

SUMMARY OF EXPRESS TERMS

This notice of proposed rulemaking amends 10 NYCRR Subpart 69-4, which governs the Early Intervention Program (EIP), to: conform to federal regulations issued by the U.S. Department of Education (34 CFR Parts 300 and 303) and recent amendments to Title II-A of Article 25 of the Public Health Law (PHL). The proposed amendments also streamline conflict of interest provisions on evaluation and service coordinator providers, clarify qualifications of service coordination providers, and add licensed behavior analysts and certified behavior analyst assistants to the list of qualified personnel for the Early Intervention Program.

Section 69-4.1(a) is amended to revise the definition of “approval” to conform to statutory amendments. A new subdivision (a-1) is added to define “approved provider.”

Subdivisions (n), (o), and (p) of section 69-4.1 are amended to conform to federal regulations. Specifically, the amendments distinguish between the evaluation and the initial evaluation to determine eligibility; and conform the definition of “family assessment.”

Section 69-4.1(ad) is amended to clarify the definition of “multidisciplinary.”

Section 69-4.1(aj)(2) is amended to revise the definition of “individual provider” to conform to statutory amendments that authorized the Department to approve and enter into agreements with providers and that eliminated the requirement that municipalities contract with providers directly.

A new paragraph (3) is added to define “payee provider” as an approved provider that shall

directly bill third party and governmental payers for early intervention services in the first instance through the Department's fiscal agent.

Section 69-4.1(ak) is amended and paragraph (4) is added to include licensed behavior analysts and certified behavior analyst assistants to the list of qualified personnel for the EIP.

Subparagraph (ii) of section 69-4.3(a)(1) is amended to reflect that a screening may be provided or that medical records may be reviewed for a child referred to the Early Intervention Program.

Subparagraph (ii) of section 69-4.3(a)(3) is amended to remove a reference to a program that no longer exists and to change the requirement of providing a telephone number to providing "contact information."

Subdivision (e) is added to section 69-4.3 to require primary referral sources to complete and transmit a referral form and, with parental consent, to transmit information sufficient to document the primary referral source's concern or basis for suspecting the child has a disability.

Subparagraph (v) is added to section 69-4.4(a)(1) to add licensure, certification, or registration in certain professions as acceptable minimum qualifications for service coordinators.

Section 69-4.4(b)(1) is amended to conform to statutory changes, which require that all providers be approved by the Department.

Section 69-4.5(a)(1) is amended to clarify that payee providers of EIP services must enroll in and, as applicable, be recertified by the Medicaid program and must notify the Department of such recertification on request. Section 69-4.5(a)(4)(iii), related to a Medicaid provider agreement and the reassignment of Medicaid benefits, is repealed.

Section 69-4.5(a)(6), which prohibits an individual provider from being approved as both an evaluator and a service coordinator, is repealed.

Section 69-4.5(c) is repealed and a new subdivision (c) is added to require providers to notify the Department upon certain changes to ownership or status of the provider agency and to clarify that the Department will determine on receipt of such notice whether re-approval of the agency is required.

Subparagraphs (i)-(ix) of section 69-4.5(e)(1) are being revised to make technical amendments and to conform to statutory amendments that provide the Department with the authority to enter into agreements with providers and eliminate the requirement that municipalities are to contract with providers directly; clarify members of the individualized family service plan (IFSP) team; to streamline conflict of interest provisions relating to marketing; and to clarify that health insurance subject to New York State Insurance Law may be billed.

Paragraphs (2) and (3) of section 69-4.5(e) have been revised to make technical amendments.

Paragraph (2) of this section has also been amended to add referral sources to the list of people who may not receive an incentive from a provider or agency.

Subdivision (f) of section 69-4.5 is amended, opening paragraph of subdivision (h) is amended, and subdivisions (h)(1) and (h)(2) are repealed, to conform to statutory amendments that provide the Department with the authority to enter into agreements with providers and eliminated the requirement that municipalities contract with providers directly.

Section 69-4.5(i) is repealed to conform to statutory amendments that eliminated the State Education Department's (SED) responsibility to approve providers to participate in the EIP.

Section 69-4.6(d) is amended and paragraphs (1), (2), and (3) are added to conform to statutory amendments related to procedures for obtaining children's third party coverage information and written referrals to establish medical necessity.

Section 69-4.7(g)(3) is amended to conform to statutory amendments that require providers to directly bill third party and governmental payers for early intervention services and specifies that unregulated insurers will not be billed for early intervention services.

Subdivision (m) is added to section 69-4.7 to conform to statutory amendments that require notification, with parent consent, to the Office of People with Developmental Disabilities (OPWDD) developmental disabilities regional office of a child's potential eligibility for OPWDD services.

Section 69-4.8 is repealed and replaced with new section 69-4.8, titled “Evaluation and Screening of the Child and Assessment of the Child and Family,” to conform to revisions to federal regulations. The proposed new section includes: procedures that apply when a qualified evaluator administers a screening or conducts a multidisciplinary evaluation; the parent’s right to request a multidisciplinary evaluation at any time; the use of medical and other records to establish a child’s eligibility for the EIP without conducting an evaluation; when a multidisciplinary assessment is appropriate; the use of informed clinical opinion as one factor to establish a child’s eligibility for the EIP; and the voluntary family-directed assessment.

Section 69-4.9(c) is amended to conform to statutory amendments that provide the Department authority to enter into agreements with providers.

Section 69-4.9(g)(6) is amended to conform to statutory amendments that require providers to directly bill third party payers prior to billing governmental payers for EIP services rendered; to clarify documentation required of providers to support claims submitted; and to make technical amendments.

Subdivisions (a)(2) and (a)(3) of section 69-4.11 are repealed and replaced with new subdivisions (a)(2) and (a)(3) to conform the requirements for IFSP meeting participants to federal regulations.

Section 69-4.11(a)(7)(ii)(a) is amended and subdivisions (a)(7)(ii)(b) through (d) and (b)(3) are repealed to streamline conflict of interest procedures related to EIP providers conducting

evaluations and delivering services. The proposed regulation clarifies that an evaluator who conducts an evaluation of a child, or the approved agency which employs or contracts with the evaluator, may deliver EIP services to the child unless the Early Intervention Official provides documentation justifying why this would not be in the best interest of the child and family.

Section 69-4.11(b)(3) is repealed and paragraphs (4) and (5) of Section 69-4.11(b) are renumbered (3) and (4).

Subdivisions (a) and (b) of section 69-4.12 are repealed, subdivision (c) is relettered subdivision (e) and new subdivisions (a), (b), (c), and (d) are added. These proposed amendments make technical amendments and conform to statutory amendments that assign new responsibilities to municipalities for monitoring of providers and procedures for monitoring of providers.

Relettered subdivision (e) of section 69-4.12 is amended to provide that municipalities continue to have the authority to audit providers that conduct evaluations and provide early intervention services.

Paragraph (1) of section 69-4.14(a) has been repealed.

Section 69-4.16(d) is amended to conform to federal regulations that require the appointment of a surrogate parent within 30 days after the EIO makes a determination of the child's need for a surrogate parent.

Paragraphs (4) and (5) of subdivision (f) of section 69-4.16 are amended and a new paragraph (6) is added to conform to federal regulations pertaining to the appointment of a surrogate parent.

Section 69-4.17(b)(1)(i)(c) is amended to include examples of procedural safeguards available under the EIP in reference to a written notice to parents by the EIO.

Section 69-4.17(b)(2)(ii) is amended to include a reference to the IFSP team members in relation to disagreements on an IFSP.

Paragraphs (1) and (2) are added to section 69-4.17(c) to conform to federal regulations on content of notice to parents regarding personally identifiable information. Additional amendments to section 69-4.17(c) include technical changes. Current paragraphs (1) through (6) are renumbered (3) through (8).

Subdivisions (d)(1), (d)(3) and (e) of section 69-4.17 are amended to conform to federal regulations concerning access and amendments to records. These amendments clarify when providers may assume the parent has authority to inspect and review records pertaining to his or her child. The amendment also clarifies the right to request amendments apply to information pertaining to the parent, as well as the child. Additionally, section 69-4.17(e)(3)(ii) is amended to clarify that a parent has a right to an administrative hearing when the parent disagrees with a declination to amend a record.

Subparagraphs (vii) and (ix) of section 69-4.17(e)(4) are amended to conform to federal regulations on minimum requirements for administrative hearings to amend the child's record.

Section 69-4.17(g)(3), on requirements for mediation procedures, is amended to conform to federal regulations, which clarify that the mediation process cannot be used to deny or delay a parent's right to an impartial hearing, or deny any other due process rights afforded to the parent; and that a written, signed mediation agreement resulting from a successful full or partial resolution is a legally binding document enforceable in any State court of competent jurisdiction or in a district court of the United States.

Section 69-4.17(g)(13)(i)(a) is amended to further clarify that the written agreement must state that all discussions that occurred during the mediation process will remain confidential and shall not be used as evidence in any subsequent due process hearing or civil proceeding.

Section 69-4.17(h)(7) is amended to conform to federal regulations that allow the hearing officer assigned to an impartial hearing to grant specific extensions of time beyond the federally-required timeframe of 30 days at the request of either party.

Section 69-4.22(a) is amended, new paragraphs (1) to (4) are added to subdivision (a), subdivisions (b) and (c) are repealed, and subdivision (d) is relettered to subdivision (b), to conform to statutory amendments that require EIP providers to bill third party payers in the first instance, using the Department's fiscal agent. The proposed provisions include subrogation of a provider to a child's and family's third party reimbursement, including notice to the insurer by

the provider; provider use of the Department's fiscal agent for claiming payment for evaluations and services rendered under the EIP; provider enrollment in one or more health care clearinghouses at the request of the Department or the Department's fiscal agent; and timely submission of claims for payment by providers.

Subdivision (a) of subpart 69-4.23 has been amended to conform to federal requirements allowing the use of medical and other records to establish a child's eligibility for the Early Intervention Program.

Paragraphs (5), (9), and (14) of section 69-4.24(a) are amended to conform to statutory amendments that: eliminated SED's responsibility to approve EIP providers; eliminated the requirement that municipalities contract with providers directly; and required providers to bill third party payors.

Section 69-4.24(c) is amended to clarify the residency requirement of the child and to conform to statutory amendments that eliminated the requirement that municipalities contract with providers directly.

Section 69-4.25 is repealed.

Section 69-4.26(a) is amended to update the new reference regarding maintaining early intervention records.

Paragraph 15 of section 69-4.26(a), on municipal claims to third party payors, is repealed.

Subdivision (b)(12), subdivision (c), and subdivision (c)(2) of section 69-4.26 are amended to conform to statutory amendments that: require providers to bill third party payers in the first instance; provide the Department with the authority to enter into agreements with providers; and eliminate the requirement that municipalities contract with providers directly.

Pursuant to the authority vested in the New York State Department of Health by Public Health Law Section 2559-b, Subpart 69-4 of Chapter II of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended to be effective immediately upon publication of a Notice of Adoption in the New York State Register, to read as follows:

Subdivision (a) of section 69-4.1 is amended, subdivisions (b) through (ao) are re-lettered (c) through (ap) and a new subdivision (b) is added as follows:

(a) [*Approve* means any type of approval process used by State early intervention service agencies to approve providers of services, including licensure or certification] *Approval means the procedures used by the department to approve providers of service as set forth in section 69-4.5 of this Subpart, which may include the requirement that approved evaluators, service coordinators, and providers of early intervention services enter into and periodically renew agreements with the department in order to conduct evaluations or render service coordination services or early intervention services in the Early Intervention Program and sets forth the terms and conditions of provider participation in the program, including establishing the obligations, expectations, and relationship between the department, municipalities within the State, and the provider.*

(b) *“Approved provider” shall mean a provider of service that is approved by the department in accordance with section 69-4.5(a)(4) of this Subpart and that has entered into an agreement with the department, where the department has required such an agreement for program participation.*

Subdivisions (n) and (p) of section 69-4.1 are re-lettered (o) and (q) and amended as follows:

[(n)] (o) *Evaluation* means the multidisciplinary procedures used by appropriate qualified personnel to determine a child's initial and continuing eligibility for the Early Intervention Program, including [determining the status] identifying the level of functioning of the child in each of the following areas of development: cognitive, physical, communication, social or emotional, and adaptive development that is consistent with the level of developmental delay as defined in subdivision (h) of this section. An initial evaluation is the evaluation to determine a child's initial eligibility for the program.

[(p)] (q) *Family assessment* means [the process of information gathering and identification of] a voluntary family-directed assessment conducted by qualified personnel to identify family priorities, resources and concerns, which the family decides are relevant to their ability to enhance their child's development, and the supports and services necessary to enhance the family's capacity to meet the developmental needs of the family's infant or toddler with a disability.

Subdivision (ad) of section 69-4.1 is re-lettered (ae) and amended to read as follows:

[(ad)] (ae) *Multidisciplinary* means the involvement of two or more professionals from different disciplines [in the provision of integrated and coordinated services including evaluation and assessment services and development of the individualized family service plan] or professions.

Paragraph (2) of subdivision (aj) is re-lettered subdivision (ak) of section 69-4.1 is amended and a new paragraph (3) is added to read as follows:

(2) Individual provider shall mean a person who holds a State-approved or recognized certificate, license, and/or registration, as applicable, in one of the disciplines set forth in subdivision [(ak)] (al) of this section and is [under] approved by the department as an individual provider. An individual may contract with [either a municipality or an] one or more approved agency [provider] providers.

(3) Payee provider shall mean an approved provider that shall directly bill third party and governmental payers for early intervention services in the first instance through the department's fiscal agent.

The opening paragraph of subdivision (ak) of section 69-4.1 is amended and re-lettered to (al), and paragraphs (4) through (22) are renumbered paragraphs (5) through (23), and new paragraphs (4) and (5) are added as follows:

[(ak)] (al) Qualified personnel are those individuals who are approved as required by section 69-4.5 of this Subpart and under contract with [a municipality or agency provider,] or employed by approved agency providers who deliver services to the extent authorized by their licensure, certification or registration, to eligible children and have appropriate licensure, certification, and/or registration, as applicable, in the area in which they are providing services, including:

* * *

(4) licensed behavior analysts;

(5) certified behavior analyst assistants;

* * *

Subparagraph (ii) of section 69-4.3(a)(1) is amended as follows:

(ii) Inform the parent that, unless the parent objects, their child will be referred to the early intervention official for purposes of a free[,] screening and/or multidisciplinary evaluation or, with parent permission, a review of medical or other records to determine eligibility for services,

Subparagraph (ii) of section 69-4.3(a)(3) is amended as follows:

(ii) Provide the parent with the name and [telephone number] contact information of the early intervention official if the child is suspected of having a disability or [or Infant-Child Health Assessment Program] if the child is at-risk.

Subdivisions (e) through (h) of section 69-4.3 are re-lettered subdivisions (f) through (i) and a new subdivision (e) is added as follows:

(e) Primary referral sources identified in subdivision (a) of this section shall, with parental consent, complete and transmit at the time of referral, a referral form developed by the department. The referral form shall contain information sufficient to document the primary referral source's basis for suspecting the child has a disability or is at risk of having a disability. Where applicable, the referral form shall specify the child's diagnosed condition, or the child's level of functioning in one or more developmental areas, that constitutes a developmental delay

that establishes the child's eligibility for the Early Intervention Program. The primary referral source shall inform the parent of a child with a diagnosed condition that has a high probability of resulting in developmental delay, or a diagnosed level of delay consistent with eligibility requirements in section 69-4.23(a)(2) of this Subpart:

- (1) that eligibility for the program may be established by medical or other records; and
- (2) of the importance of providing consent for the primary referral source to transmit records or reports necessary to support the diagnosis, or, for parents or guardians of children who do not have a diagnosed condition, records or reports that would assist in determining eligibility for the program.

Subparagraph (iv) of paragraph (1) of subdivision (a) of section 69-4.4 is amended and a new subparagraph (v) is added as follows:

- (a) All early intervention service coordinators shall meet the following qualifications:
 - (1) a minimum of one of the following educational or service coordination experience credentials:

* * *

- (iv) a Bachelor's degree in a health or human service field[.]; or

- (v) a license, certification, or registration in one of the professions listed in section 69-4.1(ak) of this Subpart.

Paragraph (1) of subdivision (b) of section 69-4.4 is amended as follows:

- (1) Employees [of incorporated entities, sole proprietorships, partnerships, and State operated facilities approved to deliver service coordination services must] of approved agency

providers shall submit documentation of participation in the introductory service coordination training to their employers for retention in their personnel record.

Paragraph (1) of subdivision (a) of section 69-4.5 is amended as follows:

(1) [All agencies approved to provide evaluations, service coordination services or early intervention services] Payee providers shall be enrolled and, as applicable, recertified as providers in the medical assistance program in accordance with the procedures for such enrollment and recertification established by the department, and shall provide documentation of the provider's enrolled and, if applicable, recertification status upon the department's request.

Subparagraph (iii) of paragraph (4) of subdivision (a) of section 69-4.5 is repealed, and subparagraphs (iv) through (xv) are renumbered subparagraphs (iii) through (xiv).

Subparagraph (iv) of paragraph (4) of section 69-4.5(a) is amended as follows:

(iv)for individual providers, proof of current certificate, license, or registration in one of the disciplines set forth in subdivision [(ak)] (al) of section 69-4.1 and documentation of a minimum of 1,600 clock hours prior to the date of application to the Department for approval, delivering such service to children under five years of age in an early intervention, clinical pediatric, early childhood education program, which may include relevant experience obtained as part of a supervised educational program and/or clinical internship as a prerequisite for professional licensure, certification, or registration, and provided that such experience must have included direct experience in delivering services to children with disabilities and their families;

Paragraph (6) of subdivision (a) of section 69-4.5 is repealed.

Subdivision (c) of section 69-4.5 is repealed and a new subdivision (c) is added as follows:

(c) If there is a transfer, assignment, or other disposition of 10 percent or more of an interest or voting rights in the approved agency provider; or if there is a transfer, assignment, or other disposition of less than 10 percent of an interest or voting rights in the approved agency provider, but the transfer, assignment, or other disposition together with all prior transfers, assignments, or other dispositions within the last five years subsequent to the date of the agency provider's approval by the department would, in the aggregate, involve 10 percent or more of an interest in the approved agency provider, the approved agency provider shall notify the department as soon as practicable, but no later than five business days after the intended effective date of the transfer, assignment, or other disposition. The notice shall include a statement as to whether the approved agency provider intends to continue to participate in the Early Intervention Program. Upon receipt of such notice, the department may determine that the approved agency provider must initiate a reapproval process.

Section 69-4.5(e) is amended as follows:

(e)(1) Approved providers shall not disseminate, or cause to be disseminated on their behalf, marketing materials that are false, deceptive, or misleading. Upon the department's request, providers shall periodically submit copies of marketing materials for review. Marketing materials that do not comply with the provisions of this subdivision may be a basis for action against the provider's approval in accordance with the provisions of section 69-4.24 of this Subpart. The department shall develop standards on appropriate marketing materials and shall require that

marketing materials that seek to promote or advertise Early Intervention Program evaluations or services adequately inform parents or guardians of potentially eligible or at-risk children less than three years of age about the [early intervention program] Early Intervention Program.

Marketing materials that seek to promote or advertise [early intervention program] Early Intervention Program evaluations or services shall include the following statements or their equivalent[.]:

(i) Clear identification that the [early intervention program] Early Intervention Program, and early intervention services available through the [early intervention program] Early Intervention Program, are for children less than three years of age who have or are suspected of having a developmental delay and/or disability.

(ii) A statement that the [early intervention program] Early Intervention Program is a public program funded by New York State and county governments.

(iii) A statement that all children must be referred to the municipality to access [early intervention program] Early Intervention Program services, and including the municipal agency's telephone number.

(iv) Clear identification of the provider referenced in the marketing and advertising materials, and an accurate statement that the provider is approved as a provider of [early intervention program] Early Intervention Program services and that it is under contract with the municipality to deliver [early intervention program] Early Intervention Program services.

(v) A statement that all services provided under the [early intervention program] Early Intervention Program are provided at no out-of-pocket cost to parents, but that health insurance subject to New York State Insurance Law may be accessed for reimbursement for early intervention services provided to eligible children and their families.

(vi) A statement that eligibility for the [early intervention program] Early Intervention Program can be determined only by [State- approved] approved evaluators under an agreement with the department [under contract with the municipality].

(vii) A statement that if a child is found eligible for the [early intervention program] Early Intervention Program, all needed early intervention services [are] must be identified [in collaboration with the parent and must be authorized by the municipality] by the IFSP team, including the parent and the Early Intervention Official.

(viii) A statement that [the municipality will arrange for service providers, considering the individual needs of the child and family, to deliver services authorized by the municipality] authorization from the Early Intervention Official is required for an evaluator, or for an approved agency provider that employs or contracts with such an evaluator, to provide early intervention services to the child.

(ix) A statement that when early intervention services are delivered in child care settings or community locations that require a fee, the parent is responsible for paying any associated costs with such access to child care or community locations.

(2) Service coordinators, evaluators and approved providers, and any individual or entity which performs paid or unpaid marketing activities related to [early intervention program] Early Intervention Program services on their behalf, shall not engage in any marketing and advertising practices that offer incentives, or could be construed or appear to offer incentives of any kind to the parents or relatives of an eligible or potentially eligible child, or to the service coordinator, evaluator, the referral source, or other approved providers authorized to deliver services to an eligible or potentially eligible child, that attempts to or would appear to influence selection of a service coordinator, evaluator or provider of services.

(3) Approved agency providers shall not offer incentives or appear to offer incentives to its employees or subcontractors in the form of payment, performance evaluations, or other awards or benefits that are based on the number of referrals and/or services authorized under the [early intervention program] Early Intervention Program.

Subdivision (f) of section 69-4.5 is amended as follows:

(f) Approved individuals shall notify the department within two business days if his or her license is suspended, revoked, limited or annulled, regardless of whether the suspension or limitation is stayed. Approved individuals and agencies shall notify the department within two days if a contract the provider holds with [a municipality or] an agency provider is terminated for any reason. [Agency] Approved agency providers shall ensure that services are delivered by those authorized to do so and shall only employ or contract with individuals who are licensed, registered or certified in compliance with applicable provisions of law, in one of the disciplines set forth in section 69-4.1[(ak)] (al) of this Subpart.

Subdivision (h) of section 69-4.5 is amended and paragraphs (1) and (2) of subdivision (h) are repealed as follows:

(h) All applicants shall receive written notice of their approval or reapproval to deliver service coordination services, evaluations, and/or [early intervention program services from the department] Early Intervention Program services, and that an agreement with the department may be required to participate in the Early Intervention Program.

[(1) The notice shall inform the applicant that a contract with a municipality or with an approved agency under contract with a municipality is necessary to provide services under the

early intervention program and to be reimbursed for service coordination services, evaluations, early intervention program services, and to be included on the list of approved agency and individual providers.

(2) The department shall notify early intervention officials for municipalities in the catchment areas in which the applicant proposes to deliver service coordination services, evaluations, and/or early intervention program services shall receive written notice of the applicant's approval.]

Opening paragraph of subdivision (i) of section 69-4.5 is repealed and subdivisions (j) through (m) are relettered subdivisions (i) through (l).

Subdivision (d) of section 69-4.6 is amended and new paragraphs (1), (2), and (3) are added as follows:

(d) [Initial] In a format prescribed by the department, initial and ongoing service coordinators shall obtain and update at least quarterly, and parents shall [supply] provide, any information and documentation necessary to establish [, and update periodically upon the request of the early intervention official,] an eligible child's third party payor coverage [,] and the nature and extent of such coverage, including coverage through the medical assistance program, other State governmental insurance or benefit program, and/or other [plan of insurance, and] policy, plan, or contract under which the child has coverage. Such services coordinators shall [promptly] transmit such information and documentation to the early intervention [official] service provider and Early Intervention Official within 14 calendar days of receipt.

(1) Service coordinators shall obtain written parental consent for the exchange of information with the insurer regarding available benefits and to facilitate claiming and payment.

(2) Service coordinators shall submit a written request to, and shall obtain from, the insurer information on the extent of benefits available to the covered child under the child's third party payor coverage, in accordance with applicable state laws and regulations. The service coordinator shall transmit such information, in a format prescribed by the department, to the early intervention service provider and Early Intervention Official within 14 calendar days of receipt.

(3) Service coordinators shall obtain, and parents shall provide, a written referral from a primary health care provider as documentation of the medical necessity of each early intervention service and shall promptly forward this documentation to the early intervention service provider(s) delivering the service(s) to which the written referral applies and to the Early Intervention Official.

Paragraph (3) of subdivision (g) of section 69-4.7 is amended as follows:

(3) The service coordinator shall inform the parent that the [municipality will] provider shall not obtain payment from their insurer if the insurer is not prohibited from applying, and [will] may apply, payment for early intervention services to the annual and lifetime limits specified in their insurance policy.

Subdivisions (m) through (p) of section 69-4.7 are relettered subdivisions (n) through (q) and a new subdivision (m) is added as follows:

(m) If, in consultation with the evaluator, the service coordinator identifies a child that is potentially eligible for programs or services offered by or under the auspices of the Office for People With Developmental Disabilities (OPWDD), the service coordinator shall, with parental consent, notify OPWDD's developmental disabilities regional office of the potential eligibility of such child for said programs or services.

Section 69-4.8 is repealed and a new section 69-4.8, Evaluation and Screening of the Child and Assessment of the Child and Family, is added as follows:

Evaluations and screenings.(a) To determine eligibility for the Early Intervention Program, a timely screening and/or multidisciplinary evaluation may be conducted to determine if the child has a developmental delay or disability, unless eligibility is established in accordance with subdivision (c) of this section.

(1) The child's parent shall have the opportunity to be present and participate in the performance of a screening, evaluation and, where applicable, assessment, unless the parent's circumstances prevent the parent's presence. If the parent's circumstances prevent the parent's presence, the parent shall have the opportunity to designate, in writing, another family member to be present and participate in the performance of the screening, evaluation and, where applicable, assessment.

(2) If the child's eligibility is established in accordance with subdivision (c) of this section, a multidisciplinary assessment of the child shall, with parental consent, be conducted and a voluntary family-directed assessment shall be offered to the parent in accordance with subdivision (h) of this section.

(b) If the child is suspected of having a developmental delay, the evaluator shall, with parental consent, conduct a screening to determine if further evaluation under the Early Intervention Program is appropriate, or conduct an evaluation to determine the child's eligibility for the Early Intervention Program. If the results of the screening demonstrate that further evaluation under the Early Intervention Program is appropriate then the evaluator shall conduct a multidisciplinary evaluation. If the evaluator does not refer the child to the Early Intervention Program based on results of screening, the child may still receive a multidisciplinary evaluation to determine eligibility for the program upon parent request. If the child is determined eligible for the Early Intervention Program, a voluntary family-directed assessment shall be offered to the parent in accordance with subdivision (g) of this section.

(1) When determining whether to conduct a screening prior to a multidisciplinary evaluation, the evaluator may rely on a recommendation from the Early Intervention Official, a physician, or other qualified personnel. The evaluator may also conduct a screening based upon a request from the parent.

(i) Prior to a screening being conducted, the evaluator shall provide notice to the parent of the intent to conduct a screening. The notice shall inform the parent that parental consent is required to conduct a screening and of the parent's right to request a multidisciplinary evaluation at any time during the screening process.

(ii) The purpose of a screening, if conducted, is to determine whether the child is suspected of having a disability and requires a multidisciplinary evaluation.

(2) A screening shall not be conducted if the child's eligibility for the Early Intervention Program is established in accordance with procedures set forth in subdivision (c) of this section.

(3) The screening shall be conducted using appropriate instruments on the list of instruments approved by the department and by personnel qualified to administer those instruments.

(4) Parental consent shall be obtained prior to conducting the screening procedures.

(5) If, at any time during the screening process, the parent requests and consents to a multidisciplinary evaluation, the screening shall conclude and a multidisciplinary evaluation of the child shall be conducted even if the child is not suspected of having a disability.

(6) The evaluator shall explain the results of the screening to the parent and shall fully document the results in writing.

(i) If, based upon the screening, a child is suspected of having a disability, the child shall, with parental consent, be referred to the Early Intervention Program and receive a multidisciplinary evaluation to be conducted in accordance with the procedures set forth in subdivision (c) of this section. The evaluator shall discuss implications of the screening for the child's multidisciplinary evaluation, including composition of the multidisciplinary evaluation team.

(ii) If, based upon the screening, a child is not suspected of having a disability, a multidisciplinary evaluation shall not be provided, unless requested by the parent. The Early Intervention Official shall provide the parent with written notice of the screening results upon receipt of such results from the evaluator, which shall include information on the parent's right to request a multidisciplinary evaluation.

(c) If a child has a diagnosed medical condition with a high probability of resulting in a developmental delay, a review of the child's medical and other records, with parental consent, may be used by the evaluator to establish eligibility for the Early Intervention Program. If a

child's eligibility is determined in accordance with this subdivision a multidisciplinary assessment of the child shall be conducted.

(1) If the child's eligibility is established based on a review of the child's medical or other records, without a multidisciplinary evaluation, the evaluator shall document in writing the basis for the child's eligibility, conduct a multidisciplinary assessment of the child and offer a voluntary family-directed assessment in accordance with procedures set forth in subdivision (g) of this section.

(d) Qualified personnel shall use informed clinical opinion when conducting a screening, evaluation and/or assessment of the child.

(1) Informed clinical opinion may be used as one factor to establish the child's eligibility for the Early Intervention Program even when other instruments do not establish eligibility; provided, however, that the evaluator shall provide written documentation that shall include observations of the child, a detailed summary of the parent interview, and a review of pertinent medical and other records and a description of all procedures used to evaluate the child and reasons why the child meets eligibility criteria set forth in section 69-4.23(a) of this Subpart, in the evaluation report.

(2) Informed clinical opinion shall not be used to negate the results of evaluation instruments that were used to establish eligibility.

(e) If a multidisciplinary evaluation is conducted pursuant to this section, the evaluator shall obtain informed parental consent to perform the evaluation prior to initiating the evaluation procedures.

(1) The multidisciplinary evaluation team shall include two or more qualified personnel from different disciplines who are trained to utilize appropriate methods and procedures and

have sufficient expertise in child development; and at least one of whom shall be a specialist in the area of the child's suspected delay or disability, if known.

(2) The multidisciplinary evaluation of the child shall utilize age-appropriate procedures and instruments on the list of standardized instruments approved by the department, unless written justification is included in the evaluation report for why such instruments are not appropriate or available for the child.

(3) The multidisciplinary evaluation shall include the following:

(i) administering the evaluation instrument;

(ii) taking the child's history, including interviewing the parent about the child's development and developmental progress;

(iii) identifying the child's level of functioning in cognitive development, physical development, communication development, social emotional development, and adaptive development;

(iv) gathering information from other sources, such as family members, other caregivers, medical providers, social workers, and educators, as applicable, to understand the full scope of the child's unique strengths and needs; and

(v) a review of medical, educational, and other records.

(4) The evaluator shall avoid making recommendations regarding frequency and duration of specific services until such time as the family's total priorities, concerns, and resources have been assessed and the plan for services to be included in the IFSP is under discussion.

(f) If a multidisciplinary assessment is conducted pursuant to this section it shall be conducted by qualified personnel and shall include the following:

(1) a review of the results of the child's medical or other records; including reports of any previous evaluations;

(2) personal observations of the child;

(3) the identification of the child's needs in the areas of cognitive development, physical development, communication development, social emotional development, and adaptive development;

(i) the assessment of the child's physical development shall include a health assessment including a physical examination, routine vision and hearing screening, and, where appropriate, a neurological assessment, except when:

(a) a physical examination has occurred within a sufficient timeframe, as determined by the child's age and commonly accepted examination schedules, such as those recommended by the American Academy of Pediatrics, and/or New York State Child/Teen Health Plan, and documentation of such examination is available; and

(b) no indications are present which suggest the need for re-examination, such as rapid regression in development.

(4) an assessment of the transportation needs of the child, which shall include parental ability or inability to provide transportation, health and safety concerns, and any parental concerns related to transporting the child.

(g) The evaluator shall offer the parent the opportunity to participate in a voluntary family-directed assessment. The purpose of the assessment shall be to identify the family's resources, priorities, and concerns and the supports and services necessary to enhance the

family's capacity to meet the developmental needs of the family's infant or toddler with a disability. The family-directed assessment shall be conducted by qualified personnel and shall:

(1) be voluntary on the part of each family member participating in the assessment;

(2) be based on information obtained through an assessment tool and an interview with those family members who elect to participate in the assessment; and

(3) include the family's description of its resources, priorities, and concerns related to enhancing the child's development.

(i) The screening, evaluation and assessment procedures, including clinical observation, shall be conducted in an environment appropriate to the unique needs of the child and conducive to ensuring accuracy of results, with consideration given to the preferences of the parent. Such settings may include structured (e.g., clinic or office), unstructured (e.g., play room), and natural settings (e.g., the child's home).

(h) Results of the child's screening, evaluation and/or, where applicable, assessment, shall be fully shared with the parent following the completion of the screening, evaluation and/or assessment, in a manner understandable to the parent.

(i) The evaluation team shall prepare an evaluation report and written summary, which shall include the results of the multidisciplinary evaluation or assessment of the child as applicable, and the voluntary family-directed assessment if completed. The evaluation team shall submit the summary and report as soon as practicable subsequent to the evaluation or, for children who are determined eligible, no later than 30 days after the evaluation to enable convening of the individual family service plan meeting within 45 days of the date that the Early Intervention Official received the referral. Such summary and report shall be submitted to the following individuals: the parent; Early Intervention Official; initial service coordinator; with

parental consent, the child's primary health care provider; and, with parental consent, for those children in the care and custody or custody and guardianship of the local social services commissioner, such commissioner or their designee.

(1) The evaluation report and summary shall: identify the persons performing the evaluation or, where applicable, the assessment of the child and voluntary family-directed assessment; describe the assessment process and conditions; describe the child's response; describe the family's belief about whether the child's response was optimal; identify measures and/or scores that were used; and explain these measures and/or scores.

(2) If the child is found eligible for the Early Intervention Program, the evaluation report and summary shall include a statement of the child's eligibility, including diagnosed condition with a high probability of delay, if any, and/or developmental delay in accordance with section 69-4.23(a) of this Subpart. Such statement shall describe the child's developmental status, including objective and qualitative criteria, in sufficient detail to demonstrate how the child meets the eligibility criteria for the program in accordance with criteria set forth in section 69-4.23 of this Subpart.

(3) The parent shall have the opportunity to:

(i) discuss the child's evaluation report and summary and, where applicable, the voluntary family-directed assessment with the evaluator or evaluators, including any concerns they may have about the evaluation and assessment process;

(ii) receive assistance in understanding these results; and

(iii) address concerns that the evaluation and, where applicable, the assessment considers their concerns and observations about their child and that such documents accurately identify family resources, priorities, and concerns.

(4) To the extent feasible, and within the confidentiality requirements prescribed in section 69-4.17(c) of this Subpart, if the parent prefers and consents to disclosure to an interpreter, the written and oral summary shall be provided in the dominant or native language or other mode of communication of the parent.

(5) A parent who disagrees with the results of an evaluation or assessment may request to obtain an additional evaluation or partial evaluation to the extent authorized by federal and state laws or regulation.

(j) If a child is determined ineligible for services, including determinations that additional evaluations or supplemental evaluations are not necessary or appropriate, the parent may request a mediation or a hearing. However, the parent may not make such a request until all evaluations are complete and a determination of ineligibility has been made.

(k) With parental consent, certain evaluations may be conducted or repeated and reimbursed in accordance with this Subpart, if deemed necessary and appropriate by the Early Intervention Official, either in conjunction with the required annual evaluation of the individualized family service plan, or more frequently under the following conditions:

(1) an observable change in the child's developmental status indicates the need for modification of the individualized family service plan or a change in eligibility status; and

(2) the parent, Early Intervention Official, service coordinator, or provider(s) requests a re-evaluation at the six-month review of the individualized family service plan.

(l) After a child's initial multidisciplinary evaluation, any additional evaluation shall be described in the child's individualized family service plan, including the type of evaluation, projected date for the evaluation, and if known, the evaluator.

(m) Nondiscriminatory procedures shall be employed in all aspects of the evaluation and assessment processes.

(1) Responsiveness to the cultural background of the family shall be a primary consideration in all aspects of the evaluation and assessment processes.

(2) Tests and other evaluation materials and procedures shall be administered in the dominant or native language or other mode of communication of the child, unless it is clearly not feasible to do so.

(3) No single procedure or instrument may be used as the sole criteria or indicator of eligibility.

(n) An evaluation or assessment shall not include a reference to any specific provider of early intervention services.

(o) Costs for multidisciplinary evaluations and assessments shall be reimbursed in accordance with section 69-4.30(c) of this Subpart.

Subdivision (c) of section 69-4.9 is amended as follows:

(c) Each municipality shall ensure that the [early intervention program] Early Intervention Program services contained in individualized family service plans are provided to eligible children, who reside in such municipality, and their families [who reside in such municipality and may contract with approved providers of early intervention program services for such purpose]. Municipalities shall make reasonable efforts to ensure that [early intervention program] Early Intervention Program services [contracted for] provided to children residing in the municipality are delivered in a manner that protects the health and safety of eligible children, in accordance with this Subpart and with standards and procedures on health, safety, and

sanitation developed by the department for the [early intervention program] Early Intervention Program.

Paragraph (2) of subdivision (d) of section 69-4.9 is amended to read as follows:

(2) ensure that only those individuals who are qualified in accordance with section 69-4.1[(ak)] (al) or 69-4.4, as applicable, deliver such services to eligible children and their families.

Paragraph (6) of subdivision (g) of section 69-4.9 is amended as follows:

(6) Maintain and make available to the municipality and the department upon request, complete financial records and clinical documentation related to the provision of early intervention services including such information and documentation as necessary to support [municipal] provider billing to third party payors (including the medical assistance program), the municipality, and the State, and to permit a full fiscal audit by appropriate State and municipal authorities.

Paragraphs (2) and (3) of subdivision (a) of section 69-4.11 are repealed and new paragraphs (2) and (3) are added as follows:

(2) A multidisciplinary IFSP team shall be convened by the Early Intervention Official to develop and annually evaluate the IFSP. Such multidisciplinary IFSP team shall include two or more individuals from separate disciplines or professions, one of whom shall be the service coordinator, and the following participants:

(i) the parent or parent(s) of the child;

(ii) other family members, as requested by the parent, if feasible to do so;

(iii) an advocate or person outside of the family, as requested by the parent;

(iv) the Early Intervention Official, provided that the Early Intervention Official may participate in the meeting via conference call if he or she is unable to attend the meeting;

(v) the initial or ongoing service coordinator responsible for assisting in the development of the IFSP or implementation of the IFSP, as applicable;

(vi) the person or persons directly involved in conducting the evaluations and assessments of the child; provided, however, that if such a person is unable to attend a meeting, arrangements shall be made for his or her involvement through other means, including participation through a conference call, having a knowledgeable authorized representative attend the meeting, or making pertinent records available at the meeting;

(vii) as appropriate, the person or persons who will be delivering early intervention services to the child or family; and

(viii) any other persons, such as the child's primary health care provider or child care provider, who the parent or the initial or ongoing service coordinator, with the parent's consent, invite.

(3) The six-month review of the IFSP pursuant to section 69-4.11(b) of this Subpart shall provide for the participation of persons in subparagraphs (i) through (v) of paragraph (2) of this subdivision and, if conditions warrant, provisions shall be made for participation of other representatives identified in paragraph (2) of this subdivision.

Subparagraph (ii)(a) of paragraph (7) of subdivision (a) of section 69-4.11 is amended and subparagraphs(ii)(b) through (d) are repealed as follows:

(ii) [(a) For children referred to the early intervention program on or after January 1, 2013, or for children referred to the early intervention program prior to January 1, 2013 for whom an additional evaluation or partial evaluation is requested on or after January 1, 2013 for the purpose of adding a new service, neither the] The evaluator [which] who conducts an evaluation of a child [,] or an approved agency which employs or contracts with the evaluator [, nor a relative or business associate of the evaluator,] shall [provide] not be prohibited from providing early intervention services [to such child unless], authorized [by the commissioner, after consultation with the early intervention official,] by the Early Intervention official and included in the child's individualized family service plan, unless it is documented by the Early Intervention Official that this course of action is not in the best interest of the child and family [due to special circumstances related to the evaluator's qualifications or availability or other extraordinary circumstances in which there is a clear showing that the child will not be able to access needed services absent such authorization]. Such documentation must include justification for prohibiting the evaluator from providing early intervention services to such child.

[(1) For purposes of this paragraph, the following terms shall have the following meanings:

(i) *business associate* shall mean a person joined or united with one or more individuals in a business or enterprise; and

(ii) *relative* shall mean any person living in the same household as an individual or the individual's spouse, child, stepchild, stepparent, or any person who is a direct descendant of that individual's grandparents or the spouse of such descendant.]

Clause (a)(2) of Subparagraph (vi) of paragraph (10) of subdivision (a) of section 69-4.11 is amended as follows:

(2) consistent with the definition of natural environment in section 69-4.1[(af)] (ag) of this subpart; and,

Paragraph (3) of subdivision (b) of section 69-4.11 is repealed and paragraphs (4) and (5) are renumbered paragraphs (3) and (4).

Subdivisions (a) and (b) of section 69-4.12 are repealed, new subdivisions (a) and (b) are added, subdivision (c) is relettered subdivision (e), and new subdivisions (c) and (d) are added as follows:

(a) Providers and municipalities shall be monitored on a periodic basis on a schedule determined by the department and shall comply with all department requirements for monitoring, including timely provision of all applicable records in a format requested by the department or the department's agent or contractor.

(b) Monitoring procedures shall be used to identify any non-compliance, deficiencies, and need for improvement and shall include any procedures determined necessary by the department to fulfill its obligations to oversee and monitor the Early Intervention Program, and may include, but not be limited to, any of the following components:

(1) On-site visits and desk reviews.

(2) Interviews with personnel responsible for the administration and/or provision of early intervention services.

(3) Where applicable and practicable, interviews with parents of children who received early intervention services from the provider, or parents of eligible children who reside in the municipality responsible for ensuring that early intervention services contained in an IFSP are provided to the eligible child and the child's family.

(4) A review of any of the following:

(i) Child records, including: child referral information; evaluation reports; individualized family service plans; where applicable, physician referrals for early intervention services; transition plans; session notes; progress notes; and any other documents related to a child's and family's participation in the EIP, as requested.

(ii) Data systems and other electronic record-keeping system reviews as determined necessary to assess compliance with the provisions of Title II-A of Article 25 of the Public Health Law and this Subpart, including confidentiality requirements.

(iii) Where applicable, personnel records, including the status of licensure, certification, or registration of qualified personnel, and required clearances, such as the Statewide Central Register on Child Abuse and Neglect.

(iv) Where applicable, the organizational structure of the provider agency and staffing requirements and patterns, including supervision of employees, in-service training, and oversight of contracted providers.

(v) Quality assurance procedures used to monitor the quality, consistency, and service delivery practices, including mechanisms for parent involvement in planning and participating in early intervention services.

(vi) Procedures used to evaluate parent experiences and satisfaction with early intervention services, such as parent surveys and exit interviews; and

(vii) Where applicable, the status of any corrective action plans for any previously identified non-compliance and deficiencies, including verification of correction of non-compliance and identified deficiencies.

(c) When non-compliance or deficiency is identified through one or more monitoring procedures, the department may ensure compliance is attained and maintained by implementing actions that include, but are not limited to, the following:

(1) require submission of a corrective action plan by the provider or municipality and timely correction to address non-compliance and deficiency;

(2) impose conditions on the provider's participation in the Early Intervention Program;

(3) impose monetary fines or penalties, which may include the withholding or adjustment of state aid reimbursement owed to the provider or municipality; or

(4) initiate proceedings under section 69-4.24 of this Subpart to revoke, suspend, limit, or annul the approval of a provider.

(d) A municipality may monitor evaluators and providers of early intervention services to eligible children who reside in such municipality. Such monitoring may include site visits.

(1) The service coordinator shall report to the municipality, in a format and frequency determined by the municipality, on the delivery of services to an eligible child in accordance with the child's individualized family service plan.

(i) The municipality may submit a written request to the parent, in accordance with section 69-4.17(b), requesting that the parent select a new service coordinator, if the municipality finds that the service coordinator has not been fulfilling his or her responsibilities to the child and family or that services have not been provided in accordance with the child's individualized family service plan. If the parent consents to the request, the individualized family service plan

shall be reviewed, in accordance with procedures set forth in section 69-4.11(b) of this Part, and amended to include the name of the new service coordinator responsible for implementation of the individualized family service plan.

(ii) The municipality may require the service coordinator to select a new provider of service if the municipality finds that services have not been delivered in accordance with the child's individualized family service plan. In such cases, the Early Intervention Official shall provide written notice to the parent of the determination, in accordance with procedures set forth in section 69-4.17(b) of this Subpart.

(2) If the Early Intervention Official determines that the evaluator has not complied with the Public Health Law or requirements in section 69-4.8 of this Subpart in conducting an evaluation to determine eligibility, the Early Intervention Official may require that the evaluator immediately submit additional documentation to support the eligibility determination of a child for the Early Intervention Program. If the evaluator does not provide the requested documentation, or the documentation provided continues to be inconsistent with the requirements of the Public Health Law or this Subpart, the Early Intervention Official may require that the parent select another evaluator to conduct a multidisciplinary evaluation to determine whether the child meets eligibility criteria for the Early Intervention Program.

(3) The municipality may implement additional procedures to monitor providers that conduct evaluations and deliver services, including service coordination, to children residing in the municipality, to ensure adherence to the provisions of Title II-A of Article 25 of the Public Health Law and this Subpart.

(i) The municipality shall coordinate the scheduling and monitoring of providers with the department to minimize the administrative burden on providers.

(ii) The municipality shall inform the department of findings of provider monitoring, including any corrective actions imposed on the provider, required timelines for correction, and verification of corrective actions.

Relettered subdivision (e) of section 69-4.12 is amended as follows:

[(c)](e) *Fiscal auditing*. For purposes of this section, [approved service] providers means [incorporated entities, sole proprietorships, partnerships, State-operated facilities and individual qualified personnel approved by a State early intervention service agency to deliver service coordination services, evaluations, and/or early intervention] evaluators and providers of early intervention services approved to deliver services to eligible children and their families.

(1) Each municipality may conduct an audit, in accordance with applicable state laws and regulations, of approved [service] providers [under contract to deliver service coordination services, evaluations, and/or early intervention services] who conduct evaluations and provide early intervention services to children residing in the municipality. The municipality shall submit the results of any such audit to the commissioner for review and, if warranted, adjustments in State aid reimbursement, as well as for recovery by the municipality of its share of any disallowances identified in such audit.

(i) All audits will be based upon these and other applicable regulations and generally accepted accounting principles.

(ii) Audits may include a comprehensive review of all financial records and related documentation.

[(2) The early intervention official shall have the ability to perform, or cause to be performed, a fiscal audit of approved service providers under contract with the municipality and located in another municipality, provided that:

(i) [(2) [prior] Prior to the initiation of such audit, the [early intervention official ascertains] Early Intervention Official shall ascertain that neither the [State] department nor the municipality where evaluations are conducted and services are [being delivered] provided has performed or intends to perform such an audit within six months[;].

[(ii)] (3) [a] A full fiscal audit [is] shall be performed[;] by the municipality.

[(iii)] (4) [where] Where appropriate, [the] auditing [is] shall be performed in conjunction with the [approving State early intervention service agency] department to avoid unnecessary duplication of [auditing] audit procedures[;].

[(iv)] (5) [results] Results of the audit shall be made available upon request of any other municipality making payments under the Early Intervention Program to the approved evaluator [, service provider or service coordinator; and] or provider.

[(v)] (6) [no] No other municipality may conduct an additional audit for the time period specified above.

Paragraph (1) of section 69-4.14(a) is repealed.

Subdivision (d) of section 69-4.16 is amended as follows:

(d) The [early intervention official] Early Intervention Official shall appoint a qualified surrogate parent for any eligible child or potentially eligible child when the child is a ward of the State, or when the child is not a ward of the State but his or her parents by birth or adoption are

unavailable after reasonable efforts to facilitate their participation [and the child has no person in parental relation]. Such appointment shall be made within 30 days after making a determination of the child's need for a surrogate parent.

Paragraphs (4) and (5) of subdivision (f) of section 69-4.16 are amended and a new paragraph (6) is added as follows:

(f) The [early intervention official] Early Intervention Official shall select a surrogate parent who is qualified and willing to serve in such capacity and who:

* * *

(4) is not an employee of [any agency] the lead agency or any other public agency or provider involved in the provision of early intervention or education, care or other services to the child, provided however that a person who otherwise qualifies to be a surrogate parent is not considered an employee solely because he or she is paid by a public agency to serve as a surrogate parent; [and]

(5) has been selected, for any child who is a ward of the State or for any child whose parent is unavailable and who is in the care and custody of the local social services commissioner, in consultation with the local commissioner of social services or designee[.]; and

(6) in the case of a child who is a ward of the State, the Early Intervention Official shall recognize the appointment of a surrogate parent by a judge overseeing the child's case, for purposes of the Early Intervention Program.

Subparagraph (i)(c) of paragraph (1) of subdivision (b) of section 69-4.17 is amended as follows:

(i) The notice must be sufficient in detail to inform the parent about:

* * *

(c) all procedural safeguards available under the Early Intervention Program, including a description of mediation, impartial hearing, and the department's complaint process; the procedures for accessing these safeguards; and any timelines under these procedures.

Subparagraph (ii) of paragraph (2) of subdivision (b) of 69-4.17 is amended as follows:

(2) The [early intervention official] Early Intervention Official shall make reasonable efforts to ensure the parent receives written notification about the right to due process and the method by which mediation and an impartial hearing can be requested at the following times:

* * *

(ii) upon disagreement [between the early intervention official] among the IFSP team members, including the Early Intervention Official and the parent, on an initial or subsequent IFSP or proposed amendment to an existing IFSP; and

* * *

Paragraphs (1) through (6) of subdivision (c) of section 69-4.17 are renumbered paragraphs (3) through (8) and are amended, and new paragraphs (1) and (2) are added to subdivision (c), as follows:

(c) Confidentiality.

(1) The Early Intervention Official shall ensure that a written notice is provided to parents when a child is referred to the Early Intervention Program, and annually thereafter, that is adequate to fully inform parents about the Early Intervention Program requirements for

protecting the confidentiality of personally identifiable information specified in subdivisions (c) through (e) of this section, and about parents' rights related to these protections, including:

(i) a description of the children for whom personally identifiable information is maintained, the types of information collected, the methods used in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

(ii) a summary of the policies and procedures that shall be followed regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information;

(iii) a description of all the rights of parents and children regarding this information, including their right to inspect, review, and request amendment of their child's early intervention records, their right to consent in writing to disclosure of personally identifiable information, and the procedures to exercise these rights; and

(iv) a description of the complaint procedures available to parents.

(2) Early intervention officials and providers of evaluations and early intervention services shall protect the confidentiality of personally identifiable information at the collection, maintenance, use, storage, disclosure, and destruction stages.

[(1)] (3) Personally identifiable data, information, or records pertaining to an eligible child shall not be disclosed by any officer or employee of the department [of Health, State early intervention service agencies, municipalities, evaluators, service providers or service coordinators], any officer or employee of the municipality, or any provider or the provider's employees or contracted providers to any person other than the parent of such child, except in accordance with [title 34 of the *Code of Federal Rules*] part 99 [, sections 300.560 through 300.576 (with the modification specified in section 303.5[b] of title 34 of the *Code of Federal*

Regulations) and part 303] of title 34 of the *Code of Federal Regulations* (Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 available from the Early Intervention Program, Room 208, Corning Tower Building, Empire State Plaza, Albany, NY 12237-0618), available at http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title34/34tab_02.tpl, to preserve the confidentiality of records pertaining to children participating in the Early Intervention Program.

(i) Except as authorized under Part 99 of Title 34 of the Code of Federal Regulations, written parental consent shall be obtained before personally identifiable information is disclosed to anyone other than authorized representatives, officials, employees, or contractors of the department, municipalities, and providers collecting, maintaining, or using the information for purposes of the Early Intervention Program.

[(2)] (4) Each municipality, evaluator, service provider and service coordinator shall adopt procedures comparable to those set forth in part 99 [and sections 300.560 through 300.576 (with the modifications specified in section 303.5[b])] of title 34 of the *Code of Federal Regulations* (Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 available from the Early Intervention Program, Room 208, Corning Tower Building, Empire State Plaza, Albany, NY 12237-0618), available at http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title34/34tab_02.tpl, to preserve the confidentiality of records pertaining to eligible children participating in the Early Intervention Program.

[(3)] (5) Early intervention officials, all providers [approved to deliver early intervention services] and all personnel involved in mediation and impartial hearing procedures shall:

(i) implement and maintain policies and procedures to assure the protection of confidential personally identifiable information, which may include existing policies and procedures where appropriate and applicable;

(ii) submit assurances that all employees [, including independent contractors] and contracted providers, consultants, and volunteers with access to personally identifiable information are informed of and are required to adhere to all confidentiality requirements of personally identifiable information;

(iii) adhere to all legal requirements that protect records containing sensitive information (*e.g.*, such as sexual or physical abuse, treatment for mental illness or mental health problems, HIV status, communicable disease status, the child's parentage, etc.); and

(iv) identify the person or persons with designated responsibility for guaranteeing the confidentiality of personally identifiable information.

[(4)] (6) The Early [intervention officials] Intervention Official and providers shall ensure the confidentiality of all information maintained in an electronic format, except as required or permitted by State or Federal law.

[(5)] (7) The Early Intervention Official shall provide for the confidential exchange of information among parent, evaluators, service providers and service coordinators, including policies and procedures which enable the parent to voluntarily give written consent for general release of information.

(i) The parent shall be informed of the right to refuse to sign a general release and offered the opportunity to sign a more selective release which specifies by name or category those individuals to whom information may be disclosed or from whom it may be sought.

(ii) The parent's authorization for general release shall be revocable at any time and the parent shall be informed of the right to revoke such authorization. Such information shall be included on any such release form.

[(6)] (8) The [early intervention official] Early Intervention Official shall make reasonable efforts to ensure notification of the parent when maintenance of personally identifiable information is no longer necessary for the purposes of the Early Intervention Program.

(i) At the request of the parent, the [early intervention official] Early Intervention Official shall ensure all personally identifiable information is removed from the record and destroyed. However, a permanent record of the [child and the family's name and address and the types and dates of services received] child's name, date of birth, parent name and contact information (including address and phone number), names of service coordinator(s) and provider(s), and exit data (including year and age upon exit and any programs entered into upon exiting) may be maintained without time limitation.

Subparagraph (ii) of paragraph (1) of subdivision (d) of section 69-4.17 is amended as follows:

(ii) obtain a copy of the record within ten [working] calendar days of the receipt of the request by the early intervention official or approved evaluator, service provider, or service coordinator;

Paragraph (3) of subdivision (d) of section 69-4.17 is amended as follows:

(3) [An agency] A provider may presume that the parent has authority to inspect and review records relating to his or her child unless the [agency] provider has been advised that the

parent does not have the authority under applicable State law governing such matters as custody, foster care, guardianship, separation, and divorce.

Paragraph (1) of subdivision (e) of section 69-4.17 is amended as follows:

(1) The [early intervention official] Early Intervention Official, evaluator, service provider and service coordinator shall ensure the parent the right to present objections and request amendments to the contents of the record because the parent believes the information is inaccurate, misleading, or violates the privacy or other rights of the child or parent.

Subparagraph (ii) of paragraph (3) of subdivision (e) of section 69-4.17 is amended as follows:

(ii) If the [early intervention official] Early Intervention Official, evaluator, service provider or service coordinator does not concur with the parent's request to amend the record, the [early intervention official] Early Intervention Official shall notify the parent in writing of the decision and inform the parent of the right to an administrative hearing in accordance with procedures set forth in paragraph (4) of this subdivision.

Subparagraphs (vii) and (ix) of paragraph (4) of subdivision (e) of section 69-4.17 are amended as follows:

(4) An administrative hearing to amend the record must meet, at a minimum, the following requirements:

* * *

(vii) if, as a result of the hearing, the municipality determines that the record contains information that is inaccurate, misleading, or violates the privacy or other rights of the child or

[family] parent, the municipality shall order the amendment of the record as requested by the parent;

* * *

(ix) if, as a result of the hearing, the municipality determines that the contents of the record are not inaccurate or misleading or do not violate the privacy or other rights of the child and [family] parent, the municipality shall order that the parent be notified in writing of such decision and informed of the right to place a statement in the record reflective of their views. The municipality shall ensure that such parental statement is incorporated, maintained, and disseminated as part of the record.

Paragraph (3) of subdivision (g) of section 69-4.17 is amended as follows:

(3) The [early intervention official] Early Intervention Official shall ensure the parent, upon the request for mediation services by the parent or the [early intervention official] Early Intervention Official, is informed [of] regarding:

(i) the voluntary nature of mediation;

(ii) the parent's right to withdraw at any time from mediation [and request an impartial hearing]; [and]

(iii) that the mediation process cannot be used to deny or delay a parent's right to an impartial hearing, or to deny any other due process rights afforded under this section;

[(iii)] (iv) the right to be accompanied by supportive persons and/or an attorney; and

(v) that a written, signed mediation agreement resulting from a successful full or partial resolution under this subdivision is a legally binding document which is enforceable in any state court of competent jurisdiction or in a district court of the United States.

Subparagraph (i)(a) is added to paragraph (13) of subdivision (g) of section 69-4.17 as follows:

(a) The written agreement shall state that all discussions that occurred during the mediation process will remain confidential and shall not be used as evidence in any subsequent due process hearing or civil proceeding.

Subparagraphs (xiii) through (xvii) of paragraph (7) of subdivision (h) of section 69-4.17 are renumbered subparagraphs (xiv) through (xviii), a new subparagraph (xiii) is added, and renumbered subparagraph (xvi) is amended as follows:

(xiii) The hearing officer may grant specific extensions of time beyond the period set out in subparagraph (xi) of this paragraph at the request of either party.

* * *

[(xv)] (xvi) A copy of the written decision shall be mailed to the parties of the hearing, the service coordinator for the child and family, the Commissioner of Health or designee, and the local social services commissioner or designee for children in his or her care and custody or custody and guardianship[and any other State early intervention service agency affected by such decision].

Opening paragraph of subdivision (a) of section 69-4.22 is amended, new paragraphs (1) to (4) are added to subdivision (a), subdivisions (b) and (c) are repealed, and subdivision (d) is relettered subdivision (b) as follows:

(a) [Municipalities] Providers shall, in the first instance and where applicable, seek payment from [private third party insurers, prior to claiming payment from Medicaid or the

department of Health,] all third party payors, including governmental agencies, prior to claiming payment from a given municipality for evaluations conducted under the program and for services [delivered] rendered to eligible children residing in the municipality and their families , provided, however, that the [municipality] provider shall not obtain payment from a third party payor who is not prohibited from applying such payment, and [will] may apply such payment, to an annual or lifetime limit specified in the insured's policy.

(1) A municipality, or its designee, and a provider shall be subrogated, to the extent of the expenditures by such municipality or for early intervention services furnished to an eligible child or parent, to any rights the child or parent may have or be entitled to for third party reimbursement.

(2) The provider shall submit notice to the insurer or plan administrator of his or her exercise of the right of subrogation upon the provider's assignment as the early intervention service provider for the child.

(i) The right of subrogation does not attach to benefits paid or provided under any health insurance policy or health benefits prior to written notice of the exercise of subrogation rights by the insurer.

(3) Providers shall utilize the department's fiscal agent and data system for claiming payment for evaluations and services rendered under the Early Intervention Program.

(i) Providers shall enroll, on request of the department or the department's fiscal agent, with one or more health care clearinghouses, as necessary, for processing of claims to third party payors and for receipt of remittance advices in standard electronic format and in compliance with any applicable federal or state regulations with respect to electronic claims transactions.

(4) Providers shall submit all claims for payment of evaluations and services within 90 days of the date of service, unless the submission is delayed due to extraordinary circumstances documented by the provider and the department's fiscal agent has been notified of the extraordinary circumstances and has provided written acknowledgement.

(i) All claims submitted after 90 days shall be submitted within 30 days from the time the provider was relieved from the extraordinary circumstances that previously delayed a timely submission.

(ii) Claims that are not submitted within timeframes set forth shall not be reimbursed by the department's fiscal agent from the escrow account funded by municipal governmental payors.

Subdivision (a) of Section 69-4.23 is amended as follows:

(a) Initial eligibility for early intervention program services shall be established by medical or other records or a multidisciplinary evaluation conducted in accordance with section 69-4.8 of this [subpart] Subpart and shall be based on the following criteria:

* * *

The opening paragraph of section 69-4.24 is amended and paragraphs (5), (9), and (14) of subdivision (a) of section 69-4.24 are amended as follows:

(a) An agency's or individual's approval to deliver evaluations, service coordination services and [early intervention program] Early Intervention Program services may be revoked, suspended, limited or annulled by the commissioner upon a finding that the agency or individual provider:

* * *

(5) falsely represented or omitted material fact in an application submitted to the department [or, where applicable, Education Department,] for approval or re-approval;

* * *

(9) has failed to provide unobstructed access to and examination of facilities, child records, or any other documents relevant to [early intervention program] Early Intervention Program services as requested and within the timeframes required by the department or a municipality [under contract with the provider], or an agent of any of these entities, for purpose of monitoring, auditing, or investigating the provider's participation in the [early intervention program] Early Intervention Program;

* * *

(14) has submitted improper or fraudulent claims [to one or more municipalities or approved agencies under contract with a municipality] to a third party payor or the municipality for payment, including but not limited to submission of claims for services not rendered.

Subdivision (c) of section 69-4.24 is amended as follows:

(c) Approval may be temporarily suspended or limited, prior to granting an opportunity to be heard, for a period not exceeding 120 days upon written notice to the provider following a finding by the department that the health or safety of a child, parents or staff of the agency or municipality [in which the provider is under contract] is in imminent risk of danger or there exists any condition or practice or a continuing pattern of conditions or practices which poses imminent danger to the health or safety of such children, parents or staff of the agency or

municipality [in which the provider is under contract]. Upon such a finding and notice the department may also:

* * *

Section 69-4.25 is repealed.

Subdivision (a) of section 69-4.26 is amended as follows:

(a) Municipalities shall maintain an early intervention record for each child referred to the program which documents the performance of all activities required to be completed by early intervention officials or their designees on behalf of eligible children under [article] Article 25 of title [II-a] II-A of the Public Health Law. The early intervention record shall be maintained in a confidential manner in accordance with section [69-4.17(b)] 69-4.17(c) of this Subpart. The early intervention record shall include the following:

* * *

Paragraph (15) of subdivision (a) of section 69-4.26 is repealed and paragraph (16) is renumbered paragraph (15).

Paragraph (12) of subdivision (b) of section 69-4.26 is amended as follows:

(b) Agency and individual providers shall maintain [early intervention program] Early Intervention Program records for each eligible child for whom the provider is authorized to deliver service coordination services, evaluations, and early intervention services. The early intervention record shall be maintained in a confidential manner in accordance with section 69-

4.17(c) of this Subpart and shall document the performance of activities required to be completed by the provider on behalf of the child and family, including:

* * *

(12) documentation necessary for submission and substantiation of early intervention claims for payment by the municipality, third party payer, including the medical assistance program, and state aid reimbursement, including recipient identification (name, sex, and age of child); information on any insurance policy, plan, or contract under which the child has coverage; unit and specific type of service provided; date(s) of service; signature of parent or caregiver verifying the service was delivered; ICD diagnostic code for the condition or reasons for which care is provided; where applicable, the appropriate procedure code(s) for the service(s) provided; and, the name, address, and license, registration, certification, or where applicable, national provider identification number, of the professional delivering the service; and

* * *

Subdivision (c) of section 69-4.26 is amended as follows:

(c) Individual providers who directly render services to a child and family [, as a contractor to a municipality] or an approved provider agency, shall maintain the following:

(i) original signed and dated session notes, following each child and family contact, which shall include the recipient's name, date of service, type of service provided, time the provider began delivering therapy to child and end time, brief description of the recipient's progress made during the session as related to the outcome contained in the individualized family service plan, name, title, and signature of the person rendering the service, and date the session note was created; and

(ii) [signature of] a service log signed by the parent or caregiver which documents that the service was received by the child on the date and during the period of time as recorded by the provider.

Paragraph (2) of subdivision (c) of section 69-4.26 is amended as follows:

(2) A [municipality or] provider agency in contract with individual providers may request or require submission of copies of such providers' session notes for [municipal or] provider agency records.

Paragraph (1) and (2) of subdivision (c) of section 69-4.30 are amended as follows:

(1) Screening as defined in section 69-4.1[(11)] (an) of this Subpart and performed in accordance with section 69-4.8 of this Subpart.

* * *

(2) Multidisciplinary evaluation as defined in section 69-4.1[(m)] (n) of this Subpart and performed in accordance with section 69-4.8 of this Subpart.

* * *

Clause (b) of subparagraph (ii) of paragraph (2) of subdivision (c) of section 69-4.30 is amended as follows:

(b) Supplemental non-physician evaluation shall mean an additional evaluation for assessing the child's specific needs in one or more of the developmental domains in accordance with section 69-4.8(a)(4)(iv) of this Subpart. Information obtained from this evaluation shall provide direction

as to the specific early intervention services that may be required for the child. Supplemental non-physician evaluations may be conducted only by qualified personnel as defined in section 69-4.1 [(jj)] (al) of this Subpart.

Paragraph (3) of subdivision (c) of section 69-4.30 is amended as follows:

(3) Service coordination as defined in section 69-4.1[(1)(2)(xii)] (m)(2)(xii) of this Subpart.

* * *

Paragraph (4) of subdivision (c) of section 69-4.30 is amended as follows:

(4) Assistive technology as defined in section 69-4.1[(k)(2)(ii)] (l)(2)(ii) of this Subpart;

Regulatory Impact Statement

Statutory Authority:

The Early Intervention Program (EIP) is established in Title II-A of Article 25 of the Public Health Law (PHL) and implements Part C of the federal Individuals with Disabilities Education Act (IDEA). Title 34 of the Code of Federal Regulation (CFR), Part 303, regulates the implementation of Part C of IDEA and provides standards to ensure compliance with IDEA.

PHL § 2550(1) establishes the Department of Health (Department) as the lead agency responsible for the general administration and supervision of providers and services under the EIP. PHL § 2550(2) authorizes the Department to establish standards for evaluators, service coordinators, and providers of early intervention services and requires the Department to monitor agencies, institutions, and organizations providing early intervention services to ensure compliance with such standards. PHL § 2559-b authorizes the Commissioner of Health (Commissioner) to adopt regulations necessary to carry out the EIP.

Legislative Objectives:

The legislative objectives of the EIP include providing a coordinated, comprehensive array of services that enhance the development of infants and toddlers with disabilities, thereby minimizing the need for later special education services, in compliance with federal and state laws.

Needs and Benefits:

Revisions to federal regulations have been adopted, in 2011, at 34 CFR Parts 300 and 303 to implement the 2004 reauthorization of IDEA. These amendments require conforming changes in State regulation governing the EIP. In addition, amendments to PHL enacted as part of the 2012-2013 State Budget require conforming revisions to EIP regulations. See L. 2012, ch. 56 (Part A).

The proposed rule will conform the State's EIP regulations to federal regulations and amendments to PHL, in relation to: definitions; the referral process; provider approval; service coordination; evaluation and screening of a child, and assessment of the child and family; standards for service provision; individualized family service plans; monitoring of providers; persons in parental relation and surrogate parents; procedural safeguards; proceeding involving providers of early intervention services; third party payments; and content of child records.

The proposed amendments that conform the regulations to state and federal law, will assist the municipalities and EIP providers by reducing confusion regarding regulatory oversight of the program, by having all the EIP regulations up to date with current federal and state law.

In addition, the Department is proposing amendments to streamline conflict of interest provisions regarding evaluation and service providers, clarify qualifications of service coordination providers, and add licensed behavior analysts and certified behavior analyst assistants to the list of qualified personnel for the EIP. These amendments will result in improved capacity to provide services to children in the EIP in a more efficient manner.

The proposed regulations also address administrative actions, including establishing timely filing requirements on the EIP providers, which will improve reimbursement by third party payors and eliminate the payment of late claims except under extraordinary circumstances documented by the provider.

In addition, a reporting requirement that no longer applies to counties is eliminated and a technical correction was made regarding municipal tracking for children at risk of developmental delays.

Costs to Regulated Parties:

The proposed regulatory amendments incorporate revisions to federal regulations issued by the U.S. Department of Education (34 CFR Parts 300 and 303) and recent amendments to PHL. These proposed amendments will not impose an additional cost to regulated parties because regulated parties are already complying with the federal and PHL requirements.

The amendment to clarify qualifications of service coordination providers will not impose any additional costs to regulated parties because such amendment simply clarifies what is already required.

In addition, the amendments proposed to streamline conflict of interest provisions regarding evaluation and service providers will likely reduce costs to regulated parties because such amendments create administrative efficiencies by streamlining paperwork requirements.

The adding of licensed behavior analysts and certified behavior analyst assistants to the list of qualified personnel for the EIP will also not impose additional costs to regulated parties because such provisions address concerns related to continuity, capacity, and quality of care for children. EIP providers may achieve cost savings through this amendment because EIP providers may now utilize supervised, certified behavior analyst assistants to assist in the delivery of intensive behavior interventions for children with autism spectrum disorders.

Costs to the Agency, the State and Local Governments for the Implementation of and Continuing Compliance with the Rule:

The proposed regulatory amendments incorporate revisions to federal regulations issued by the U.S. Department of Education (34 CFR Parts 300 and 303) and recent amendments to PHL.

These proposed amendments will not impose an additional cost to the Agency, the State or Local Governments because such parties are already complying with the federal and PHL requirements.

The amendment to clarify qualifications of service coordination providers will not impose any additional costs to the Department, the State or local governments because such amendment simply clarifies what is already required.

In addition, the amendments proposed to streamline conflict of interest provisions regarding evaluation and service coordination providers will likely reduce costs to the Department, the State or local governments because such amendments create administrative efficiencies by streamlining paperwork requirements.

The proposed amendments that address administrative actions, including establishing timely filing requirements on the EIP providers, will yield cost savings for localities through improved reimbursement by third party payors and elimination of payment of late claims except under extraordinary circumstances documented by the provider.

The adding of licensed behavior analysts and certified behavior analyst assistants to the list of qualified personnel for the EIP will also not impose additional costs to the Department, the State or local governments because such provisions address concerns related to continuity, capacity, and quality of care for children.

Local Government Mandates:

The proposed rule does not impose any new duty upon any county, city, town, village, school district, fire district, or other special district.

Paperwork:

The proposed rules do not impose any new paperwork requirements upon the State or local governments.

Paperwork requirements will initially increase for payee providers of EIP services who will be required to enroll in one or more healthcare clearinghouses upon the request of the Department or the Department's State Fiscal Agent. However, enrollment in one or more healthcare clearinghouses will ultimately reduce the paperwork burden on payee providers by enabling receipt of third party payor remittance advices in a standardized format.

An annual report from counties to the Department that is no longer required and was removed from the regulations.

Duplication:

The proposed rules do not duplicate, overlap, or conflict with relevant rules and other legal requirements of the State or federal government.

Alternatives:

There are no alternatives to the majority of the proposed rules. Amendments to these sections are necessary to comply with recently adopted federal regulations and amendments to State law.

With respect to the amendments that would streamline conflict of interest provisions, the alternative of not proposing these regulations was considered. The Department ultimately decided to propose these amendments to address concerns related to continuity and quality of care for children, address personnel shortages in the EIP, and create administrative efficiencies in the program.

The Department presented the proposed regulations to the Early Intervention Coordinating Council (EICC) on September 15, 2016. No specific alternative proposals were recommended by the EICC. Recommendations for clarification of proposed rules in the areas of definitions, provider approval, multidisciplinary evaluation requirements, and conflict of interest provisions were considered and, where applicable, incorporated into the proposal.

Federal Standards:

The proposed amendments will be consistent with the federal standards at 34 CFR Parts 300 and 303.

Compliance Schedule:

The proposed rules will be effective immediately upon adoption. These proposed rules conform current regulation to existing requirements in federal regulations and federal and state statutes.

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

A Rural Area Flexibility Analysis for these amendments is not being submitted because amendments will not impose any adverse impact or significant reporting, record keeping, or other compliance requirements on public or private entities in rural areas. 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 amendments.

Statement in Lieu of 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.

SUMMARY OF ASSESSMENT OF PUBLIC COMMENT

The Department of Health (“Department”) received comments from various stakeholders including but not limited to Early Intervention (EI) provider agencies, EI associations, professional associations, members of the New York State Assembly, and an EI provider. The most common related to preventing conflicts of interest; screenings, multidisciplinary evaluations, and assessments; non-regulated insurance; and procedures to establish a child’s eligibility. The Department has revised the proposed rulemaking based on the comments received.

ASSESSMENT OF PUBLIC COMMENT

Eighteen public comments were received from various stakeholders including but not limited to Early Intervention (EI) provider agencies, EI associations, professional associations, members of the New York State Assembly, and an EI provider.

To comply with federal requirements under the Individuals with Disabilities Education Act (IDEA), the New York State Department of Health (Department) also convened public hearings. An in-person public hearing was held at the School of Public Health in Rensselaer, New York on August 17, 2017, and another hearing was held statewide by webinar on August 15, 2017. Two individuals presented comments and numerous representatives of various organizations attended the public hearing on August 17, 2017. Approximately 40 organizations and individuals participated in the public hearing convened by webinar on August 15, 2017. No comments were presented by the attendees of the webinar.

The comments and the Department's responses are summarized below. The Department has revised the proposed rulemaking based on the comments received.

COMMENT: A comment suggested that the proposed regulations should include detailed enforcement measures for providers who fail to comply with billing protocols.

RESPONSE: The Department will provide additional guidelines relating to enforcement related to billing protocols. No changes to the proposed regulations were made as a result of this comment.

COMMENT: A comment recommended clarifying the proposed confidentiality provisions by referencing specific federal regulations.

RESPONSE: As a result of this comment the Department has revised the proposed regulation.

COMMENT: Numerous comments were received regarding EI provider rates, including suggested rate adjustments.

RESPONSE: These comments are outside the scope of the current notice of proposed rulemaking. No changes to the proposed regulations were made as a result of this comment.

COMMENT: Numerous comments were received that objected to the conflict of interest (COI) provisions, in the current regulations and in the proposal. These comments included:

- Concern over additional burden on the Early Intervention Official (EIO), with no evidence of cost savings or less paper work.
- Statements that oversight is already implemented in the Early Intervention program (EIP) to prevent COI, including supervision by the Department and the LHD, and through the role of the Individualized Family Service Plan (IFSP) team. One commenter suggested that only the EIO should provide oversight.
- Support for the EIO making COI decisions rather than the State Commissioner of Health.
- Concern that EIOs cannot be assumed to be “unbiased” and that the COI provisions will not be applied consistently throughout the state.
- Concern that the COI provisions are not in conformance with Public Health Law (PHL) or Federal regulations.

- A suggestion for a checklist or criteria be developed to assist Service Coordinators (SC) in finding service providers.
- Multiple comments stated that the COI provisions would hinder the right of parents to choose a provider for their child. This loss would leave parents with providers that they are not comfortable with or that they do not have a relationship with.
- Complaints that there is no evidence to show that there is a problem with COI within the EIP, that EI providers are professionals, and that professional ethics demands an appropriate judgment of the health professional regarding evaluation and treatment decisions.
- A suggestion that new legislation should require SED to study COI among special needs preschool.
- Concern that the COI provisions could cause a loss of providers, and disrupt or delay services to children. The commenter suggested language to allow standing waivers from the COI provisions to not delay services in areas that are having staffing shortages.
- Concern that EI agencies may discontinue conducting evaluations.
- Concern that the EIO has discretion to approve an evaluator to provide EI services under any circumstances.

RESPONSE: As a result of these comments the Department has revised the COI to allow delivery of services by an evaluator who conducted an evaluation of a child, or an approved agency which employs or contracts with the evaluator, unless the Early Intervention Official provides documentation justifying that this would not be in the best interest of the child and family.

COMMENT: Commenters expressed concerns with the proposed changes to the definition of evaluator and multidisciplinary.

RESPONSE: As a result of these comments, the Department has revised the proposed regulation.

COMMENT: One commenter requested clarification on whether “multidisciplinary” means a person with two distinct licenses or a person such as a Speech Pathologist or Occupational Therapist who, per the NYSDOH Qualified Personnel Matrix, may conduct a special Instruction Evaluation without a certification in Special Instruction.

RESPONSE: As a result of these comments, the Department has revised the proposed regulation.

COMMENT: One commenter requested that language be added to the definition of Individual Provider to clarify when they may bill directly for EI Services.

RESPONSE: Payee providers are defined in section 69-4.1(aj)(3). Additional billing guidance will be issued as necessary. No change was made to the regulation in response to this comment.

COMMENT: Several commenters supported the proposal that allows an individual to be approved as both an evaluator and service coordinator.

RESPONSE: These comments are noted. No change was made to the regulation in response to this comment.

COMMENT: Numerous comments were received regarding the amendments to “multidisciplinary evaluation” or “multidisciplinary assessment” including the following:

- Concern that a provider will likely spend the same amount of time on an assessment as an evaluation.
- The parents should be notified of the right to request a multidisciplinary evaluation (MDE).
- One commenter requested clarification regarding when a full MDE is not necessary.
- One commenter requested clarification regarding whether an evaluator would be required to review the MDE during an assessment, if an evaluation was never conducted.
- Numerous comments requested clarification on the difference between a multidisciplinary evaluation and assessment.

RESPONSE: A multidisciplinary assessment must be conducted if the child has a diagnosed condition with a high probability of developmental delay and eligibility for a child has been established through a review of the child’s medical records rather than a MDE. A multidisciplinary assessment of the child must be conducted by qualified personnel and includes a review of the results of evaluation, personal observations of the child, identification of the child’s needs in each of the developmental areas and an assessment of the transportation needs of the child. However, if a child receives a multidisciplinary assessment rather than an MDE, the evaluator should notify the parent that the parent may still request an MDE if one was not conducted. No change was made to the regulation in response to this comment.

COMMENT: One commenter recommended that certain language from federal regulations be added to the regulation.

RESPONSE: The Department’s EIP regulations are consistent with federal regulations.

Guidance on interpretation will be provided as needed. No change was made to the regulation in response to this comment.

COMMENT: One commenter recommended that “sufficient timeframe” be replaced with “no later than 30 days” regarding timely submission of MDE.

RESPONSE: As a result of this comment the Department has revised the proposed regulation.

COMMENT: A commenter requested that the term “partial evaluation” be defined or replaced with “supplemental evaluation.”

RESPONSE: As a result of this comment the Department has revised the proposed regulation.

COMMENT: A commenter requested clarification regarding whether a multidisciplinary assessment is required only where eligibility for services has been determined based upon review of a child’s medical or other records.

RESPONSE: A multidisciplinary assessment is required only when the child has been referred to the EIP with a diagnosed condition with a high probability of resulting in developmental delay, and the child’s eligibility for early intervention services has been established based upon review of a child’s medical or other records. No change was made to the regulation in response to this comment.

COMMENT: Several comments were received that expressed concern over relying on medical records in place of conducting a multidisciplinary evaluation (MDE). The commenters asserted that this change would need to be accomplished statutorily, is not required by federal regulations,

and that not giving an MDE to a child with a diagnosed condition may result in less appropriate and effective service provisions.

RESPONSE: A medical record review may be used to establish a child's eligibility for the EIP when the child has a diagnosed condition with a high probability resulting in developmental delay. As part of the IFSP development process, a multidisciplinary assessment or supplemental evaluation(s) would be necessary to determine the specific services appropriate for the child and to develop an IFSP. A voluntary family assessment may be used to determine supports for the family to be included in the IFSP if the family wishes. No change was made to the regulation in response to this comment.

COMMENT: One commenter requested confirmation that a child's medical records may be used to establish eligibility to receive EI services, but that additional information will be used to develop the IFSP through a multidisciplinary assessment.

RESPONSE: This is correct. Additional information will be used to develop the IFSP through a multidisciplinary assessment, which includes a review of the results of evaluation, personal observations of the child, identification of the child's needs in each of the developmental areas, and assessment of the transportation needs of the child. No change was made to the regulation in response to this comment.

COMMENT: One commenter supported the Department's proposal authorizing the use of informed clinical opinion as an independent basis to establish a child's eligibility for EI services.

RESPONSE: This comment is noted.

COMMENT: Two commenters supported the amendment to the definition of “evaluation” to include the term “multidisciplinary,” and one supported the amendment that provides for the identification of the level of functioning of a child in all five development domains, consistent with federal regulations.

RESPONSE: This comment is noted. No change was made to the regulation in response to this comment.

COMMENT: Numerous comments were received that expressed concerns over allowing an MDE to be conducted by a single evaluator with more than one certification, rather than two or more people with difference certifications. Commenters suggested that the proposal exceeds federal standards, and that in actual practice a team approach has proven to be a better approach for MDEs.

RESPONSE: As a result of this comment the Department has revised the proposed regulation.

COMMENT: One commenter requested that the regulations clarify that there will be no reimbursement of providers that are not enrolled in the medical assistance program or where certification is pending.

RESPONSE: The Department will issue policy guidance to reinforce the Early Intervention Program requirements regarding reimbursement. No change was made to the regulation in response to this comment.

COMMENT: One commenter requested that the term “promptly” be clarified regarding how quickly a child’s insurance information must be sent from the service coordinator to the provider and EIO.

RESPONSE: The Department will issue policy guidance to clarify the timing for transmitting children’s insurance information. No change was made to the regulation in response to this comment.

COMMENT: A commenter suggested that “good cause” should be shown before extensions are granted on impartial hearings.

RESPONSE: The proposed amendments regarding impartial hearings are consistent with CFR section 303.447(c). No change was made to the regulation in response to this comment.

COMMENT: Numerous commenters rejected the proposed requirement that allows parents to consent to bill insurance policies that have annual or lifetime limits. These comments include requests for clarification and concern over parents not understanding their rights regarding consent.

RESPONSE: As a result of these comments the Department has revised the proposed regulation.

COMMENT: Several commenters suggested that Licensed Mental Health Counselors (LMHCs) should be allowed to be EI providers.

RESPONSE: The Department will take this comment under advisement. No change was made to the regulation in response to this comment.

COMMENT: One commenter asserted that, regarding the proposal’s marketing standards for EI providers, the word "municipality" should be stricken to reflect the shift of contractual arrangements to the State, away from municipalities.

RESPONSE: As a result of this comment the Department has revised the proposed regulation.

COMMENT: A commenter opposed the requirement that the EIO authorize EI Services.

RESPONSE: Service delivery in the EIP requires that services be authorized by the EIO or their designee. This is part of the Individualized Family Service Plan (IFSP) process and important to program integrity. No change was made to the regulation in response to this comment.

COMMENT: A commenter suggested that “a referral source” be added to the list of those who cannot receive incentives.

RESPONSE: As a result of this comment the Department has revised the proposed regulation.

COMMENT: A commenter recommended that 69-4.5(h)(2) not be repealed and instead be amended to notify municipalities when new providers become approved by the Department.

RESPONSE: The information the commenter is requesting is available on the Department’s website in the Central Directory, in accordance with federal regulations. No change was made to the regulation in response to this comment.

COMMENT: One commenter suggested that enforcement measures be included for providers who are not in compliance with enrollment in the Medical Assistance Program.

RESPONSE: Enrollment in the Medical Assistance Program is required for early intervention providers and is incorporated in the Provider Agreement. No change was made to the regulation in response to this comment.

COMMENT: Several comments were received regarding the requirement of a written referral from a primary health care provider as documentation for EI services. These comments included:

- Concern that obtaining the referral would be more burdensome on the parent than current PHL or could result in a delay of services to children.
- A request for clarification as to whether prescriptions for therapies would constitute a written referral.
- A request for clarification as to whether a parent would need a written referral to seek counseling.
- A comment that some municipalities have systems in place, such as hotlines, that have been successful in transmitting EI referrals.
- A suggestion that the PHL should be amended to require insurance companies to accept the IFSP as documentation of medical necessity.
- Concern that a doctor may not believe that a service is medically necessary.

RESPONSE: The Medicaid program and other payors currently require written orders to ensure that services to be furnished are medically necessary. Therefore, the proposed amendments will not create a burden on providers or parents. No change was made to the regulation in response to this comment.

COMMENT: Commenters proposed changes to the regulations relating to monitoring activities by municipalities, including adding language regarding the reporting of findings, recoupment of

funds, procedures to be followed, and language that allows municipalities to recover moneys from disallowances identified as a result of monitoring.

RESPONSE: The proposed amendments include information pertaining to fiscal audits conducted by municipalities of early intervention providers that furnish evaluations and provide early intervention services. Results of municipality-conducted fiscal audits must be reported to the Department for review and, if warranted, for adjustments in State aid reimbursement. No change was made to the regulation in response to this comment.

COMMENT: A commenter recommended the addition of language to further support municipal monitoring activities.

RESPONSE: Currently, municipalities have sufficient authority to monitor the EIP in its jurisdiction. No change was made to the regulation in response to this comment.

COMMENT: A commenter requested that the requirement for written requests for selecting new service coordinators be removed.

RESPONSE: The requirement for written requests ensures that such requests are documented in the child's record. However, this requirement does not preclude the municipality from contacting a family via telephone to discuss or facilitate such a change. No change was made to the regulation in response to this comment.

COMMENT: A commenter requested additional language supporting the efforts of the Department and municipalities to improve family outcomes, service coordination, and delivery of family-centered practices.

RESPONSE: The proposed regulations appropriately support efforts to improve family outcomes. No change was made to the regulation in response to this comment.

COMMENT: A commenter recommended clarification to ensure that third-party payers are reimbursed if a municipal audit demonstrates it is warranted.

RESPONSE: Audit findings conducted by municipalities may only result in recoupment of the municipal share of funds. Any audit irregularities potentially affecting other payers may be referred as appropriate. No change was made to the regulation in response to this comment.

COMMENT: A commenter asserted that the proposal's definition of ownership of an agency provider, as a 10% or greater interest in that agency, is too low, and suggested the use New York State Education Department's 25% standard instead.

RESPONSE: The Department believes the definition is appropriate. No change was made to the regulation in response to this comment.

COMMENT: Several comments were received suggesting that the additional referral form requirement for a primary referral source was burdensome and not necessary; should be optional with a referral by phone option; and should account for counties utilizing their own referral procedures.

RESPONSE: The intent of the proposed regulations is to establish a uniform referral form that captures the required information to streamline the referral and evaluation processes. While a municipality is not precluded from taking a referral by telephone, the call must be followed up with written documentation. No change was made to the regulation in response to this comment.

COMMENT: A commenter stated that the regulation implies that the new referral form establishes eligibility.

RESPONSE: The referral form alone does not establish eligibility for the EIP. Qualified professionals must review the child’s medical and other records, including the referral form, and make an eligibility determination based on their review, or refer the child for further evaluation as applicable. No change was made to the regulation in response to this comment.

COMMENT: Several commenters expressed concern regarding the consequences if an EIO did not consider the submitted information on a primary referral form, sufficient to document a suspicion of a disability. Some commenters suggested the removal of the requirement that the referral form must contain information sufficient to document the basis for the suspicion of a disability.

RESPONSE: The primary referral form must contain information required in each field. Forms received by an EIO with unclear or insufficient information will necessitate follow-up for clarification of the reason for referral, which would prolong the intake process. No change was made to the regulation in response to this comment.

COMMENT: One commenter requested clarification as to whether the new requirement for a primary referral form limits a parent’s right to request an evaluation.

RESPONSE: The requirement for a primary referral form does not limit the parent’s right to request an evaluation. Parents may request an evaluation, consistent with federal and State rules and regulations. No change was made to the regulation in response to this comment.

COMMENT: One commenter expressed concern that the proposed regulations could allow for an EIO to require an evaluator to conduct a screening.

RESPONSE: While an EIO, physician or other qualified personnel may recommend a screening be conducted, the decision to screen a child rests with the evaluator, and is contingent upon parental consent to conduct the screening. No change was made to the regulation in response to this comment.

COMMENT: One commenter expressed concerns that it may be difficult for providers and families to complete a screening, multidisciplinary assessment, and the development of an IFSP within 45 days of referral, and that this issue needs to be resolved through regulation.

RESPONSE: The Department will continue to monitor timeliness of service when screening use increases to ensure the 45-day window is not negatively impacted. Children referred with a diagnosed condition with a high probability of resulting in developmental delay would not receive both a screening and a multidisciplinary assessment (MDA) as a screening would not be necessary or permitted in this circumstance. No change was made to the regulation in response to this comment.

COMMENT: One commenter expressed concern that the evaluation process will become complicated by creating a new layer of optional screening prior to the Multidisciplinary Evaluation and may result in developmental conditions going undiagnosed. The commenter also claims that variations of this provision were proposed by the executive budget but rejected by both houses of the legislature.

RESPONSE: Currently, approximately 50 percent of children who have an MDE, which is resource and time intensive, are not eligible for the EIP. The proposed regulation will increase efficiency through effective use of screening, with parental consent, by streamlining the referral and intake process for children and families. Similar language was included in the proposed executive budget however a statutory change is not necessary to implement the proposed amendments. No change was made to the regulation in response to this comment.

COMMENT: One commenter supported the requirement that an EIO must recognize the appointment of a surrogate parent by an overseeing judge, but requested that the regulation clarify that a judge may only exercise this authority in cases where the appropriate conditions for appointing a surrogate parent exist.

RESPONSE: The Department can address this through guidance. No change was made to the regulation in response to this comment.

COMMENT: Several commenters requested changes to the requirement that reasonable effort must be made to find a person in a parental relationship before the EIO appoints a surrogate.

RESPONSE: As a result of this comment the Department has revised the proposed regulation.

COMMENT: One commenter recommended changes to section 69-4.17(d)(ii), relating to when parents receive a copy of the child's records.

RESPONSE: As a result of this comment the Department has revised the proposed regulation.

COMMENT: One commenter stated that the 90-day billing limit is unsustainable.

RESPONSE: The Department chose the 90-day billing time frame as the majority of early intervention claims are currently submitted within 90-days. This time frame is consistent with Medicaid program requirements. No change was made to the regulation in response to this comment.

COMMENT: One commenter suggested that an enforcement measure be included in the 90-day filing limit for providers, and two commenters requested that the regulations clarify the definition of “timely submission” and “extraordinary circumstances” with regard to the 90-day claiming limit. A commenter also requested that providers and affected municipalities be notified of approval or denial of a filing extension.

RESPONSE: The Department will issue guidance explaining the process for submitting late claims based on extraordinary circumstances. The Department’s fiscal agent will acknowledge such extensions, and the provider must ensure that their late submission comports with the Department’s guidance. No change was made to the regulation in response to this comment.

COMMENT: A commenter recommended the inclusion of language, similar to the EI provider Agreement, to require that Introduction to Service Coordination (ISC) training be secured prior to providing service to children and families in EI.

RESPONSE: Securing ISC training prior to providing service to children and families in the EI Program is currently required. There is a waiver process if circumstances prevent participation in ISC training prior to providing services. No change was made to the regulation in response to this comment.

COMMENT: One commenter suggested that the Department establish criteria concerning increased penalties for providers for non-compliance or deficiency within the Early Intervention Program.

RESPONSE: EI providers are expected to adhere to Department requirements as outlined in the provider agreement and regulation. The Department believes that the current penalty structure is appropriate. No change was made to the regulation in response to this comment.

COMMENT: One commenter suggested that the Department establish a fair hearings process and a right to appeal for the imposition of fines and suspension of provider approval.

RESPONSE: EI providers are expected to adhere to Department requirements as outlined in the provider agreement, regulation and current PHL and have the right to a fair hearing as afforded to them in State law and regulations. No change was made to the regulation in response to this comment.

COMMENT: Numerous commenters expressed concern regarding obtaining insurance information from the parent on a quarterly basis and upon the request of the EIO. The commenters suggested the proposed regulation was burdensome, creates more paperwork, and potentially delays services. Some commenters suggested changing the quarterly requirement to twice a year and including language to have the Service Coordinator (SC) ask parents to inform the SC if their insurance changes.

RESPONSE: The requirement to check for updated insurance information on a quarterly basis ensures that claims for EI services are submitted to the correct payor. Incorrect insurance information results in an added burden to providers and has the potential to delay provider

payments. Documentation of checks for updated insurance information may remain in the service coordinator's records but would only be transmitted to the provider or municipality if a change in coverage had occurred. No change was made to the regulation in response to this comment.

COMMENT: A commenter recommended that service coordinators be required to obtain insurance information within 14 days rather than periodically.

RESPONSE: As a result of this comment the Department has revised the proposed regulation.

COMMENT: A commenter recommended that the definition of "approval" in section 69-4.1 be revised to establish a more specific time period for the renewal of provider agreements.

RESPONSE: Provider approval coincides with the time frame of the provider agreements. No change was made to the regulation in response to this comment.

COMMENT: A commenter expressed concern with the requirement in section 69-4.5(e)(1)(iii) that marketing materials include a statement that all children must be referred to the municipality.

RESPONSE: This provision is consistent with the requirement for a single point of entry into the Early Intervention Program. Section 2542(3) of the PHL requires primary referral sources to refer any infant or toddler identified as suspected of having a disability, or at risk of having a disability, to the designated municipal official in the county in which the child resides, unless the parent objects to the referral. The proposed language has been revised for clarity.

COMMENT: Several commenters supported the requirement that SC's notify the Office of People with Developmental Disabilities (OPWDD) of children potentially eligible for OPWDD services, with the consent of parent. One commenter suggested that the parental consent should be in writing.

RESPONSE: The comment is noted and the Department has revised the proposed regulation regarding parental consent.

COMMENT: One commenter stated that the Early Intervention Coordinating Council did not have an opportunity to review and respond to the proposed regulations.

RESPONSE: The Department reviewed the proposed amendments with the Early Intervention Coordinating Council (EICC) in September 2016. In addition, two public forums were held, one on August 15, 2017 and one on August 17, 2017, both of which were available to EICC members.

COMMENT: Comments supported protections during the mediation process to ensure that the mediation process is not used to deny or delay a parent's right to an impartial hearing.

RESPONSE: Parent participation in mediation is voluntary and is part of the due process rights of the parent. No change was made to the regulation in response to this comment.