

Pursuant to the authority vested in the Commissioner of Health by Section 363-a(2) of the Social Services Law, paragraphs (6) and (7) of subdivision (f) of section 505.8 of Title 18 (Social Services) of the Official Compilation of Codes, Rules and Regulations of the State of New York are amended, to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

(6) Effective January 1, 2007, payment for nursing services provided to medically fragile children; and effective April 1, 2022, payment for nursing services provided to medically fragile adults; shall be at an enhanced rate which exceeds the provider's nursing services payment rate established by the Department of Health and approved by the State Budget Director under this subdivision.

([a]i) Medically fragile children means children who are at risk of hospitalization or institutionalization, but who are capable of being cared for at home if provided with appropriate home care services, including but not limited to case management services and continuous nursing services, and includes any children under the age of 21 receiving continuous nursing services pursuant to this section; medically fragile adults means adults who are at risk of hospitalization or institutionalization, but who are capable of being cared for at home if provided with appropriate home care services, including but not limited to case management services and continuous nursing services, and includes but is not limited to any individuals who previously qualified as a medically fragile child but who no longer meet the age requirements.

([b]ii) The enhanced rate shall be determined by applying thirty percent (30%) of the provider's approved rate in addition to the rate otherwise payable under this subdivision, which increase is at least equivalent to the reimbursement rate for the AIDS Home Care Program specified in section 86-1.46(b) of Title 10 of the Official Compilation of Codes, Rules and Regulations of the

State of New York. Licensed Home Care Services Agency (LHCSA) providers receiving reimbursement at the enhanced rate shall use such amounts only to recruit and retain nurses to ensure the delivery of nursing services to medically fragile children and medically fragile adults.

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

(7)(i) Fee-for-service reimbursement for provider directory participants.

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

(b) Effective April 1, 2022, the Commissioner of Health shall, subject to the provisions of paragraph (f)(6) of this section, and the provisions of paragraph (f)(7)(ii) of this section, and subject to the availability of federal financial participation, increase fees for the fee-for-service

reimbursement of private duty nursing services provided to medically fragile adults by fee-for-service private duty nursing services providers who enroll and participate in the provider directory pursuant to paragraph (f)(7)(ii) of this section, so such fees for reimbursement equal the benchmark payment designed to ensure adequate access to the service. In developing such benchmark, the Commissioner of Health may utilize the average 2018 Medicaid managed care payments for reimbursement of such private duty nursing services.

(ii) Provider directory for fee-for-service private duty nursing services provided to medically fragile children and medically fragile adults. The Commissioner of Health shall establish a directory of qualified providers for the purpose of promoting the availability and ensuring delivery of fee-for-service private duty nursing services to medically fragile children and [individuals transitioning out of such category of care] medically fragile adults. [Such transition period shall commence upon the individuals reaching age 21 and shall include any such individuals under the age of 23 receiving continuous nursing services pursuant to this section.] Qualified providers enrolling in the directory shall ensure the availability and delivery of such services to individuals in need of such services, and shall receive increased reimbursement for such services pursuant to paragraph f(7)(i)(a) and f(7)(i)(b) of this section. The directory shall offer enrollment to all private duty nursing services providers to promote and ensure the participation in the directory of all nursing services providers available to serve medically fragile children and medically fragile adults.

## **REGULATORY IMPACT STATEMENT**

### **Statutory Authority:**

Social Services Law (“SSL”) section 363-a and Public Health Law (“PHL”) section 201(1)(v) provide that the Department is the single state agency responsible for supervising the administration of the State’s medical assistance (“Medicaid”) program and for adopting such regulations, not inconsistent with law, as may be necessary to implement the State’s Medicaid program. The State’s Medicaid program includes nursing services authorized by SSL § 367-r, as amended by Chapter 56 of the Laws of 2020, and Chapter 57 of the laws of 2022. The Department may promulgate regulations necessary to carry out the program’s objectives, which includes the provision of and payment for nursing services. SSL § 367-r. The proposed amendment to the nursing services regulation is within the Department’s statutory rulemaking authority as it sets forth a required framework for the method of reimbursing private duty nursing services and establishing a provider directory for provision of nursing services to medically fragile adults.

### **Legislative Objectives:**

The Legislature’s objective in amending SSL § 367-r was to establish an increase to fees for fee-for-service (FFS) reimbursement of private duty nursing (PDN) services provided to medically fragile adults by FFS enrolled PDN service providers who additionally enroll and participate in the provider directory, commencing April 1, 2022, to ensure adequate access to the service. This will establish parity with the increased rates for medically fragile children authorized in 2020. In increasing the fees, the Commissioner of Health may utilize the average 2018 Medicaid managed care payments for reimbursement of such PDN services. The statutory amendment further provides for the Commissioner of Health to establish a directory of qualified providers for the purpose of promoting the availability and ensuring delivery of FFS PDN services to medically

fragile adults. Qualified providers enrolling in the directory are required to ensure the availability, delivery, and provision of PDN to those individuals who need the services in order to receive the increased reimbursement for the nursing services. The directory offers enrollment to all PDN services providers.

**Needs and Benefits:**

There are approximately 1,500 Medicaid members who access PDN services in the FFS program, one-third who are 21 years of age or older. These members often require long-term PDN services, starting as children and continuing into adulthood. Historically, there has been an industry-wide shortage of private duty nurses which the Department addressed by increasing pediatric nursing reimbursement, to attract enough qualified providers to staff these cases. In 2002, changes were enacted to provide a 3 percent increase to nurses serving pediatric cases. In 2007, the section 367-r of the Social Services Law was amended to provide an additional add-on to nurses attesting to their qualifications to serve medically fragile children. In the 2020-21 budget, a new program was created to address the difficulty staffing pediatric FFS nursing cases, due to the higher reimbursement offered by managed care organizations. A directory of private duty nurses was created to identify providers willing to provide services to FFS members up to the age of 23 with enhanced fees amounting phased in over three (3) years to achieve parity with Medicaid Managed Care (MMC) fees; and to extend the current add-on from age 21 to age 23 to allow an additional two year transitional period in which to locate nursing providers willing to accept the lower adult reimbursement amount in effect at that time. Under that legislation and policy, when medically fragile children reached 23 years of age, the increased provider reimbursement was no longer available, and consequently nurses were unwilling to continue providing the same services at a lower reimbursement amount to these members who had aged out of the enhanced pediatric reimbursement. The transitioning FFS adult cases were at further

disadvantage in trying to attract nurses, because the adult FFS base hourly fees were significantly lower than the MMC fees, creating further disincentive for nurses to serve adult FFS cases. The increases enacted to address the pediatric FFS staffing shortage caused an adult nursing shortage.

In November of 2021, to address this disparity, temporary increased fee reimbursement was made to providers of adult PDN under Section 9817 of the American Rescue Plan Act (ARPA). In the 2022-23 budget, Chapter 56 of the laws of 2022, amended section 367-r of the SSL to permanently eliminate the disparity between pediatric and adult PDN reimbursement, and establish a provider directory of available nurses to provide PDN services to medically fragile adults. This current regulatory change implements these 2022 statutory amendments.

**Costs to Regulated Parties:**

There will be no additional costs to private regulated parties because of the proposed regulation.

**Costs to State Government:**

As reflected in the State's fiscal year 2022-23 budget, there is additional increase of \$15.5 million (State share) in Medicaid expenditures anticipated because of the proposed regulation.

**Costs to Local Government:**

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

**Costs to the Department of Health:**

There will be no additional administrative cost to the Department of Health.

**Local Government Mandates:**

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

**Paperwork:**

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

**Duplication:**

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

**Alternatives:**

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

**Federal Standards:**

The proposed regulations do not exceed any minimum federal standards.

**Compliance Schedule:**

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

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**STATEMENT IN LIEU OF  
REGULATORY FLEXIBILITY ANALYSIS**

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



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

A Rural Area Flexibility Analysis for these amendments is not being submitted because the 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.

## ASSESSMENT OF PUBLIC COMMENT

The Department of Health (“Department”) received one comment, from Lauren George, supporting the proposed amendment of Section 505.8, *Nursing Service, Reimbursement*. The comment is summarized below with the Department’s response.

**COMMENT:** Ms. George stated, “As a Registered Nurse in an acute care Level I Trauma Center Hospital, I can very much advocate for the proposed rule Amendment of Section 505.8 of Title 18 NYCRR (Private Duty Nursing Services to Medically Fragile Adults).

**RESPONSE:** The Department concurs.