

Pursuant to the authority vested in the Commissioner of Health by Social Services Law Sections 363-a(2) and 367-r, Section 505.8 of Title 18 (Social Services) of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR) is amended, to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

Paragraph (c) is deleted, paragraphs (d) through (h) are re-numbered (c) through (g), paragraph (a) is amended, and, as re-numbered, paragraphs (d), (e) and (f) are amended to read as follows:

505.8 Nursing service. (a) Where nursing care may be provided. Nursing services, as medically needed, may be provided to a medical assistance recipient in the person's home [or in a hospital] and, with respect to a child receiving nursing services pursuant to an individualized education program or an interim or final individualized family services plan, also in a school, an approved pre-school or a natural environment, including home and community settings, where such child would otherwise be found.

(b) Who may provide nursing care. (1) Nursing care to patients in New York State shall be provided by a person possessing a license and current registration from the New York State Education Department to practice as a registered professional nurse or licensed practical nurse. (2) Out-of-state nurses providing care to a New York State Medical Assistance patient who is temporarily located outside New York State, must be licensed and registered in the state in which they are practicing.

[(c) Private duty nursing care in the hospital. Private duty nursing care in the hospital shall be provided on the recommendation of the patient's attending physician when the patient is in need

of individual and continuous care beyond that available by the staff of a hospital, including that which is available in a critical care area.]

([d]c) Nursing service in the home. (1) For necessary nursing service to be provided in the person's home, full and primary use shall be made of the services of an approved home health agency, including a hospital-based home health agency.

(2) Such service shall be provided on a per visit basis and may include not only intermittent or part-time nursing service for the patient but also instructions to members of the patient's family in procedures necessary for the care of the patient.

(3) Service of a registered professional nurse or of a licensed practical nurse on a private practitioner basis may be provided to a patient in his own home only under the following circumstances:

(i) when there is no approved home health agency available to provide the intermittent or part-time nursing services needed by the patient;

(ii) when the patient is in need of individual and continuous nursing care beyond that available from an approved home health agency.

([e]d) Prior approval and prior authorization. Prior approval [by the local professional director and prior authorization by the local social services official] shall be required for nursing service provided in a person's home [or in a hospital] by a private practicing registered professional or licensed practical nurse, except that in an urgent situation the attending physician may order the service of such nurse for no more than two nursing days and immediately notify the [local social services official and the appropriate medical director] Department of Health.

([f]e) Physician's written order required. All nursing services provided by a registered professional nurse or licensed professional nurse in a recipient's home, [a hospital,] a school, an

approved pre-school, or a natural environment, including home and community settings, where such child would otherwise be found, must be provided in accordance with the attending physician's written order and plan of treatment. In extraordinary circumstances and for valid reasons which must be documented, nursing services in the home may be initiated by a home health agency before the physician examines the recipient. A physician's written order is required for all such nursing services in excess of the initial two visits.

([g]f) Reimbursement. (1) Reimbursement for nursing services rendered by a registered professional nurse or licensed practical nurse on a private practitioner basis shall be at fees not to exceed those established by the Department of Health and approved by the State Budget Director. Nursing services rendered by a registered professional nurse or licensed practical nurse on a private practitioner basis in a hospital provided on dates between July 1, 1977 and October 8, 1979 are non-reimbursable under the Medical Assistance Program, except that a local social services official (or the MMIS project director, if a county was listed in section 540.6 of this Subchapter at the time service was rendered) may determine to reimburse services rendered after October 1, 1979, in accordance with this Part, if written approval is obtained from the State Commissioner.

(2) Reimbursement shall not be allowed on a fee paid to a legally responsible relative who provides nursing services in the patient's home [or in a hospital].

(3) Payment for nursing services provided by an approved home health agency, including a hospital-based home health agency, shall be at rates established by the State Commissioner of Health pursuant to subdivision 7 of section 206 of the Public Health Law and reimbursement for such expenditures shall be at such rates.

(4) Payment is available for nursing services which are part of the development of, or furnished pursuant to, an individualized education program and which are provided by a registered professional nurse or licensed practical nurse employed by, or under contract to, a school district, an approved pre-school, a county in the State or the City of New York. Reimbursement for such services must be made in accordance with the provider agreement.

(5) Payment is available for nursing services which are part of the development of, or furnished pursuant to, an interim or final individualized family services plan and which are provided by a registered professional nurse or licensed practical nurse employed by, or under contract to, an approved early intervention program or a municipality in the State. Reimbursement for such services must be made in accordance with the provider agreement.

(6) Effective January 1, 2007 [through January 1, 2009], payment for nursing services provided to medically fragile children shall be at an enhanced rate which exceeds the provider's nursing services payment rate established by the Department of Health and approved by the State Budget Director under this subdivision. (a) Medically fragile children means children who are at risk of hospitalization or institutionalization, but who are capable of being cared for at home if provided with appropriate home care services, including but not limited to case management services and continuous nursing services, and includes any children under the age of 21 receiving continuous nursing services pursuant to this section. (b) The enhanced rate shall be determined by applying thirty percent (30%) of the provider's approved rate in addition to the rate otherwise payable under this subdivision, which increase is at least equivalent to the reimbursement rate for the AIDS Home Care Program specified in section 86-1.46(b) of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York. Licensed Home Care Services Agency (LHCSA) providers receiving reimbursement at the enhanced rate shall use such

amounts only to recruit and retain nurses to ensure the delivery of nursing services to medically fragile children. (c) The enhanced rate shall only be payable upon submission of a certification by a nurse provider, on forms and procedures prescribed by the Department, that he or she has satisfactory training and experience to provide nursing services to medically fragile children. A LHCSCA provider shall make and submit such certifications on behalf of nurses rendering services to children under this subdivision.

(7)(i) Fee-for-service reimbursement for provider directory participants. Effective October 1, 2020, the Commissioner of Health shall, subject to the provisions of paragraph (f)(6) of this section, and the provisions of paragraph (f)(7)(ii) of this section, and subject to the availability of federal financial participation, annually increase fees for the fee-for-service reimbursement of private duty nursing services provided to medically fragile children by fee-for-service private duty nursing services providers who enroll and participate in the provider directory pursuant to paragraph (f)(7)(ii) of this section, over a period of three years, commencing October 1, 2020, by one-third annual increments, until such fees for reimbursement equal the final benchmark payment designed to ensure adequate access to the service. In developing such benchmark the Commissioner of Health may utilize the average 2018 Medicaid managed care payments for reimbursement of such private duty nursing services.

(ii) Provider directory for fee-for-service private duty nursing services provided to medically fragile children. The Commissioner of Health shall establish a directory of qualified providers for the purpose of promoting the availability and ensuring delivery of fee-for-service private duty nursing services to medically fragile children and individuals transitioning out of such category of care. Such transition period shall commence upon the individuals reaching age 21 and shall include any such individuals under the age of 23 receiving continuous nursing services pursuant

to this section. Qualified providers enrolling in the directory shall ensure the availability and delivery of such services to individuals in need of such services, and shall receive increased reimbursement for such services pursuant to paragraph f(7)(i) of this section. The directory shall offer enrollment to all private duty nursing services providers to promote and ensure the participation in the directory of all nursing services providers available to serve medically fragile children.

([h]g) Nurse-midwife services. (1) Standards of conformity. The provision of nurse-midwife services to a recipient in the Medical Assistance Program shall be in conformity with the provisions of section 85.36 of the Department of Health regulations (10 NYCRR) in order to be a reimbursable service.

(2) Payment for nurse-midwife services. (i) State reimbursement shall be available for expenditures made in accordance with provisions of this section.
(ii) Payment and reimbursement under the Medical Assistance Program for services provided by an independently practicing nurse-midwife shall be in accordance with fees established by the State Department of Health and approved by the State Director of the Budget.

(iii) Services provided by a nurse-midwife who is salaried by a medical facility that is reimbursed for services on a cost-related basis shall not be reimbursed on a fee-for-service basis if the cost for the nurse-midwife's salary is included in the facility's cost-based rate.

(iv) Services provided by nurse-midwives under this subdivision shall be eligible for payment and State reimbursement effective January 1, 1984.

REGULATORY IMPACT STATEMENT

Statutory Authority:

Social Services Law (“SSL”) section 363-a and Public Health Law (“PHL”) 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, not inconsistent with law, as may be necessary to implement the State’s Medicaid program. The State’s Medicaid program includes nursing services authorized by SSL § 367-r, as amended by Chapter 56 of the Laws of 2020. The Department may promulgate regulations necessary to carry out the program’s objectives, which includes the provision of and payment for nursing services. SSL § 367-r. The proposed amendment to the nursing services regulation is within the Department’s statutory rulemaking authority as it sets forth a required framework for the method of reimbursing nursing services and establishing a provider directory for medically fragile children.

Legislative Objectives:

The Legislature’s objective in amending SSL § 367-r was to establish the annual increase to fees for the fee-for-service reimbursement of private duty nursing services provided to medically fragile children by fee-for-service private duty nursing service providers who enroll and participate in provider directory over a period of three years, commencing October 1, 2020, by one-third annual increments, until such fees for reimbursement equal the final benchmark payment designed to ensure adequate access to the service. In developing such benchmark, the Commissioner of Health may utilize the average 2018 Medicaid managed care payments for reimbursement of such private duty nursing services. The statutory amendment further provides

for the Commissioner of Health to establish a directory of qualified providers for the purpose of promoting the availability and ensuring delivery of fee-for-service private duty nursing services to medically fragile children and individuals transitioning out of such category of care; such transition period shall commence upon the individuals reaching age 21 and shall include any such individuals under the age of 23 receiving continuous nursing services pursuant to this section. Qualified providers enrolling in the directory are required to ensure the availability and delivery of and to provide such services to those individuals as are in need of such services and to receive the increased reimbursement for the nursing services. The directory offers enrollment to all private duty nursing services providers to promote and ensure the participation in the directory of all nursing services providers available to serve medically fragile children. Additional changes—amending paragraphs (a) and (e) and deleting paragraph (c)—are made to remove obsolete references to private duty nursing services in a hospital setting, because the State’s Medicaid program has not and does not reimburse for services in a hospital since those services are included in the hospital’s all-inclusive Medicaid reimbursement rate.

Needs and Benefits:

Historically, the State has provided additional reimbursement for private duty nursing (PDN) services provided to medically fragile children. Reimbursement for PDN services currently also includes a 30 percent add-on enhanced fee for medically fragile children under age 21. However, access to fee-for-service private duty nursing services provided to medically fragile children continues to be challenging based on the demand for and shortage of available nurses. Even with the current 30 percent add-on, for the approximately 1,500 medically fragile children who access PDN services in the fee-for-service program, it is often difficult to find private duty

nurses to serve complex cases, and to find nurses who accept the Medicaid fee schedule and/or who are enrolled in the Medicaid program. Many PDN providers are no longer accepting cases for medically fragile children.

The annual increase to fees for the fee-for-service reimbursement to private duty nurses who participate in the directory will allow greater access to the private duty nursing services and allow for a transition period for those private duty nursing services to individuals up to the age of 23 at the increased reimbursement rate. This transition period will prevent providers from discontinuing private duty nursing services to medically fragile children once the enhanced rates ends at the time individuals turn 21.

Costs to Regulated Parties:

There will be no additional costs to private regulated parties as a result of the proposed regulation.

Costs to State Government:

As reflected in the State's fiscal year 2020-21 budget, there is additional increase in Medicaid expenditures anticipated as a result of the proposed regulation of \$12.8 million (State share).

Costs to Local Government:

Local districts' share of Medicaid costs is statutorily capped; therefore, there will be no additional costs to local governments as a result of the proposed regulation.

Costs to the Department of Health:

As reflected in the State's fiscal year 2020-21 budget, in addition to the \$12.8 million State share cost to State Government, there will be an additional administrative cost to the Department of Health of \$436,456.68.

Local Government Mandates:

The proposed regulation does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

The proposed regulations do not impose any reporting requirements on fiscal intermediaries or other entities. The existing enrollment forms will be modified, and no new forms will be created.

Duplication:

The proposed regulations do not duplicate any existing federal, state or local regulations.

Alternatives:

As discussed above, the Legislature has determined that, based on the need for private duty nursing services and the scarcity of nurses available for medically fragile children, the additional reimbursement fees are needed for those who enroll and participate in the provider directory. Accordingly, the alternative of not taking this regulatory action was rejected.

Federal Standards:

The proposed regulations do not exceed any minimum federal standards.

Compliance Schedule:

There is no compliance schedule imposed by this amendment, which shall be effective upon publication of a notice of adoption.

Contact Person:

Katherine Ceroalo
New York State Department of Health
Bureau of Program Counsel, Regulatory Affairs Unit
Corning Tower Building, Rm 2438
Empire State Plaza
Albany, NY 12237
(518) 473-7488
(518) 473-2019 (FAX)
REGSQNA@health.ny.gov

**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.

JOB IMPACT STATEMENT

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

ASSESSMENT OF PUBLIC COMMENT

The Department of Health (“DOH” or the “Department”) received several comments from St. Mary’s Healthcare Systems for Children regarding the amendment of Social Services Law Sections 363-a(2) and 367-r, Section 505.8 of Title 18 (Social Services) of the Official Compilation of Codes, Rules and Regulations of the State, specifically the proposed rule change to *Private Duty Nursing Services to Medically Fragile Children*. The comments are summarized below with responses. Comments received were concerning the three-year incremental timeline for fee increases, and the recommendation that private duty nursing (PDN) fees should be the same across fee-for-service Medicaid and Managed Medicaid plans. One comment was not addressed because it did not concern the proposed rule changes.

COMMENT:

“Although St Mary’s values the statute that increases fee for service private duty nursing rates we request future consideration to the three year incremental timeline and the impact it will have on families that have private insurance and are required to remain in fee for service Medicaid. Families in New York State pay high insurance premiums to ensure their medically fragile children receive quality medical care however, due to the managed Medicaid enrollment exclusion they still must rely on fee for service rates to secure private duty nursing. The inequity in the rates will continue to force nursing agencies to compete with managed care rates, minimize their ability to hire nurses and most importantly put families in crisis situations. For these reasons St Mary’s strongly recommends future consideration to an immediate increase to fee for service private duty rates to equal managed care rates rather than an incremental increase over three years.”

RESPONSE:

The responsibility of setting PDN fees will be under the authority of the Commissioner of Health. Current fees for PDN services are set by the county and will transition to regional PDN fees as of 10/1/2020. The regional fees were established to provide equitable reimbursement in two geographical regions, removing the county to county variability. Nurses who provide services to medically fragile children and enroll in the PDN directory will receive an enhanced fee. The enhanced fee will be provided in a three-year incremental timeframe. The enhancement will be calculated based on the new regional fees established. The provider will continue to receive the enhanced fee until the member reaches the age of 23. These increases are in addition to the 30% enhanced fee for nurses who demonstrate that they have the training and experience to treat medically fragile children. The 30% enhancement has also been expanded to nurses servicing members up until the age of 23. Enrollment in the directory, the new regional fees, and enhanced fees will strengthen the network of providers available to Medicaid members and better match medically fragile children with a nurse trained to meet their medical needs.

COMMENT:

“St Mary’s is also concerned about the continuous need to address fee for service private duty nursing rates and strongly recommends the same Medicaid rate for the same service regardless of whether it is fee for service or managed Medicaid.”

RESPONSE:

As stated above, the responsibility of setting PDN fees will be under the authority of the Commissioner of Health. Currently the counties set fees for PDN services and are variable. Regional fees that will go into effect on 10/1/2020 will eliminate the variability between

counties. The regional fees were established to provide reasonable and fair reimbursement for PDN services in two geographical areas. The Managed Medicaid Plans are responsible for providing the same coverage for services that fee-for-service Medicaid provides, however, they have the ability to set their own fees. Fee-For-Service Medicaid will set fees based on geographic location and industry standards. As described above, fee enhancements for nurses providing services to medically fragile children are available. With fees being set by the Commissioner of Health as of 10/1/2020 and having only two fees based on region throughout the state, re-evaluation of fees can be performed more consistently and ensure that fee-for-service nursing providers are receiving equitable reimbursement for the services they are providing to Medicaid members.