

SUMMARY OF EXPRESS TERMS

The proposed regulations amend 10 NYCRR Subpart 86-10, concerning the rate methodology for Residential Habilitation delivered in Supervised Individualized Residential Alternatives (IRAs), Community Residences (CRs) and for Non-State Providers of Day Habilitation.

OPWDD's proposed regulatory amendments are necessary due to the approval of an amendment to OPWDD's Comprehensive Home and Community-Based Services (HCBS) 1915(c) Waiver by the Centers for Medicare and Medicaid Services. These proposed regulations amend Title 10 NYCRR Subpart 86-10 to change calculations of the occupancy adjustment for Individualized Residential Alternatives (IRAs) by eliminating the adjustment based on a system-wide assessment of vacancy utilization and limiting reimbursement for periods when individuals are not present in those residences. There are also changes to conform the regulations for OPWDD waiver services to the approved HCBS waiver agreement with the federal Centers for Medicare and Medicaid Services.

Specifically, Subpart 86-10.2 is amended to make changes to several defined terms in the rate methodology used to set reimbursement rates for IRAs. These definition changes include: a change setting the occupancy adjustment for IRA rates to zero beginning on May 1, 2021; a change limiting reimbursement for retainer days to 50 percent of a provider's established rate; and a change limiting the number of therapy days the provider may bill each year to 96 days per individual and limiting reimbursement to 50% of the provider's established rate.

Subpart 86-10.3 is amended to conform the language of certain terms in the rate-setting methodology to the language used in the approved HCBS waiver. Subpart 86-10.5 adds conforming language regarding the April 1, 2015 direct support professionals' compensation increase. Subpart 86-10.6 amends a reimbursement section to operationalize the changes to the occupancy adjustment, retainer days, and therapy days described above.

Pursuant to the authority vested in the Commissioner of Health by Part I of Chapter 60 of the laws of 2014 and Part K of Chapter 54 of the laws of 2016, sections 86-10.2, 86-10.3, 86-10.5, and 86-10.6 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended, to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

Section 86-10.2 of 10 NYCRR is REPEALED and a new section 86-10.2 is added to read as follows:

As used in this Subpart, the following terms shall have the following meanings:

(a) Allowable capital costs. Capital costs that are allowable under 14 NYCRR Subpart 635-6.

(b) Allowable operating costs. In the case of residential habilitation services, operating costs that are allowable under 14 NYCRR paragraph 635-10.4 (b)(1) and subdivision 686.13(b); in the case of day habilitation services, operating costs that are allowable under 14 NYCRR paragraph 635-10.4(b)(2).

(c) Acuity factor. Factor developed through a regression analysis utilizing components of Developmental Disabilities Profile-2 (DDP-2) scores, average residential bed size, Willowbrook class indicators and historical utilization data to predict direct care hours needed to serve individuals. Factors are available on the Department's website:

http://www.health.ny.gov/health_care/medicaid/rates/mental_hygiene/

(d) Allowable Agency Administration. For Non-State Government and Voluntary Providers, from the CFR for the base year, divide the Agency Administration Allocation (from CFR1 Line 65) by the Total Operating Costs (from CFR1 Line 64) to determine the agency administration percentage.

(e) Authorized Rate Period Units, or Authorized Units. Units approved by OPWDD Budget Office to deliver Day Habilitation Services. OPWDD Budget Office adjusts the units based on addition or subtraction of individuals as well as addition or subtraction of sites. These units are tracked on an ongoing basis and reported to DOH on a semi-annual basis (January and July). Based on the unit update the operating portion of the final target rate will not change. The capital portion will be adjusted by the change in units, which will change the overall Day Habilitation rate.

(f) Base Period CFR, or Base Year CFR. The Consolidated Fiscal Report (CFR) used to update methodologies.

(g) Budget Neutrality Adjustment. Factor applied to the end of the methodology, by service, to ensure the total annual target reimbursement is equivalent to the total annual base reimbursement. The factors can be found on the Department's website at

http://www.health.ny.gov/health_care/medicaid/rates/mental_hygiene/

(h) Capital Costs. Allowable costs that are related to the acquisition, lease and/or long-term use

of land, buildings and construction equipment, leasehold improvements and vehicles.

(i) Community residence. A facility operated as a community residence under 14 NYCRR Part 686, including an individualized residential alternative.

(j) Consolidated Fiscal Report (CFR). The reporting tool utilized by all government and non-government providers to communicate annual costs incurred as a result of operating OPWDD programs and services, along with related patient utilization and staffing statistics. The CFR is the report and associated instructions as of April 1, 2013, identified by the New York State Education Department, and found at: http://www.oms.nysed.gov/rsu/Manuals_Forms/

(k) Day habilitation services. Day habilitation services provided under the home and community-based services waiver operated by OPWDD and pursuant to 14 NYCRR Subpart 635-10.

(l) Department of Health (DOH) regions. Regions as defined by the Department, assigned to providers based upon the geographic location of the provider's headquarters as reported on the consolidated fiscal report. Such regions are as follows:

(1) Downstate: five boroughs of New York City, Nassau, Suffolk, Westchester;

(2) Hudson Valley: Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster;

(3) Upstate Metro: Albany, Erie, Fulton, Genesee, Madison, Monroe, Montgomery, Niagara, Onondaga, Orleans, Rensselaer, Saratoga, Schenectady, Warren, Washington, Wyoming;

(4) Upstate Non-Metro: Any counties not listed in paragraph (1), (2) or (3) of this subdivision.

(m) Depreciation. The allowable cost based on historical costs and useful life of buildings, equipment, capital improvements and/or acquisition of real property. The useful life shall be based on “The Estimated Useful Life of Depreciable Hospital Assets (2008 edition)” except that the useful life for day habilitation buildings will be 25 years. The depreciation method used shall be straight-line method.

(n) Developmental Disabilities Profile (DDP-2). The document titled *Developmental Disabilities Profile (DDP-2)* dated 10/16 and issued by OPWDD. This document, the *Developmental Disabilities Profile (DDP-2) User’s Guide* and another document titled *Scoring the DDP* are available during business hours and by appointment at the following locations:

(1) the Department of State, Division of Administrative Rules, One Commerce Plaza, 99 Washington Avenue, Albany NY 12231-0001;

(2) OPWDD, Attention Public Access Officer, 44 Holland Avenue, Albany, NY 12229.

(o) E-Score factor. Factor derived from analysis of evacuation scores to adjust staffing needs necessary to address health and safety needs.

(p) Evacuation score (E-Score). The score for a supervised community residence that is certified under chapter 32 or 33 of the Residential Board and Care Occupancies of the NFPA 101 Life Safety Code (2000 edition) that is provided to the Department by OPWDD once a year. The E-score is described in the NFPA 101A Guide on Alternative Approaches to Life Safety, 2001 edition. The Life Safety Code and Guide on Alternative Approaches to Life Safety are available from the National Fire Protection Association, One Batterymarch Park, Quincy, MA 02169-7471; or is available during business hours and by appointment at the following locations:

(1) the Department of State, Division of Administrative Rules, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231-0001;

(2) OPWDD, Attention Public Access Officer, 44 Holland Avenue, Albany, NY 12229.

(q) Facility. The site or physical building where actual services are provided.

(r) Final Average Rate. The final average rate is determined using the final rate year reimbursable cost divided by the final rate year total units of service regardless of payer.

(s) Financing expenditures. Interest expense and fees charged for financing of costs related to the purchase/acquisition, alteration, construction, rehabilitation and/or renovation of real property,

vehicles, and equipment.

(t) Individual. Person receiving a residential or day habilitation service.

(u) Initial period. The first 12 months of the rate cycle.

(v) Lease/rental and ancillary payments. A facility's annual rental payments for real property and ancillary outlays associated with the property such as utilities and maintenance.

(w) Occupancy Adjustment. An adjustment to the calculated daily rate of a Voluntary Agency which provides Supervised Residential Habilitation to account for days when Medicaid billing cannot occur because an individual has passed away or has moved to another site.

(1) For the rate periods beginning July 1, 2019, Voluntary Providers receive an occupancy adjustment to the operating component of their rate for vacancy days. The occupancy adjustment percentage is calculated by dividing the sum of the agency's rate period reported retainer days, service days and the therapy days by 100% of the agency's certified capacity. The certified capacity is calculated taking into account capacity changes throughout the year, multiplied by 100% of the year's days. This adjustment will begin on July 1, 2019 and be recalculated on an annual basis based on the most current and complete twelve months of experience.

(2) For the period beginning May 1, 2021, the occupancy adjustment will be 0%.

(x) Operating costs. Provider costs related to the provision of day habilitation and residential habilitation services provided in a community residence and identified in such provider's cost reports. With the exception of live-in caregiver services, allowable operating costs shall not include the costs of board.

(y) Provider. An individual, corporation, partnership or other organization to which OPWDD has issued an operating certificate to operate a community residence, and for which the NYS Department of Health has issued a Medicaid provider agreement, or an individual, corporation, partnership or other organization to which OPWDD has issued an operating certificate or approval to operate a day habilitation program, and for which the Department has issued a Medicaid provider agreement.

(z) Rate. A reimbursement amount based on a computation using annual provider reimbursable cost divided by the applicable annual units of service.

(aa) Rate Period. The annual time period that rates are effective. For Voluntary Providers the time period is July 1st through June 30th.

(ab) Rate sheet capacity. The number of individuals for whom a provider is certified or approved by OPWDD to provide residential habilitation.

(ac) Rebasing. Updating cost data in the methodology, using an available and complete CFR.

(ad) Reimbursable cost. The final allowable costs of the rate year after all audit and/or adjustments are made.

(ae) Residential habilitation. Residential habilitation services provided in a community residence, under the home and community-based services waiver operated by OPWDD and pursuant to 14 NYCRR Subpart 635-10 and 14 NYCRR Part 671.

(af) Retainer days. Days of Medical leave or an associated day where any other institutional or in-patient Medicaid payment is made for providing services to the beneficiary. A provider is limited to being paid 14 Retainer days per rate year, multiplied by certified capacity. Effective on or after May 1, 2021, Retainer days will be reimbursed at a rate of 50 percent of the provider's established rate.

(ag) Room and board. Room means hotel or shelter type expenses including all property related costs such as rental or depreciation related to the purchase of real estate and furnishings; maintenance, utilities and related administrative services. Board means three meals a day or any other full nutritional regimen.

(ah) Service days. A day when paid Supervised IRA staff deliver residential habilitation to a person who is either present in the Supervised IRA or is absent from the IRA and receives residential habilitation services from paid Supervised IRA staff, and these services are of the same scope, frequency and duration as the services provided when the person is resident in the

Supervised IRA.

(ai) Start-up costs. Those costs associated with the opening of a new program. Start-up costs include pre-operational rent, utilities, staffing, staff training, advertising for staff, travel, security services, furniture, equipment and supplies.

(aj) State supplement. Amount paid to a provider to cover room and board costs in excess of SSI and Supplemental Nutrition Assistance Program (SNAP) payments.

(ak) Target rate. The final rate in effect at the end of the transition period for each waiver service determined using the rate year final reimbursable cost for each respective provider for each respective service divided by the final total of actual units of service for all individuals, regardless of payor.

(al) Therapy Day. A therapy day is a day when the individual is away from the supervised residence and is not receiving services from paid Residential Habilitation staff and the absence is for the purpose of a visiting with family or friends, or a vacation. The therapy day must be described in the person's plan of care to be eligible for payment and the person may not receive another Medicaid-funded residential or in-patient service on that day. Effective May 1, 2021 or after, a provider is limited to being paid 96 therapy days per rate year per person. All therapy days will be reimbursed at a rate of 50 percent of the provider's established rate.

(am) Units of service. The unit of measure for the following waiver services shall be:

- (1) residential habilitation provided in a supervised community residence--daily;
- (2) residential habilitation provided in a supportive community residence--monthly;
- (3) day habilitation--daily.

(an) Wage Equalization. The sum of the provider average direct care hourly rate multiplied by seventy-five hundredths from the base period CFR and the applicable regional average direct care hourly rate multiplied by twenty-five hundredths from the base period CFR.

Subdivision (b) of section 86-10.3 of 10 NYCRR is amended to read as follows:

(b) (1) The State will set rates for Services delivered to individuals with Developmental Disabilities as described below for the following three services; effective July 1, 2019.

(i) Residential Habilitation - Supervised IRA (Certified Site)

(ii) Residential Habilitation – Supportive IRA (Certified Site)

(iii) Day Habilitation – Group and Supplemental Group

(2) Rates shall be computed on the basis of a full twelve-month base year CFR, adjusted in accordance with the methodology as provided in this section. The rate shall include operating cost components, facility cost components and capital cost components as identified in applicable subdivisions. Such base year may be updated periodically, as determined by the Department.

Paragraph 2 of subdivision (c) of section 86-10.3 of 10 NYCRR is amended to add new subparagraphs (iii), (iv) and (v) to read as follows:

(iii) Provider Operating Revenue is calculated as follows: Add applicable Reimbursement from Regional Direct Care Hourly Rate, as computed in subparagraph (d)(2)(i) above, and applicable Reimbursement from Regional Clinical Hourly Wage, as computed in subparagraph (d)(2)(ii) above.

(iv) Total Provider Operating Revenue – Adjusted is calculated as follows: Multiply applicable Provider Operating Revenue, as computed in subparagraph (d)(2)(iii) above, by applicable Budget Neutrality Adjustment.

(v) Target Regional Daily Operating Rate is calculated as follows: Divide the sum of applicable Total Provider Operating Revenue-Adjusted, as computed in subparagraph (d)(2)(iv) above, and applicable Adjustments as computed in Section 86-10.5, by the applicable Rate Period capacity for the Initial Period. Divide such quotient by 365, or in the case of a leap year 366. This rate will be in effect until such time that the provider has submitted a cost report for a base year which will be used in the calculation of a subsequent rate period.

Subparagraph (xxix) of paragraph (1) of subdivision (d) of section 86-10.3 of 10 NYCRR is amended to read as follows:

(xxix) Total provider operating revenue-adjusted[, which shall mean the product of the provider operating revenue, as determined pursuant to subparagraph (xxvii) of this paragraph, and the statewide budget neutrality adjustment factor for operating dollars, as determined pursuant to subparagraph (xxviii) of this paragraph.] is calculated as follows:

Multiply applicable Provider Operating Revenue, as computed in subparagraph (xxvii) of this paragraph, by applicable Budget Neutrality Adjustment factor found on the Department of Health's website. The final monthly operating rate shall be determined by dividing the total provider operating revenue-adjusted, as determined pursuant to subparagraph (xxix) of this paragraph, by the applicable rate sheet capacity for the initial period and such quotient to be further divided by 12.

Paragraph (2) of subdivision (d) of section 86-10.3 of 10 NYCRR is amended by adding new subparagraphs (iii) and (iv):

(iii) Provider Operating Revenue is calculated as follows: Add applicable Reimbursement from Regional Direct Care Hourly Rate, as computed in subparagraph (e)(2)(i), and applicable Reimbursement from Regional Clinical Hourly Wage, as computed in subparagraph (e)(2)(ii).

(iv) Total Provider Operating Revenue – Adjusted is calculated as follows: Multiply applicable Provider Operating Revenue, as computed in subdivision (c) of this section, by applicable Budget Neutrality Adjustment xxviii. The final Target Regional Monthly operating rate is then calculated as follows: Divide the sum of applicable Total Provider Operating Revenue-Adjusted, as computed in subparagraph (e)(2)(iv) of this paragraph and applicable Adjustments as computed in Section 86-10.5, by the applicable Rate Period capacity for the Initial Period. Divide such quotient by twelve. This rate will be in effect until such time that the provider has submitted a cost report for a base year which will be used in the calculation of a subsequent rate period.

Subparagraph (xxv) of paragraph (1) of subdivision (e) of section 86-10.3 of 10 NYCRR is amended to read as follows:

(xxv) Provider to/from transportation reimbursement, which [shall mean the quotient of the to/from transportation allocation for the base year divided by the provider billed units for the base year. Such quotient to be multiplied by rate sheet units for the initial period] is calculated as follows: Effective July 1, 2018 and only for the rate period July 1, 2018 through June 30, 2019, all providers will receive a survey requesting prospective reimbursement data for Provider To/From transportation. Only those providers having a signed and negotiated multi-year transportation contract inclusive of the period January 1, 2017 through December 31, 2017 for calendar year filers and July 1, 2017 through June 30, 2018 for fiscal year filers will need to submit the completed survey to DOH. The budgets will be reviewed and compared to the most current and available cost report. A determination of appropriate reimbursement will be made by DOH and that result will be included in the July 1, 2018 rates. A reconciliation of this funding will be performed with a reimbursement adjustment made in the rate period July 1, 2019 through June 30, 2020 utilizing the July 1, 2017 through June 30, 2018 and January 1, 2017 through December 31, 2017 CFRs. In subsequent rate periods, To/From transportation will be updated on an annual basis by utilizing the most current available CFR. Divide To/From Transportation Allocation (CFR1 line 68b) by applicable provider billed units. Multiply by rate period authorized units.

Subparagraph (ii) of paragraph (3) of subdivision (b) of section 86-10.5 of 10 NYCRR is amended to read as follows:

(ii) April 1, 2015 increase. In addition to the compensation funding effective January 1, 2015 providers that operate supervised IRAs, including supervised community residences, supportive IRAs, including supportive community residences, and group day habilitation will receive a compensation increase targeted to direct support professional and clinical employees to be effective April 1, 2015. The compensation increase funding will be inclusive of associated fringe benefits. The April 1, 2015 direct support professionals' compensation funding will be the same, on an annualized basis, as that compounded on the amount which was calculated for the January 1, 2015 compensation increase and will be an augmentation to the January 1, 2015 increase.

Subdivision (c) of section 86-10.6 of 10 NYCRR is amended and adds a new paragraph (4) to read as follows:

(c) For periods subsequent to June 30, 2015:

(1) The daily rate, as determined pursuant to this Subpart excluding section 86-10.8, will be adjusted to include an occupancy factor. For the period beginning May 1, 2021, the occupancy adjustment will be 0%.

(2) Retainer days shall be reimbursed at the daily rate as determined pursuant to subparagraph (1) of this paragraph. Such reimbursement shall be limited to 14 days per [individual] rate year, multiplied by certain capacity. Effective on or

after May 1, 2021, Retainer days will be reimbursed at a rate of 50 percent of the provider's established rate.

(3) Therapeutic leave days shall be reimbursed per individual at the daily rate as determined pursuant to subparagraph (1) of this paragraph. Effective May 1, 2021, a provider is limited to being paid 96 therapy days per rate year per person. All Therapy days will be reimbursed at a rate of 50 percent of the provider's established rate. The therapy day must be described in the person's plan of care to be eligible for payment and the person may not receive another Medicaid-funded residential or in-patient service on that day.

(4) Effective May 1, 2021, the methodology will update cost data within four years from the previous rebase utilizing an available and complete CFR. Thereafter, the Department will follow a rate cycle utilizing the base period CFR. For years in which the Department does not update the base year, the Department will update to-from transportation from the CFR and update property using an available and complete CFR.

REGULATORY IMPACT STATEMENT

Statutory Authority:

The Department of Health (DOH) is the single state agency to supervise the administration of the medical assistance plan, under title XIX of the federal Social Security Act, known as Medicaid in this state, and is authorized to promulgate regulations to implement the Medicaid program, as stated in Social Services Law (SSL) Sections 363-a, 365-a(2)(c), and 365-n(7); and Public Health Law (PHL) Sections 201(1)(v) and 206.

DOH has the statutory authority to develop rate setting methodologies and to promulgate rules and regulations regarding rate setting methodologies applying to facilities under the jurisdiction of OPWDD, pursuant to Mental Hygiene Law Section 43.02.

Legislative Objectives:

The proposed regulations further legislative objectives embodied in MHL sections 13.07, 13.09(b), 16.00, and 43.02; PHL sections 201(1)(v) and 206; and SSL sections 363-a, 365-a(2)(c), and SSL 365-n (7). These proposed regulations amend Title 10 New York Codes Rules and Regulations (NYCRR) Subpart 86-10, to amend calculations of the occupancy adjustment for Individualized Residential Alternatives by eliminating the adjustment based on a system-wide assessment of vacancy utilization and limiting reimbursement for periods when individuals are not present in those residences. There are also changes to conform the regulations for OPWDD waiver services to OPWDD's approved waiver agreement with the federal Centers for Medicare and Medicaid Services.

Needs and Benefits:

These changes are necessary to reflect historical utilization and efficiencies, and to make other operational, technical and streamlining changes to conform the identified regulations to the approved waiver agreement and the State Plan. These targeted actions are designed to preserve Medicaid funding for direct service delivery to individuals with developmental disabilities by reducing payments to residential providers for periods when the individual is away from the residence. These periods are known as retainer days, reserved bed days, therapy days, and leaves of absence.

Costs:**Costs to the Agency and to the State and its Local Governments:**

There is an anticipated reduction on Medicaid expenditures as a result of the proposed regulations, resulting in approximately \$103.8 million in gross Medicaid (federal and state) savings.

These regulations will not have any fiscal impact on local governments, as the contribution of local governments to Medicaid has been capped by Chapter 58 of the Laws of 2005.

There are no anticipated costs to OPWDD in its role as a provider of services to comply with the new requirements.

Costs to Private Regulated Parties:

The elimination of the occupancy adjustment, and the reduction of retainer day, reserved bed day, therapy day, and leave of absence payments will impose varying costs to regulated

facilities based on the volume and length of reserved bed days within their facilities. For all affected OPWDD facilities, the aggregate impact is estimated to be approximately \$103.8 million annually.

Local Government Mandates:

This rule would only apply to a small number of local governments that deliver these services via a local department of social services. There are no new requirements imposed by the rule on any other county, city, town, village; or school, fire, or other special district.

Paperwork:

The proposed amendments would not increase paperwork requirements.

Duplication:

The proposed regulations do not duplicate any existing State or Federal requirements on this topic.

Alternatives:

The proposed amendments would conform the regulations to changes approved by CMS in the approved waivers and State Plan Amendments. The alternative would be to maintain existing regulations; however, this alternative was rejected as it would be inconsistent with Budget actions negotiated with the Legislature as well as the waiver provisions approved by CMS.

Federal Standards:

The proposed amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

Compliance Schedule:

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

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REGULATORY FLEXIBILITY ANALYSIS

Effect of the Rule:

This regulation would apply to OPWDD voluntary providers who deliver day habilitation and/or residential habilitation services pursuant to OPWDD's Home and Community Based Services 1915(c) Comprehensive Waiver agreement (HCBS Waiver) with the federal Centers for Medicare and Medicaid Services (CMS). OPWDD has determined, through a review of the certified cost reports, that many OPWDD-funded services are provided by not-for-profit agencies which employ more than 100 people. Smaller agencies that employ fewer than 100 employees are classified as small businesses. OPWDD is unable to estimate the number of agencies that may be considered to be small businesses.

This rule would only apply to a small number of local governments that deliver day habilitation services via a local department of social services. Furthermore, this action would conform the state's regulations to the HCBS Waiver amendment that was previously publicly noticed and later approved by CMS with an effective date of October 1, 2020. The approved HCBS Waiver amendment revised the rate setting methodology for calculating the occupancy adjustment for Residential Habilitation services by eliminating the adjustment based on a system-wide assessment of vacancy utilization. The amendment also limited reimbursement in certain situation in which individuals are not present in the residence by limiting the amount of reimbursement that providers can receive for "therapy days" (defined as days when the individual is away from the supervised residence for the purpose of a visiting with family or friends, or a vacation) and "retainer days" (defined as days of Medical leave or where any other institutional or in-patient Medicaid payment is made for providing services to the beneficiary).

Compliance Requirements:

These regulations will not require additional reporting or compliance requirements.

Professional Services:

This rule would only apply to a small number of local governments that deliver these services via a local department of social services. Entities that provide affected services will not require additional professional services as they all already have compliance managers or staff tasked with following other OPWDD regulations.

Compliance Costs:

There will be no additional compliance costs. There is an anticipated reduction on Medicaid expenditures as a result of the proposed regulations, resulting in approximately \$103.8 million in Medicaid (Federal and state) savings.

Economic and Technological Feasibility:

The entities required to comply with this rule already have the technological capability to comply with this rule. Additionally, there are no extra costs for compliance.

Minimizing Adverse Impact:

OPWDD and DOH considered other potential rate actions in lieu of the instant actions that were approved via CMS. OPWDD and DOH concluded that these regulatory amendments are appropriate to maintain reimbursement in direct care services, rather than in situations when

an individual is not receiving services from a provider. DOH continually reviews regulations as affected by the HCBS Waiver, to assess the impact of these changes.

Small Business and Local Government Participation:

This rule would only apply to a small number of local governments that deliver day habilitation services via a local department of social services. Regulated entities impacted by these changes were provided with opportunities to comment on OPWDD's public notice of the submission for the HCBS Waiver amendment. After public comment DOH and Office for People With Developmental Disabilities (OPWDD) held stake holder meetings on June 4, 2020, open to the public, to walk through the changes being made to the Waiver. Following the approval of the waiver by the Centers for Medicaid Services (CMS) on September 28, 2020, the Waiver and the response to public comment were published on OPWDD's web page.

RURAL AREA FLEXIBILITY ANALYSIS

A Rural Area Flexibility Analysis for these amendments is not being submitted because the regulation will not impose any disproportionate adverse impact or significant reporting, record keeping or other compliance requirements on public or private entities in rural areas, as these are changes to rate methodologies under a federal program, requiring equitable application across all providers. There are no professional services, capital, or other compliance costs imposed on public or private entities in rural areas as a result of the proposed regulation.

The proposed regulation amends 10 NYCRR Part 86-10 to amend calculations of the occupancy adjustment for Individualized Residential Alternatives by eliminating the adjustment based on a system-wide assessment of vacancy utilization and limiting reimbursement for periods when individuals are not present in those residences. There are also changes to conform the regulations for OPWDD waiver services to OPWDD's approved waiver agreement with the federal Centers for Medicare and Medicaid Services. The regulation will not result in an adverse impact on rural communities because the regulation applies to all providers of these services.

JOB IMPACT STATEMENT

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

The proposed regulation amends 10 NYCRR Part 86-10 to amend calculations of the occupancy adjustment for Individualized Residential Alternatives by eliminating the adjustment based on a system-wide assessment of vacancy utilization and limiting reimbursement for periods when individuals are not present in those residences. The regulation will not result in new compliance requirements for providers. The regulation will not have a substantial impact on jobs or employment opportunities in New York State.

ASSESSMENT OF PUBLIC COMMENT

Comment: Some Respondents claimed that the proposed actions relating to the occupancy adjustments and changes to payments for retainer days and therapeutic leave described in the regulations would violate the American Rescue Plan Act of 2021 (“ARPA”).

Response: The federal American Rescue Plan Act of 2021 allows participating states to receive a 10% enhanced FMAP for HCBS services if the states use the funds “to supplement, and not supplant, the level of State funds expended for home and community-based services for eligible individuals through programs in effect as of April 1, 2021.” This provision does not prevent implementation of the proposed regulations. These proposed regulations are the final implementation of OPWDD’s most recent amendment to its 1915(c) Comprehensive HCBS Waiver, which was approved by the Centers for Medicare and Medicaid Services (“CMS”) with an effective date of October 1, 2020, well before the enactment of ARPA in March of 2021. The actions in these proposed regulations were drafted and approved under deliberations that did not and could not include the ARPA funds. ARPA funds will, in fact, supplement the level of State funds as the funds related to these actions were already set when ARPA was enacted.

Comment: One Respondent expressed concern that the funding actions would affect instances when a residential staff member accompanies a person receiving services in a hospital and claimed that New York did not avail itself of federal funding made available for this purpose.

Response: There was no additional federal funding that targeted HCBS services provided by a staff member to a person admitted to a hospital. Hospitals are required to be appropriately staffed to meet the needs of admitted individuals regardless of disability status.

Comment: Some Respondents claimed that the funding actions were contrary to federal inclusion law and the requirements of the Mental Hygiene Law.

Response: The funding actions were approved after review by CMS and are not inconsistent with the Mental Hygiene Law as these actions preserve essential community-based services by addressing funding to providers at times when services are not being provided to individuals.

Comment: Two Respondents claimed that the rate actions would affect the ability of individuals to choose when they could leave their provider-operated residence to make overnight visits to family.

Response: The ability of individuals to choose when they visit family is not affected by the funding actions. Individuals who are told otherwise by providers should contact OPWDD.

Comment: Respondents expressed concerns about the proposed funding adjustments for Supervised Residential Habilitation services including the draft revisions to reimbursement for Retainer Days, Vacancy Days, Therapy Days and elimination of the Occupancy Adjustment. These concerns included:

- Negative impact on people receiving services particularly those who are older or have complex needs;
- Implementation will result in a loss of revenue for agencies, risk the closure of residences and effectuate agencies going out of business which decreases freedom of choice and community living access;

- Proposed changes do not reflect agencies' true costs as costs do not decrease when one person is absent from the residence and in cases of hospitalization the increased costs related to a person's discharge planning and advocacy during the hospital stay;
- Increasing staff turnover and failing to acknowledge staff's role during the COVID emergency.
- Implementation will result in a loss of revenue for agencies, risk the closure of residences, reduce the quality and effectiveness of care and treatment, and result in agencies going out of business, decreasing individual freedom of choice and community living access.

Respondents suggested that the funding adjustments be paused until OPWDD completes a review of its rate methodologies or rejected altogether due to the federal aid received by the State of New York.

Response: These regulations implement OPWDD's most recent amendment to its 1915(c) Comprehensive HCBS Waiver, which was approved by the Centers for Medicare and Medicaid Services ("CMS") with an effective date of October 1, 2020, and are reflected in the appropriations in the approved New York State 2021-2022 Budget. As previously indicated in the response to public comment to that Waiver amendment, OPWDD concluded that by targeting payments for the non-delivery of services rather than implementing reductions to rates paid for services delivered, OPWDD would best be able to preserve essential community-based services while also achieving the required budget savings.

Comment: Some comments assumed that the proposed regulations were associated with OPWDD's series of Appendix K emergency waivers, which were approved by CMS during the COVID-19 public health emergency.

Response: The proposed regulations are not associated with OPWDD's Appendix K waivers. The proposed regulations implement actions from Amendment 03 to OPWDD's Comprehensive Home and Community-Based Services (HCBS) 1915(c) Waiver, which was approved by CMS in September 2020.