

## **SUMMARY OF EXPRESS TERMS**

The proposed amendments would make changes to subdivision (d) of section 505.9 of 18 NYCRR and to subdivision (a) and paragraph (4) of subdivision (ac) of section 86-2.40 of 10 NYCRR, relating to reserved bed payments made by Medicaid to nursing facilities during periods when the facility is holding the bed of a patient while the patient is hospitalized or on leave of absence from the facility. The changes are necessary to conform Department regulations to recent amendments to Public Health Law (PHL) § 2808(25), which place limits on the availability of Medicaid reserved bed payments to nursing facilities to reserve a bed for Medicaid recipients who are 21 years of age or older. The proposed amendments also clarify when reserve bed days should be included in the methodology utilized to calculate residential health care rates.

Section 505.9(d) of 18 NYCRR would be amended to provide that reserved bed payments for recipients age 21 and over who are temporarily hospitalized are only available with respect to recipients who are receiving hospice services in the facility.

Section 86-2.40(a) of 10 NYCRR would be amended to clarify that reserve bed days are included in the rate methodology utilized for specialty units. Section 86-2.40(ac)(4) of 10 NYCRR would be amended, with respect to nursing facility patients who are 21 years of age or older, to provide that Medicaid reserved bed day payments: (a) for patients who are hospitalized, will be made only for patients who are receiving hospice services within the facility, will be paid at 50 percent of the Medicaid rate otherwise payable to the facility with regard to such days of care, and will be available for a total of 14 days in any 12-month period; and (b) for patients who are on a leave of

absence, will be paid at 95 percent of the Medicaid rate otherwise payable to the facility with regard to such days of care, and will be available for a total of 10 days in any 12-month period.

Pursuant to the authority vested in the Commissioner of Health by sections 201 and 206 of the Public Health Law and sections 363-a and 365-a(2) of the Social Services Law, section 505.9 of Title 18 and section 86-2.40 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York are amended, to be effective upon publication of a Notice of Adoption in the New York State Register.

The opening language of subdivision (d) of section 505.9 of 18 NYCRR is amended to read as follows:

(d) Reserved bed days [payment].

Paragraphs (1), (2), (6), and (7) of subdivision (d) of section 505.9 of 18 NYCRR are amended to read as follows:

(1) The department will pay the medical institutions listed in paragraph (3) of this subdivision to reserve a bed for an MA recipient temporarily hospitalized or on leave of absence from the institution for one or more reserved bed days; however, the department will not pay to reserve an NF bed for a recipient 21 years of age or older who is temporarily hospitalized unless such recipient is receiving hospice services within the NF. A reserved bed day is a day for which the department pays a medical institution to reserve an MA recipient's bed while he or she is temporarily hospitalized or on leave of absence from the institution. The recipient must be absent from the institution overnight for the day to be considered a reserved bed day. A recipient is considered to be absent overnight when he or she is absent later than the time at which the institution normally conducts its patient census. The day the recipient departs for temporary hospitalization or

the leave of absence begins is counted as a reserved bed day. The day the recipient returns is not counted as a reserved bed day.

(2) Payments necessary to reserve [a] an NF bed for an MA recipient under 21 years of age who is temporarily hospitalized or on leave of absence[ from an NF], as permitted by this section, will be made at the reserved bed rate established for the facility by the commissioner of the Department of Health and approved by the Director of the Budget. Payments necessary to reserve a NF bed for an MA recipient 21 years of age or older, as permitted by this section, shall be made at 95 percent of the Medicaid rate otherwise payable to the facility with regard to such days of care in the case of a leave of absence, and at 50 percent of the Medicaid rate otherwise payable to the facility with regard to such days of care in the case of the temporary hospitalization of a recipient receiving hospice services within the facility. Payments to reserve a bed in any other medical facility listed in paragraph (3) of this subdivision, as permitted by this section, will be at the full rate established for the facility.

(6) [Reserved bed payments] Reserving beds for recipients who are temporarily hospitalized. [NFs, JICFs/MR, RTFs and specialty hospitals, as a condition of participation in the MA program, must make, extend and terminate bed reservations for MA recipients who are temporarily absent from such institutions for hospitalization as provided in subparagraphs (i) through (iv) of this paragraph. NFs must, as a condition of participation in the MA program, make, extend and terminate bed reservations for MA recipients who are either under 21 years of age, or receiving hospice services within the facility and temporarily absent from such institutions for hospitalization as provided in subparagraphs (i) through (iv) of this paragraph.

(i) Reserving a recipient's bed. The institution must reserve a recipient's bed when the recipient is hospitalized and expected to return to the institution in 15 or fewer days, subject to the limitations set forth in this paragraph. Unless medically contraindicated, the institution must reserve the same bed and room the recipient occupied before being hospitalized. When an institution reserves a recipient's bed, it must notify the hospital by telephone and in writing, according to department instructions, that:

(a) the recipient's bed has been reserved;

(b) the hospital discharge planning coordinator must notify the institution by telephone of any changes in the recipient's condition during the period that the recipient's bed is reserved; and

(c) the hospital discharge planning coordinator must notify the institution of the recipient's planned discharge date by the morning of the fourth day of hospital care. The hospital discharge planning coordinator must also notify the institution by telephone if the recipient's planned discharge date must be adjusted after the third and before the 16th day of hospital care because his or her condition has changed or additional medical information has become available. The hospital discharge planning coordinator must confirm in writing all bed reservation telephone communications.

(ii) When a recipient's bed will not be reserved. Under certain circumstances a recipient's bed will not be reserved. The institution must notify the hospital where the recipient is admitted that it is not reserving the recipient's bed. The institution must make appropriate notes on the recipient's transfer records or telephone the hospital within 24 hours after the recipient has been admitted if the recipient's bed will not be reserved. The institution also must document its decision not to reserve the bed. If a bed is not reserved,

the recipient must be given priority in readmission to the institution over persons referred to the institution for their first admissions. An NF, ICF/MR, RTF or specialty hospital cannot reserve a recipient's bed when:

(a) it is clear when the recipient is hospitalized that he or she will not return to the institution within 15 days or fewer;

(b) after hospitalization, the recipient will need a level of care the institution does not provide; or

(c) the recipient does not want to return to the institution.

(iii) Extending bed reservation. An NF, ICF/MR, RTF or specialty hospital must extend the bed reservation of a hospitalized recipient under the following circumstances:

(a) if an extension will permit the recipient to return to the institution within 20 days of his or her admission to the hospital, the bed reservation must be extended up to five days beyond the 15-day limit; or

(b) if an extension will permit a recipient hospitalized for acute psychiatric care to return to the RTF within 30 days of his or her admission to the hospital, the RTF must extend the recipient's reservation up to 15 days beyond the 15-day limit.

(iv) Terminating bed reservations.

(a) An NF, ICF/MR, RTF and specialty hospital must terminate a recipient's bed reservation when:

(1) the planned discharge date determined by the hospital by the morning of the fourth day of hospital care is more than 15 days from the day the recipient was admitted;

or

(2) the hospital adjusted the recipient's planned discharge date between the morning of the fourth day of hospital care and the 16th day of hospital care and the new discharge date will not permit the recipient to return to the institution within 20 days of the hospital admission date, except as provided in clause (b) of this subparagraph.

(b) An RTF must terminate a recipient's bed reservation if the recipient was hospitalized for acute psychiatric care, the recipient's planned discharge date was changed between the morning of the fourth day and 16th day of hospital care and the new discharge date will not permit the recipient to return to the institution within 30 days of the hospital admission date.

(c) The hospital discharge coordinator must provide the institution with appropriate documentation regarding circumstances which caused the discharge date to be changed.

(7) [Reserved bed payments] Reserving beds for recipients who are on leave of absence.

(i) A recipient is on leave of absence when he or she is absent from the medical institution overnight to visit friends or relatives or to participate in a medically acceptable therapeutic or rehabilitative plan of care.

(ii) An NF, ICF/MR, RTF and specialty hospital must, as a condition of participation in the MA program, reserve beds as follows:

(a) Reserving the recipient's bed. A medical institution must reserve a recipient's bed when his or her plan of care provides for leaves of absence. Unless medically contraindicated, the institution must reserve the same bed and room the recipient occupied before the leave of absence. If a bed may not be reserved for a recipient under

this paragraph, the institution must give priority to the recipient's readmission, over individuals referred for their first admissions.

(b) Prior authorization for payment of leave of absence reserved bed days:

(1) is not required for the first 18 of a recipient's reserved bed days during any 12-month period;

(2) is required if a recipient's reserved bed days are more than 18 days in any 12-month period, except for a recipient in an RTF, ICF/MR or specialty hospital. The medical institution must request prior authorization from the recipient's social services district's MA professional director. Prior authorization will be granted only if the 18-day limit interferes with a physician's ability to prescribe an appropriate therapeutic or rehabilitative plan for the recipient; and

(3) is required for a recipient's reserved bed days in an RTF which exceed 75 days in any 12-month period or four days per single leave. The RTF must request prior authorization from the appropriate regional office of the OMH for payment of the excess reserved bed days. The request for prior authorization must be:

(i) supported by verification from a physician;

(ii) consistent with the RTF's written policy; and

(iii) approved by the appropriate regional office of the OMH.

(c) An ICF/MR or a specialty hospital may request payment without prior authorization for an unlimited number of reserved bed days in any 12-month period.

(iii) For a recipient in a rehabilitation or psychiatric facility other than an RTF, or in the psychiatric or rehabilitation unit of a general hospital, the facility or unit must assure that leaves of absence are consistent with the institution's written policy on the use



of leaves for therapy only, and limited to two days for any single leave, unless the recipient's social services district's MA professional director has approved an exception to this limitation prior to the leave.

(iv) Other payment standards for leave of absence reserved bed days.

(a) When a recipient incurs expenses, such as room and board, while on leave of absence, and the institution's per diem rate already reimburses the institution for these expenses, the institution must pay the cost. The recipient's social services district must give prior approval for an exception to this requirement. The social services district must ensure that costs included in the institution's per diem rate are reconciled with the institution's claim for payment of reserved bed days.

(b) No payment for reserved bed days will be made if a recipient returns to the institution from a leave of absence and is then discharged within 24 hours. Prior approval by the recipient's social services district's MA professional director, or for a recipient in an RTF, by the commissioner of the OMH or his or her designee, or, for recipients in ICFs/MR or specialty hospitals, by the commissioner of the [OMRDD] OPWDD or his or her designee, must be obtained for an exception to this provision.

[(c) Reserved bed days will be paid for only if the leave of absence is for therapeutic purposes.]

(v) An NF may not reserve a bed under this [subdivision] paragraph for a recipient who is temporarily receiving care in a hospital.

(vi) A bed reservation under this paragraph must be terminated when the institution is informed that the recipient will not return from leave to the institution.

(vii) When a recipient has been a patient in more than one medical institution within any 12-month period, the institution where the recipient is currently a patient must determine the number of paid leave of absence days in other institutions. Such institution must assure that the recipient's total number of leave days during the previous 12-month period does not exceed 18 days, unless prior authorization for extra days has been received or the 180-day limit is inapplicable. When a recipient is transferred to another inpatient institution, a copy of his or her absence register must be included in the transfer records.

Subdivision (a) of Section 86-2.40 of 10 NYCRR is amended to read as follows:

(a) “specialty facilities” means those facilities or discrete units of facilities described in paragraph (c) of subdivision 2-c of section 2808 of the Public Health Law. Such facilities and such discrete units of facilities shall not be subject to the provisions of this section, other than subdivisions (ac)(2) and (ad) of this section, and the costs and statistical data reported by such facilities and such discrete units of facilities shall not be included in the rate computations otherwise made pursuant to this section, and the term “facilities” as used in this section shall not be deemed to include such facilities.

New subparagraphs (v) and (vi) of paragraph (4) of subdivision (ac) of section 86-2.40 of 10 NYCRR are added to read as follows:

(v) Notwithstanding any other provision of this subdivision, and subject to the availability of Federal financial participation, for services provided to patients 21 years of age and older, Medicaid payments for reserved bed days, as defined in paragraph (2) of

this subdivision, which are related to a patient's hospitalization shall be made: only with respect to patients who are receiving hospice services within the facility; at 50 percent of the Medicaid rate otherwise payable to the facility with regard to such days of care; and for up to a combined aggregate of 14 days for any 12-month period.

(vi) Notwithstanding any other provision of this subdivision, and subject to the availability of Federal financial participation, for services provided to patients 21 years of age and older, Medicaid payments for reserved bed days, as defined in paragraph (2) of this subdivision, which are related to a patient's leave of absence shall be made: at 95 percent of the Medicaid rate otherwise payable to the facility with regard to such days of care; and for up to a combined aggregate of 10 days for any 12-month period.

## **REGULATORY IMPACT STATEMENT**

### **Statutory Authority:**

Social Services Law (SSL) section 363-a and Public Health Law section 201(1)(v) provide that the Department is the single State agency responsible for supervising the administration of the State's medical assistance ("Medicaid") program and for adopting such regulations, which shall be consistent with law, and as may be necessary to implement the State's Medicaid program. SSL section 365-a authorizes Medicaid coverage for specified medical care, services and supplies, together with such medical care, services and supplies as authorized in the regulations of the Department.

### **Legislative Objectives:**

Chapter 57 of the Laws of 2017 amended Public Health Law (PHL) § 2808(25), which places limits on the availability of Medicaid payments to nursing facilities to reserve a bed for a Medicaid recipient 21 years of age or older who is temporarily absent from the facility. Generally, the amendments eliminated reserved bed payments for recipients age 21 and over who are temporarily hospitalized. However, it was not the intent of the Legislature or the Department to affect the availability of reserved bed payments for temporary hospitalizations with respect to recipients under age 21 or recipients receiving hospice services in the nursing facility.

### **Needs and Benefits:**

The proposed amendments are necessary to conform Department regulations governing Medicaid's reserved bed policy with the changes made to PHL § 2808(25) by

Chapter 57 of the Laws of 2017, and to provide clarity with respect to the scope and intent of those statutory revisions.

The proposed amendments would make changes to paragraphs (1), (2), (6), and (7) of subdivision (d) of section 505.9 of 18 NYCRR. Paragraph (1), which sets forth the general rule regarding reserved bed payments, would be amended to provide that Medicaid will not pay to reserve a bed for a recipient in a nursing facility who is 21 years of age or older and temporarily hospitalized unless the recipient is receiving hospice services in the facility.

Paragraph (2) would be amended to provide that the department pays 95 percent of the Medicaid rate otherwise payable to the facility for a leave of absence, and 50 percent of such rate for a temporary hospitalization for recipients who are receiving hospice services in the facility.

Paragraphs (6) would be amended to provide that, as a condition of participating in the Medicaid program, nursing facilities must reserve beds in accordance with the regulation.

Paragraph (7) would be amended to make minor clarifications.

The proposed amendments would also make conforming changes to subdivision (a) and paragraph (4) of subdivision (ac) of section 86-2.40 of 10 NYCRR. These changes would clarify that reserve bed days are included in the methodology utilized to calculate residential health care rates for specialty facilities and would set forth payment amounts for Medicaid recipients 21 years of age or older.

A new subparagraph (v) would be added to provide that reserved bed day payments for Medicaid recipients 21 years of age or older in nursing facilities who are

hospitalized will be made: only with respect to patients who are receiving hospice services within the facility; at 50 percent of the Medicaid rate otherwise payable to the facility with regard to such days of care; and for up to a combined aggregate of 14 days for any 12-month period.

A new subparagraph (vi) would be added to provide that reserved bed day payments for Medicaid recipients 21 years of age or older in nursing facilities during a leave of absence from the facility will be made: at 95 percent of the Medicaid rate otherwise payable to the facility with regard to such days of care; and for up to a combined aggregate of 10 days for any 12-month period.

## **Costs**

### **Costs to Regulated Parties:**

The elimination of reserved bed day payments for those aged 21 and over in nursing facilities, and who are not receiving hospice services in the facility, will impose varying costs to nursing facilities based on the volume and length of reserved bed days within their facilities. For all nursing facilities reporting reserved bed days, the aggregate impact is estimated to be approximately \$14M annually.

### **Costs to State Government:**

There will be no additional costs to state government as a result of the proposed amendment.

### **Costs to Local Government:**

There will be no additional costs to local government as a result of the proposed amendment.

### **Costs to the Department of Health:**

There will be no additional costs to the Department as a result of the proposed amendment.

**Local Government Mandate:**

This amendment will not impose any program, service, duty, additional costs, or responsibility on any county, city, town, village, school district, fire district, or other special district.

**Paperwork:**

The proposed amendments would not increase paperwork requirements.

**Duplication:**

There are no duplicative or conflicting rules identified.

**Alternatives:**

The proposed amendments would conform the regulations to changes made to Public Health Law (PHL) § 2808(25) and to the legislative intent underlying such changes. Therefore no alternatives were considered.

**Federal Standards:**

The regulatory amendment exceeds the minimum requirements set out in 42 CFR 483.15 on patient admission, transfer, and discharge rights. This amendment exceeds those requirements due to the sensitive nature and complex needs of Medicaid beneficiaries within nursing facilities. Residents of nursing facilities are often elderly and/or severely disabled, present with two or more chronic conditions, or are afflicted with mental/cognitive impairments.

**Compliance Schedule:**

Regulated parties are expected to comply with the proposed regulations when they become effective.

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## **STATEMENT IN LIEU OF REGULATORY FLEXIBILITY ANALYSIS**

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

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

No rural area flexibility analysis is required pursuant to section 202-bb(4)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse impact on facilities in rural areas, and it does not impose reporting, record keeping or other compliance requirements on facilities in rural areas. There are no further compliance requirements created by the proposed amendment.

## **STATEMENT IN LIEU OF JOB IMPACT STATEMENT**

No job impact statement is required pursuant to section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have an adverse impact on jobs and employment opportunities.

## ASSESSMENT OF PUBLIC COMMENT

The Department of Health (“Department”) received comments from two stakeholders, representing nursing home facilities and services for the aging. These comments are summarized below along with the Department’s responses.

**COMMENT:** Commenters requested that rate changes should be prospective and that such changes require a State Plan Amendment (SPA).

**RESPONSE:** These regulations codify rate changes pursuant to a 2017 statutory change to section 2808 of the Public Health Law. The Department has submitted a SPA (#18-0042) with an effective date of January 1, 2019.

**COMMENT:** Commenters requested confirmation that the regulations, as amended, do not require nursing homes to hold a bed for days where no Medicaid payment is available.

**RESPONSE:** The Department confirms that the regulations, as amended, do not require nursing homes to reserve a bed for days where no Medicaid payment is available.

**COMMENT:** Commenters asserted that the rate to reserve a bed for persons 21 and over who are temporary hospitalized while receiving hospice should be greater than 50% of the rate otherwise provided for nursing home care, as provided in the amended regulations.

**RESPONSE:** The Department considers the rate to be appropriate for reserving a bed, and the establishment of the rate is within the Department’s rate-making authority. The Department notes that the rate of 95% only applies to certain leaves of absence. Further, the regulation authorizing a 50% rate for persons 21 and over who are temporary hospitalized while receiving hospice, is an exception to the “full rate” otherwise authorized by 18 NYCRR 505.9(d)(3).

**COMMENT:** One commenter suggested that the amendment to 10 NYCRR 86-2.40(a), which added a reference to subdivision (ac)(2), is at odds with PHL 2808(2-c)(c), insofar as the statute generally provides that the non-capital component of rates for specialty facilities shall be the rates in effect for such facilities on January 1, 2009, adjusted for inflation and rate appeals.

**RESPONSE:** The Department agrees that the non-capital component of rates for specialty facilities will continue to reflect the rates in effect for such facilities on January 1, 2009, adjusted for inflation and rate appeals, consistent with PHL 2808(2-c)(c). The regulatory amendment clarifies that patient days include reserved bed days for purposes of calculating the January 1, 2009 rate.

**COMMENT:** Commenters supported regulatory amendments to provisions authorizing reserve bed day payments for certain leaves of absence.

**RESPONSE:** The Department acknowledges these supportive comments.