EALRs) that choose to use advanced home health aides. Any of these entities, depending on their size, could constitute a small business. This proposal will only impact local governments if they operate one of these entities.

Compliance Requirements:

This proposal will require adult homes, enriched housing programs, residences for adults, and hospice programs to request CHRCs pursuant to PHL Article 28-E whenever they determine to hire or otherwise use unlicensed individuals who provide direct care or supervision to patients or residents. Consistent with the statutory provisions, compliance with the proposed regulations will require the completion of additional paperwork by these entities; for example, by completing a form that notifies the Department of a prospective employee who needs to be fingerprinted. A provider may also be asked to submit information not known to the Department to assist the Department in vetting and perfecting the criminal history of a prospective employee. Further, providers will need to document the supervision of employees that they temporarily approve to work pending the results of the CHRC.

The proposed regulatory changes related to advanced home health aides are applicable to home care services agencies (meaning CHHAs, LTHHCPs, and LHCSAs), EALRs, and hospice programs only to the extent they desire to use such aides under the supervision of registered professional nurses they employ. The registered professional nurses who supervise advanced home health aides will spend additional time carrying out the supervisory obligations set forth in the law and proposed regulations, but to some extent this will be offset by the ability to use such aides to carry out many of the tasks that otherwise would be carried out directly by the nurses.

Home care service agencies, EALRs, and hospice programs are already required to establish written policies and procedures related to various operational requirements, including the training and supervision of employees. Therefore, although additional paperwork will be required to ensure that advanced home health aides are properly trained and supervised, this type of documentation should be familiar to these providers. Accessing the Registry is new for EALRs and hospice programs, but the Department has and will continue to make training and assistance available to guide them through these changes.

Professional Services:

The CHRC provisions of this proposal are not expected to require any additional use of professional services. The proposed regulatory changes related to advanced home health aides are applicable to home care services agencies (meaning CHHAs, LTHHCPs, and LHCSAs), EALRs, and hospice programs only to the extent they desire to use such aides, in which case they must ensure that the aides are supervised by registered professional nurses. The registered professional nurses who supervise advanced home health aides will spend additional time carrying out the supervisory obligations set forth in the law and proposed regulations, but to

some extent this will be offset by the ability to use such aides to carry out many of the tasks that otherwise would be carried out directly by the nurses.

Compliance Costs:

Entities submitting CHRC requests must submit a fee, currently \$99, together with a CHRC request, and will incur costs of approximately \$12.00 per individual for obtaining the fingerprints. Pursuant to PHL § 2899-a(9)(a), and as reflected in the proposed amendments to 10 NYCRR § 402.10, providers will be reimbursed for such fees and costs when funds are appropriated in the state budget.

If CHHAs, LTHHCPs, LHCSAs, EALRs, and hospice programs choose to use advanced home health aides, they must do so under the supervision of registered professional nurses they employ. The registered professional nurses will spend additional time carrying out the supervisory obligations set forth in the law and proposed regulations, but to some extent this will be offset by the ability to use such aides to carry out many of the tasks that otherwise would be carried out directly by the nurses.

Economic and Technological Feasibility:

This proposal is economically and technically feasible. As indicated above, providers will be reimbursed for fees and costs associated with the CHRC requirements. Providers that can and choose to use advanced home health aides must do so under the supervision of registered professional nurses. It is expected that in many cases the additional time spent by the registered professional nurses in supervising the advanced home health aides will be offset by the ability to

use such aides to carry out many of the tasks that otherwise would be carried out directly by the nurses.

Minimizing Adverse Impact:

There are no alternatives to the proposed regulations, which are consistent with the statutory provisions regarding CHRCs and advanced home health aides enacted by Chapters 60 and 94 of the Laws of 2014, Chapter 471 of the Laws of 2016, and Chapter 206 of the Laws of 2017.

Small Business and Local Government Participation:

Development of these regulations included input from organizations including those whose members include providers that constitute small businesses or are operated by local governments.

Cure Period:

Chapter 524 of the Laws of 2011 requires agencies to include a “cure period” or other opportunity for ameliorative action to prevent the imposition of penalties on a party subject to enforcement when developing a regulation or explain in the Regulatory Flexibility Analysis why one is not included. As this proposed regulation does not create a new penalty or sanction, no cure period is necessary.

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

No rural area flexibility analysis is required pursuant to § 202-bb(4)(a) of the State Administrative Procedure Act. The proposed amendments will not impose an adverse impact on facilities in rural areas, and will not impose reporting, record keeping or other compliance requirements on facilities in rural areas.

STATEMENT IN LIEU OF JOB IMPACT STATEMENT

No job impact statement is required pursuant to § 201-a(2)(a) of the State Administrative Procedure Act. No adverse impact on jobs and employment opportunities is expected as a result of these proposed regulations.

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ASSESSMENT OF PUBLIC COMMENT

The New York State Department of Health (Department) received comments from seven entities regarding the proposed amendments to Parts 402, 403, 700, 763, 765, 766, 793, 794, and 1001 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

Comment: An advocacy organization that focuses on direct care workforce issues stated that the proposed regulations (specifically the proposed amendments to 10 NYCRR § 700.2(b)(54)) should detail the process for approval and monitoring of training for advanced home health aides.

Response: The Department will provide guidance on the procedures, approval, and monitoring of training programs. No changes were made to the regulation as a result of this comment.

Comment: An advocacy organization that focuses on direct care workforce issues stated that State Education Law § 6908(2)(b)(iv) requires that registered professional nurses (RNs) “visit individuals receiving services for the purpose of supervising the services provided by advanced home health aides no less than once every two weeks.” The commenter noted that such visits have financial and operational implications and requested that the Department consider permitting options other than in-person visits, such as permitting remote supervision via the use of technology.

Response: Noting that State Education Law § 6908(2)(b)(iv) also requires an RN to be available to an advanced home health aide by telephone 24 hours a day, the Department, in consultation with the New York State Education Department, interprets the requirement for a “visit” once every two weeks to mean an “in-person” visit. No changes were made to the regulation as a result of this comment.

Comment: An advocacy organization that focuses on direct care workforce issues stated that the regulations should be amended to include details about the duration of certification for advanced home health aides and the process for recertification. The commenter suggested that a model can be found in the current requirements for home health aides, where certification lapses when an individual has not worked for a home care agency for two full years, and an aide can be recertified through the successful completion of a competency examination.

Response: The Department does not believe it is necessary to include the requested information about certification in the regulation. This information will be made available by the Department in the form of guidance. No changes to the regulation are necessary.

Comment: An advocacy organization that focuses on direct care workforce issues suggested that the regulations should include a requirement for the formation of a stakeholder workgroup.

Response: The Department has previously convened a workgroup related to advanced home health aides and intends to do so again. Convening a workgroup in this manner does not require a regulation. No changes were made to the regulation as a result of this comment.

Comment: An association representing long term care providers suggested that the scope of practice for advanced home health aides should be expanded to include additional tasks suggested by a workgroup convened by the Department.

Response: Pursuant to the New York State Education Law, the scope of practice for advanced home health aides will be established pursuant to regulations of the State Education Department. No changes were made to the regulation as a result of this comment.

Comment: Several commenters (an association of hospice programs, two associations representing long term care providers, an association representing adult care facility providers, and a certified home health agency) noted that when an individual declines services by an advanced home health aide, the regulation provides for the services to be provided by an RN. The commenters suggest that the regulation should include licensed practical nurses (LPNs) as well.

Response: Services provided by an advanced home health aide are considered skilled in nature and an extension of the RN's practice. Consequently, individuals who exercise their right to refuse of services provided by an advanced home health aide should receive services from an RN. The Department will consider whether expanding the regulation to include LPNs could provide an appropriate level of care in the future. No changes were made to the regulation as a result of this comment.

Comment: An association of long term care providers and a certified home health agency noted that, in addition to requiring that advanced home health aides be supervised by RNs and not LPNs, the regulation eliminates current language permitting LPNs to supervise home health aides and personal care aides. The commenters believe that home health aides and personal care aides should continue to be supervised by LPNs.

Response: Pursuant to federal regulation 42 CFR 484.36, supervision of home health aides and personal care aides must be conducted by registered professional nurses. No changes were made to the regulation as a result of this comment.

Comment: An association of long term care providers and an association of adult care facilities commented that the regulation's requirement that any failure by a supervising RN be reported to the Department is too broad and subjective.

Response: This provision is consistent Public Health Law § 206(30) and Education Law § 6909(8). The Department believes that a registered professional nurse that engages in improper behavior while supervising an advanced home health aide should be reported. The grounds for improper behavior by a supervising registered professional nurse are listed specifically in the regulation. No changes were made to the regulation as a result of this comment.

Comment: An association of long term care providers asked whether personal care aides and home health aides who have completed a state approved training program and are employed by

an enhanced assisted living residence (EALR) are subject to the provisions of Part 403 related to the Home Care Services Registry (Registry).

Response: The regulations provide that all individuals who complete a state-approved home health aide or personal care aide training program and are employed by an EALR are subject to the Registry requirements.

Comment: An association of long term care providers and an association of adult care facilities asked if a licensed home care services agency associated with an Assisted Living Program (ALP) can offer advanced home health aide services to residents in the ALP.

Response: Section 494.3 of Title 18 specifically indicates that the provision of nursing and therapy services provided to individuals who reside in the ALP must be provided by a certified home health agency. Further, on June 7, 2012, the Department issued guidance regarding the Medicaid program's revised regulations, allowing ALPs to conduct initial and re-assessments directly or through contract with a certified home health agency. Services provided by an advanced home health aide are considered skilled in nature and an extension of the RN's practice.

Comment: An association of adult care facilities asked if the phrase "or services" could be added to 10 NYCRR § 402.3(i)(3) to clarify that the criminal history record check provisions apply to all unlicensed staff that have regular face to face interactions with residents.

Response: This clarification will be provided in guidance issued to providers. No changes were made to the regulation as a result of this comment.

Comment: A certified home health agency asked whether the organization employing an advanced home health aide must also employ the supervising RN.

Response: The supervising RN must be employed by the same entity which employs the advanced home health aide. No changes were made to the regulation as a result of this comment.

Comment: A certified home health agency requested clarification as to whether medical orders for advanced home health aides must be in writing or if verbal orders can be obtained.

Response: Pursuant to 10 NYCRR 766.4, physician orders may be obtained verbally but signed orders must be obtained within 12 months. No changes were made to the regulation as a result of this comment.

Comment: A certified home health agency requested clarification as to whether the minimum 18 hours in-service training required for advanced home health aides under the regulations includes or is in addition to the 12 hours currently required for home health aides. The commenter expressed concern that a total of 30 hours would be a barrier to training.

Response: The minimum total hours of in-service training for advanced home health aides under the regulation is 18 hours. This includes the initial 12 hours for initial home health aide training. No changes were made to the regulation as a result of this comment.

Comment: A licensed home care services agency wrote to express concern that the demand for RNs will increase, as more RNs will be needed to oversee advanced home health aides. The commenter stated that recruitment may be more difficult as fewer RNs will be willing to accept the added responsibility.

Response: State Education Law § 6908 requires that RNs provide oversight of advanced home health aides. No changes were made to the regulation as a result of this comment.