

Howard A. Zucker, M.D., J.D.  
Acting Commissioner of Health

**NEW YORK**  
*state department of*  
**HEALTH**

Sue Kelly  
Executive Deputy Commissioner

SEP 30 2014

National Institutional Reimbursement Team  
Attention: Mark Cooley  
CMS, CMCS  
7500 Security Boulevard, M/S S3-14-28  
Baltimore, MD 21244-1850

RE: SPA #14-033  
Long Term Care Facility Services

Dear Mr. Cooley:

The State requests approval of the enclosed amendment #14-033 to the Title XIX (Medicaid) State Plan for long term care facility services to be effective July 1, 2014 (Appendix I). This amendment is being submitted based on State regulations. A summary of the proposed amendment is provided in Appendix II.

This amendment is submitted pursuant to §1902(a) of the Social Security Act (42 USC 1396a(a)) and Title 42 of the Code of Federal Regulations, Part 447, Subpart C, (42 CFR §447).

1. The State of New York pays for long-term care services using rates determined in accordance with methods and standards specified in an approved State Plan following a public process which complies with §1902(a)(13)(A) of the Social Security Act.
2. (a) It is estimated that the changes represented by the estimated average payment rates for long-term care facility services will have no noticeable short-term or long-term effect on the availability of services on a statewide and geographic area basis.  
  
(b) It is estimated that the changes represented by the estimated average payment rates for long-term care facility services will have no noticeable short-term or long-term effect on care furnished.  
  
(c) It is estimated that the changes represented by the estimated average payment rates for long-term care facility services will have no noticeable short-term or long-term effect on the extent of provider participation.

In accordance with 42 CFR §447.272, New York assures that the aggregate Medicaid payments for inpatient services provided by nursing facilities for each prescribed category of providers does not exceed the upper payment limit for the particular category of providers.

A copy of the pertinent section of proposed State statute is enclosed for your information (Appendix III). A copy of the public notice of this proposed amendment, which was given in the New York State Register on May 28, 2014, is also enclosed for your information (Appendix IV). In addition, responses to the five standard funding questions are also enclosed (Appendix V).

If you have any questions regarding this matter, please do not hesitate to contact John E. Ulberg, Jr., Medicaid Chief Financial Officer, Division of Finance and Rate Setting at (518) 474-6350.

Sincerely,

A handwritten signature in black ink, appearing to read "Jason A. Helgerson". The signature is written in a cursive style with a large, looping initial "J".

Jason A. Helgerson  
Medicaid Director  
Office of Health Insurance Programs

Enclosures

cc: Mr. Michael Melendez  
Mr. Tom Brady

**TRANSMITTAL AND NOTICE OF APPROVAL OF  
STATE PLAN MATERIAL**

**FOR: HEALTH CARE FINANCING ADMINISTRATION**

1. TRANSMITTAL NUMBER:  
**14-033**

2. STATE  
**New York**

TO: REGIONAL ADMINISTRATOR  
HEALTH CARE FINANCING ADMINISTRATION  
DEPARTMENT OF HEALTH AND HUMAN SERVICES

3. PROGRAM IDENTIFICATION: **TITLE XIX OF THE  
SOCIAL SECURITY ACT (MEDICAID)**

4. PROPOSED EFFECTIVE DATE  
**July 1, 2014**

5. TYPE OF PLAN MATERIAL (Check One):

- NEW STATE PLAN       AMENDMENT TO BE CONSIDERED AS NEW PLAN       AMENDMENT

COMPLETE BLOCKS 6 THRU 10 IF THIS IS AN AMENDMENT (Separate Transmittal for each amendment)

6. FEDERAL STATUTE/REGULATION CITATION:  
**§1902(a) of the Social Security Act and 42 CFR 441.304(e) and  
447.205**

7. FEDERAL BUDGET IMPACT: (in thousands)  
a. FFY 07/01/14-09/30/14 **S 0**  
b. FFY 10/01/14-09/30/15 **S 0**

8. PAGE NUMBER OF THE PLAN SECTION OR ATTACHMENT:  
  
**Attachment 4.19-D, Part II: Pages 90, 91, 92, 93, 94, 95, 96, 97, 98,  
99, 100, 101, 102, 103, 104, 105**

9. PAGE NUMBER OF THE SUPERSEDED PLAN  
SECTION OR ATTACHMENT (If Applicable):

10. SUBJECT OF AMENDMENT:  
**7/1/14 ICF Rate Rationalization  
(FMAP = 50%)**

11. GOVERNOR'S REVIEW (Check One):

- GOVERNOR'S OFFICE REPORTED NO COMMENT       OTHER, AS SPECIFIED:  
 COMMENTS OF GOVERNOR'S OFFICE ENCLOSED  
 NO REPLY RECEIVED WITHIN 45 DAYS OF SUBMITTAL

12. SIGNATURE OF STATE AGENCY OFFICIAL:

13. TYPED NAME: **Jason A. Helgeson**

14. TITLE: **Medicaid Director  
Department of Health**

15. DATE SUBMITTED:

**SEP 30 2014**

16. RETURN TO:

**New York State Department of Health  
Bureau of Federal Relations & Provider Assessments  
99 Washington Ave – One Commerce Plaza  
Suite 1460  
Albany, NY 12210**

**FOR REGIONAL OFFICE USE ONLY**

17. DATE RECEIVED:

18. DATE APPROVED:

**PLAN APPROVED – ONE COPY ATTACHED**

19. EFFECTIVE DATE OF APPROVED MATERIAL:

20. SIGNATURE OF REGIONAL OFFICIAL:

21. TYPED NAME:

22. TITLE:

23. REMARKS:

**Appendix I**  
**2014 Title XIX State Plan**  
**Third Quarter Amendment**  
**Amended SPA Pages**































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receiving the rate computation or within ninety days of the first day of the rate period in question, whichever is later.

**(10) Specialized template populations.**

- (a) Notwithstanding any other provisions of this Subpart, rates for individuals identified by OPWDD as qualifying for specialized template populations funding shall be as follows:
- (b) For individuals initially identified as qualifying for specialized template populations funding between November first, two thousand eleven and March thirty-first, two thousand fourteen

<u>Residential – Specialized Level of Care</u>	
<u>Region</u>	<u>Gross Annual Funding Allocation Per Individual – Operating Only</u>
<u>Downstate</u>	<u>\$166,400</u>
<u>Upstate</u>	<u>\$150,500</u>

<u>Residential – Highly Complex Level of Care</u>	
<u>Region</u>	<u>Gross Annual Funding Allocation Per Individual – Operating Only</u>
<u>Downstate</u>	<u>\$189,500</u>
<u>Upstate</u>	<u>\$171,500</u>

<u>Residential – Auspice Change</u>	
<u>Region</u>	<u>Gross Annual Funding Allocation Per Individual – Operating Only</u>
<u>Downstate</u>	<u>\$136,500</u>

TN #14-033

Supersedes TN NEW

Approval Date \_\_\_\_\_

Effective Date \_\_\_\_\_

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<u>Upstate</u>	\$123,500
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<u>Day Services – Specialized Level of Care</u>	
<u>Region</u>	<u>Gross Annual Funding Allocation Per Individual – Operating Only</u>
<u>Downstate</u>	\$41,730
<u>Upstate</u>	\$37,562

<u>Day Services – Highly Complex Level of Care</u>	
<u>Region</u>	<u>Gross Annual Funding Allocation Per Individual – Operating Only</u>
<u>Downstate</u>	\$46,433
<u>Upstate</u>	\$43,063

(c) For individuals initially identified as qualifying for specialized template populations funding after March thirty-first, two thousand fourteen

<u>Residential – Highly Complex Level of Care</u>	
<u>Region</u>	<u>Gross Annual Funding Allocation Per Individual – Operating Only</u>
<u>Downstate</u>	\$189,500
<u>Upstate</u>	\$171,500

<u>Residential – Auspice Change</u>	
<u>Region</u>	<u>Gross Annual Funding Allocation Per Individual – Operating Only</u>
<u>Downstate</u>	\$136,500
<u>Upstate</u>	\$123,500

TN #14-033

Supersedes TN NEW

Approval Date \_\_\_\_\_

Effective Date \_\_\_\_\_

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<u>Day Services – Highly Complex Level of Care</u>	
<u>Region</u>	<u>Gross Annual Funding Allocation Per Individual – Operating Only</u>
<u>Downstate</u>	<u>\$46,433</u>
<u>Upstate</u>	<u>\$43,063</u>

**(11) Severability.** If any provision of this Subpart or its application to any person or circumstance is held to be invalid, the remainder of this Subpart and the application of that provision to other persons or circumstances will not be affected.

TN #14-033

Approval Date \_\_\_\_\_

Supersedes TN NEW

Effective Date \_\_\_\_\_

**Appendix II  
2014 Title XIX State Plan  
Third Quarter Amendment  
Summary**

**SUMMARY**  
**SPA #14-033**

This State Plan Amendment proposes to implement rate rationalization to bring Intermediate Care Facilities for the Developmental Disabilities (ICF/DD) to cost effective July 1, 2014.

**Appendix III  
2014 Title XIX State Plan  
Third Quarter Amendment  
Authorizing Provisions**

Finally, since reimbursement for therapeutic leave days will commence July 1, 2014, this section needs to be amended to exclude reference to therapeutic leave days.

**RESPONSE:** The Department has made system changes in order to allow providers to be paid for therapeutic leave days as they are reported. With respect to the remainder of the comment, the Department has decided that no change to the regulations is necessary at this time in response to the comment. However, the comment will be taken under advisement for consideration when subsequent amendments are made to the regulation.

10. **COMMENTS:** 86-10.6(b)(3) Vacant Bed Days. The last sentence in this section needs to be amended as follows: "Providers will be paid for vacant bed days at seventy five percent of the daily operating rate as calculated pursuant to paragraph (1) of subdivision (c) of section 641-1.3 of this Subpart up to a maximum of ninety consecutive vacancy days per vacancy".

We also recommend that the following two items be added to the proposed regulations:

- The regulations should provide for at least a 90 day correction period for errors made in the computation of the rate.
- Template funding rates is clearly not addressed in the Waiver regulations. We recommend that the funding of template rates under Balancing Incentive Program (BIP) funds be specifically included in the rate setting methodology.

**RESPONSE:** The vacant bed language is correct as written. The maximum allowable vacant bed days for the initial period will be limited to a maximum of ninety days per bed.

• OPWDD regulations 14 NYCRR 686.13(h) already allow for a 90-day review period for any rates promulgated. This regulation when promulgated will not supersede the previous approved regulation.

• Template funded individuals are not included in the new methodology as yet. These individuals will continue to receive their current level of funding until 10/1/15 at which time consideration will be given to the needs of these individuals.

**NOTICE OF ADOPTION**

**Rate Rationalization – Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DDs)**

**I.D. No.** HLT-15-14-00012-A

**Filing No.** 487

**Filing Date:** 2014-06-10

**Effective Date:** 2014-07-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Addition of Subpart 86-11 to Title 10 NYCRR.

**Statutory authority:** Social Services Law, section 363-a; and Public Health Law, section 201(1)(v)

**Subject:** Rate Rationalization – Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DDs).

**Purpose:** To establish new rate methodology effective July 1, 2014.

**Text or summary was published in the April 16, 2014 issue of the Register, I.D. No. HLT-15-14-00012-P.**

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqa@health.state.ny.us

**Assessment of Public Comment**

1. **COMMENT:** 86-11.3(c)(1)(xxvi) State Wide Budget Neutrality Adjustment - In addition to describing the calculation of the Budget Neutrality Adjustment, the actual value of the adjustment should be published as part of the regulation in order for providers to be able to calculate its rate from reading the regulations. Also, the Budget Neutrality Adjustment is permanently fixed because it is calculated using the sum of all provider rate sheets "in effect on June thirtieth, two thousand fourteen." This language should be modified to indicate that this value will be revised annually to include the value of services expansion and other funding increases added after June 30, 2014.

**RESPONSE:** The Department has decided that no change to the regulation is necessary at this time in response to the comment. However, the comment will be taken under advisement for consideration when subsequent amendments are made to the regulation.

2. **COMMENT:** 86-11.2(e) (1) (2) (3) (4) DOH Regions - The use of DOH regions to align providers is predicated on the anticipated move to managed care. However, since the predominance of funding for people

with developmental disabilities is in fact related to OPWDD funded services and not health or other long term care services we question not using regions that are driven by OPWDD services.

**RESPONSE:** Although DOH regions are slightly different from OPWDD regions, the Department of Health feels that the regions are closely aligned and are appropriate for use in the methodology. The regions were chosen to align with long term managed care regions currently being used by the Department.

3. **COMMENT:** 86-11.2(i) Initial Period - The "initial period" is defined as "July first, two thousand fourteen through December thirty-first, two thousand fourteen for providers reporting on a calendar year basis or July first, two thousand fourteen through June thirtieth, two thousand fifteen for providers reporting on a fiscal year basis". However, in 641-1-6 (Transition Period and reimbursement), there is no reference to the "initial period" but rather to the "base operating rate" which as defined in 641-1.2(d) has a different meaning.

**RESPONSE:** The "initial period" will be July one, two thousand fourteen through June thirty, two thousand fifteen and refers to the first year of operation under the new methodology, while the "base operating rate" refers to the reimbursement amount calculated by dividing the annual reimbursement by applicable annual units of service in effect on June thirtieth, two thousand fourteen. The Department has decided that no change to the regulation is necessary at this time in response to the comment. However, the comment will be taken under advisement for consideration when subsequent amendments are made to the regulation.

4. **COMMENT:** 86-11.3(c)(1)(i-vi) Regional Averages - The regulations refer to various "regional averages" for various components of the operating rate and the method for calculating such "regional averages" and the resulting values should be published as part of the regulations in order for providers to be able to calculate its rate from reading the regulation.

**RESPONSE:** The regional averages will be posted on the Department's website and therefore will be accessible to providers.

5. **COMMENT:** 86-11.3(c)(4)(i-iv) Capital Component - The capital thresholds included in the proposed regulations are more than 6 years old (adopted April 1, 2008) and minimally should be made current. This issue is especially problematic for the downstate regions of the State where affordable housing continues to be a significant problem. There needs to be a provision for amendments to the cap and threshold values for capital acquisitions, new construction and leases to be updated on at least a periodic basis based upon an appropriate housing index.

The State and the nonprofit providers have made significant investments in real property to support thousands of individuals yet there is no provision to exceed the threshold values:

- especially as homes are reviewed by OPWDD against fire safety guidelines that could require providers to make significant capital investments to meet code;

- for developing new homes that can satisfactorily meet the needs of individuals with significant challenging behaviors and/or medical issues; and

- in order to meet money follows the person goals which require 4 persons or less to live together.

The inclusion of language that "DOH may retroactively adjust the capital component" in (i) General Principles is problematic for providers whose capital cost has already been approved by OPWDD in that the draft regulation appear to permit DOH to reduce capital reimbursement approved under proposes to limit reimbursement at the lower of the amount Subpart 745-6 if it exceeds reimbursement under the new proposed regulations. The language in the proposed regulation needs to be amended as follows "(i) General principles." Capital costs shall be included in the rate at the lower of the amount determined pursuant to Subpart 635-6 of this Title or thresholds as determined pursuant to subparagraph (iv) of this paragraph. However, capital costs approved by OPWDD prior to July 1, 2014 through the formal prior property approval process shall only be subject to Subpart 635-6 of this Title. DOH may retroactively adjust the capital component to reflect capital costs approved pursuant to Subpart 635-6 or pursuant to this paragraph.

The language in "(ii) Initial rate" needs to be amended to make clear that the new regulations on capital costs only apply to new residential and day programs and that the new proposed capital cost rules do not apply to capital costs approved by OPWDD prior to July 1, 2014 and such capital costs shall only be subject to Subpart 635-6.

The short term interest time limit ("k") should be increased from 12 months to 18 months without limitation between acquisition or renovation phases given the delays in receiving prior property approvals as well the delays in the ability to obtain building permits from local municipalities.

**RESPONSE:** The Department has decided that no change to the regulation is necessary at this time in response to the comment. However, the comment will be taken under advisement for consideration when subsequent amendments are made to the regulation.



6. COMMENTS: 86-11.6 Trend Factor - The regulation states that "for years in which DOH does not update the base year, subject to the approval of the Director of the Budget, DOH may use a compounded trend factor to bring base year costs forward to the appropriate rate period". However, the regulation fails to describe the use of a trend factor when the base year is being updated.

RESPONSE: The Departments language as stated is correct. Trend factors will not be applied in years in which the methodology is rebased.

7. COMMENTS: The regulations should provide for at least a 90-day correction period for errors made in the computation of the rate.

RESPONSE: OPWDD regulations 14 NYCRR 686.13(h) already allow for a 90-day review period for any rates promulgated. This regulation when promulgated will not supersede the previous approved regulation.

## Department of Motor Vehicles

### NOTICE OF ADOPTION

#### Temporary License Plates

I.D. No. MTV-16-14-00004-A

Filing No. 483

Filing Date: 2014-06-10

Effective Date: 2014-06-25

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of section 21.2 of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a) and 404(3)

**Subject:** Temporary License Plates.

**Purpose:** To permit the issuance of Emergency plates to State and Local governments.

**Text or summary was published in** the April 23, 2014 issue of the Register, I.D. No. MTV-16-14-00004-EP.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Michelle Seabury, Department of Motor Vehicles, 6 ESP, Room 522A, Albany, NY 12228, (518) 474-0874, email: mseabury@dmv.ny.gov

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Dealer Plate Program

I.D. No. MTV-16-14-00005-A

Filing No. 484

Filing Date: 2014-06-10

Effective Date: 2014-06-25

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of section 78.23(a) of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a) and 420-a

**Subject:** Dealer Plate Program.

**Purpose:** Waives one year waiting period for new dealers to enter the Dealer Plate Issuance Program.

**Text or summary was published in** the April 23, 2014 issue of the Register, I.D. No. MTV-16-14-00005-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Michelle Seabury, Department of Motor Vehicles, 6 ESP, Room 522A, Albany, NY 12228, (518) 474-0874, email: mseabury@dmv.ny.gov

#### Assessment of Public Comment

The agency received no public comment.

### PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### Waiver of Skills Test for Certain Out of State Licensees Applying for a NYS License

I.D. No. MTV-25-14-00011-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** This is a consensus rule making to amend section 8.2(a) of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a), 502(4)(b) and 508

**Subject:** Waiver of skills test for certain out of state licensees applying for a NYS license.

**Purpose:** Skills test waived for out of state applicants for a NYS license if out of state license is not expired more than two years.

**Text of proposed rule:** Subdivision (a) of section 8.2 is amended to read as follows:

(a) if the applicant was formerly a resident of another state, the District of Columbia, Guam, Puerto Rico, the Canal Zone or a province of Canada and has become a resident of this State, and is or was, within [one year] two years prior to the date of application for a New York license, the holder of a valid license issued by the motor vehicle authority of his former residence.

**Text of proposed rule and any required statements and analyses may be obtained from:** Michelle Seabury, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 522A, Albany, NY 12228, (518) 474-0871, email: mseabury@dmv.ny.gov

**Data, views or arguments may be submitted to:** Ida L. Traschen, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 522A, Albany, NY 12228, (518) 474-0871, email: itraschen@dmv.ny.gov

**Public comment will be received until:** 45 days after publication of this notice.

**This rule was not under consideration at the time this agency submitted its Regulatory Agenda for publication in the Register.**

#### Consensus Rule Making Determination

The proposed amendment will allow a person moving to New York State to obtain a New York State driver's license without taking the driving skills test if such person submits an out-of-state license that is not expired more than two years. Currently, if such out-of-state license is expired more than one year, the applicant for the New York State license must take the skills test. The knowledge test is currently waived if the out-of-state license is not expired more than two years.

This amendment is consistent with the Vehicle and Traffic Law (VTL) and current regulations. Section 502(6) of the VTL provides that a New York State license may be renewed as long as such license has not been expired for more than two years. In addition, a road test is waived, under Part 8.2(b), if an applicant is applying for an original license after revocation of a New York State license, provided that application is made within two years from the date the person was last validly licensed. Consistent with this two year rule, it follows that a person from another state who is applying for a New York State license should have the road test waived if his or her out-of-state license has not been expired more than two years.

This proposed rule will be beneficial to customers moving to New York State and will reduce the number of road tests that the DMV must offer.

Since the proposed amendment is consistent with current law and regulations regarding the renewal of licenses and the waiver of road tests, a consensus rule is appropriate.

#### Job Impact Statement

A Job Impact Statement is not submitted with this rule because it will not have an adverse impact on job creation or development.

**Department of Health**

**EMERGENCY/PROPOSED  
RULE MAKING  
NO HEARING(S) SCHEDULED**

**Rate Rationalization—Intermediate Care Facilities for Persons with Developmental Disabilities**

LD. No. HLT-28-14-00015-EP

Filing No. 571

Filing Date: 2014-07-01

Effective Date: 2014-07-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Proposed Action:** Amendment of Subpart 86-11 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 201

**Finding of necessity for emergency rule:** Preservation of public health, public safety and general welfare.

**Specific reasons underlying the finding of necessity:** The emergency adoption of these amendments is necessary to protect the health, safety, and welfare of individuals receiving services in the OPWDD system.

The amendments are necessary to properly implement a new rate methodology for ICFs/DD, OPWDD and DOH made commitments to the Centers for Medicare and Medicaid Services (CMS) in order to qualify for substantial federal funding, including its commitment to implement the new ICF/DD rate methodology in July, 2014. To fulfill its commitment, OPWDD and DOH adopted proposed regulations to implement the new methodology effective July, 2014 through the regular rulemaking process. However, OPWDD and DOH became aware that substantive changes were necessary to properly implement the methodology subsequent to the proposal of the regulations, which was too late to incorporate the amendments through the regular rulemaking process. The State Administrative Procedure Act (SAPA) sets forth timeframes for the promulgation of regulations (including a mandatory public comment period) and prohibits the adoption of rules containing substantive changes in the terms of proposed regulations. SAPA requires additional rulemaking activities to make substantive changes through the regular rulemaking process which delays the effective date. The only way that the substantive amendments necessary to properly implement the new methodology could be promulgated at the same time that the original regulation is adopted is through the emergency rulemaking process.

If DOH did not promulgate these regulations on an emergency basis, DOH would fail to meet its commitment to CMS and would risk loss of the substantial federal funding that is contingent on this commitment. The loss of this federal funding could jeopardize the health, safety, and welfare of individuals receiving services in the OPWDD system, as without it, individuals would be at risk of receiving services that are inadequate or insufficient in meeting their needs.

**Subject:** Rate Rationalization—Intermediate Care Facilities for Persons with Developmental Disabilities.

**Purpose:** To amend the new rate methodology effective July 1, 2014.

**Substance of emergency/proposed rule (Full text is posted at the following State website: [www.health.ny.gov](http://www.health.ny.gov)):** This emergency/proposed regulation amends the newly-adopted 10 NYCRR subpart 86-11 concerning the rate methodology for ICF/DD facilities. (Note that the text of the proposed regulation published in the spring of 2014.) The changes include the following:

- 1) A clarification that the "initial period" of the methodology is July 1, 2014 through June 30, 2015.
- 2) A clarification in the definitions of the "regional average general and administrative component" and the "provider average general and administrative component" to specify that the administrative allocation for the base year is agency administration, that depreciation is equipment depreciation and that program administration property is not part of the formula.
- 3) A clarification in the definition of "provider direct care hours", "provider salary clinical hours" and the "provider contracted clinical hours" to indicate that the formulas are based on rate sheet capacities rather than billed units and that the formula quotient is multiplied by rate sheet capacities rather than units.
- 4) A change in the "provider facility reimbursement" definition to

indicate that depreciation is equipment depreciation and that the formula utilizes provider rate sheet capacities rather than billed units or units.

5) Clarification to the "alternative operating component" to indicate that this section applies to providers that did not submit a cost report or submitted a cost report that was incomplete. The previous language applied the section in a more narrow set of circumstances, i.e., only when providers did not provide services during the base year.

6) The "day program services component" was revised by changing the word "and" to "plus" to add clarity to the intent of the section.

7) A note was added to the "capital component" section to indicate that the capital component language was not applicable to capital approved by OPWDD prior to July 1, 2014.

8) The "capital component" section was changed to clarify that start-up costs for ICFs/DD may be amortized over a one-year period beginning with certification.

9) Numerous changes were made to the capital threshold schedules to add clarity including the elimination of references to non-ICF/DD programs; the elimination of the non-relevant "architect/engineer design fee schedule for ground-up construction", and to standardize definitions, including that of soft costs.

10) A clarification was made to the "transition to new methodology" section to indicate that the described base rate is specifically the base operating rate.

11) A "rate correction" section was added to specify the policies and procedures for the correction of arithmetic or calculation errors.

12) A new section is added governing funding for those individuals identified as qualifying for template or auspice funding. The funding for ICF/DD services provided to these individuals will be determined in accordance with that section instead of the methodology that is generally applicable.

13) Various non-substantive technical corrections were added to correct inconsistencies, grammatical errors, etc.

**This notice is intended:** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire September 28, 2014.

**Text of rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: [regsqa@health.state.ny.us](mailto:regsqa@health.state.ny.us)

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

**This rule was not under consideration at the time this agency submitted its Regulatory Agenda for publication in the Register.**

**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.

**Legislative Objective:**

These emergency/proposed regulations further the legislative objectives embodied in sections 363-a of the Social Services Law and section 201(1)(v) of the Public Health Law. The emergency/proposed regulations amend the newly adopted methodology for reimbursement of Intermediate Care Facilities for Persons with Developmental Disabilities (ICFs/DD).

**Needs and Benefits:**

The Office for People With Developmental Disabilities (OPWDD) and the Department of Health (DOH) recently finalized a new reimbursement methodology, which complements existing OPWDD requirements concerning ICFs/DD, to satisfy commitments included in OPWDD's transformation agreement with the federal Centers for Medicare and Medicaid Services (CMS).

Prior to final adoption of the rule, OPWDD and DOH became aware of amendments that were needed to properly implement the new methodology. Many of the corrections and clarifications contained in these amendments are in response to concerns noted in public comments about the proposed regulations and questions submitted to OPWDD and DOH about the new methodology. The changes in these amendments clarify the new methodology and contain corrections that are necessary for its proper implementation.

**Costs:**

Costs to the Agency and to the State and its Local Governments: The emergency/proposed regulations are necessary to enable the State to properly implement the new methodology. There are no material fiscal changes that result from the amendments compared to the intent of the original methodology. The amendments, building on the original method-

ology, will be cost neutral to the state as the overall monies expended for such services will remain constant.

The new methodologies do not apply to the state as a provider of services.

There will be no savings or costs to local governments as a result of these regulations because pursuant to Social Services Law sections 365 and 368-a, either local governments incur no costs for these services or the State reimburses local governments for their share of the cost of Medicaid funded programs and services.

**Costs to Private Regulated Parties:**

The emergency proposed regulations will amend the new reimbursement methodology for ICFs/DD and facilitate its proper implementation. Application of the new methodology (as amended) is expected to result in increased rates for some non-state operated providers and decreased rates for others. However, overall reimbursement to providers will not be changed. The amendments themselves may result in a minor increase or decrease in rates for some providers, but will have no overall impact on provider rates because budget neutrality is built into the new methodology.

**Local Government Mandates:**

There are no new requirements imposed by the rule on any county, city, town, village, school, fire or other special district.

**Paperwork:**

The emergency/proposed amendments are not expected to increase paperwork to be completed by providers.

**Duplication:**

The emergency/proposed regulations do not duplicate any existing State or federal requirements that are applicable to services for persons with developmental disabilities.

**Alternatives:**

The amendments include a statement to clarify that the provisions of the capital component do not apply to capital approved by OPWDD prior to July 1, 2014. This statement reflects the intent of the original regulations although this was not explicit in the original language. The statement is included in the amendments in response to concerns raised that the regulations could be construed to permit the prior approval of capital to be subject to inappropriate review. OPWDD and DOH considered the inclusion of the statement to be unnecessary but after consideration decided to include it to make its intent explicit and the regulations clear.

**Federal Standards:**

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

**Compliance Schedule:**

DOH is adopting the amendments on an emergency basis effective July 1, 2014 to coincide with the final adoption of the proposed regulations which it is amending. During the spring of 2014, DOH and OPWDD trained providers on the new methodology as amended and issued rate sheets, guidance documents and training materials which reflected the anticipated amendments. DOH expects to finalize the amendments as soon as possible within the timeframes established by the State Administrative Procedure Act.

**Regulatory Flexibility Analysis**

**Effect of Rule:**

The emergency/proposed amendments make changes to the newly-adopted regulations that revise the rate methodology for ICF/DD facilities. The changes in these amendments clarify the new methodology and contain corrections that are necessary for its proper implementation.

Many of the amendments correct technical errors in the original text or add clarifying material. In general, these provisions do not change the impact of the original regulations on providers, including providers that are small businesses, or have positive impacts. However, several technical amendments make changes to the original text that may translate into a minor increase or decrease in the rates and may have a modest negative impact on some small business providers of ICFs/DD. For example, the change from "billed units" to "rate sheet capacities" in the methodology may result in immaterial positive or negative differences in the final rates. These immaterial differences will not impose an adverse economic impact on small business providers and in any case, the overall funding to providers will remain the same because of budget neutrality. The amendments do not change any requirements for record-keeping or other compliance requirements that are contained in the original regulations.

Finally, these amendments do not impose any requirements on local governments, and (as noted in the Regulatory Impact Statement) have no fiscal impact on local governments.

**Compliance Requirements:**

There are no new compliance activities imposed by these amendments.

**Professional Services:**

No additional professional services will be required as a result of these regulations and the regulations will not add to the professional service needs of local governments.

**Compliance Costs:**

There are no compliance costs since there are no new compliance activities imposed by these amendments.

**Economic and Technological Feasibility:**

The emergency/proposed amendments do not impose on regulated parties the use of any new technological processes.

**Minimizing Adverse Impact:**

Some of the technical changes may affect the rates either positively or negatively. DOH does not expect that these immaterial differences would impose an adverse economic impact on small business providers. In any case, the overall funding to providers will remain the same because of budget neutrality.

DOH has reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. The emergency/proposed regulations minimize adverse economic impact in several ways. First, the anticipated fiscal impact of the amendments is expected to be slight because only minor changes in the rates result from the technical amendments. In addition, DOH notes that the rate sheets distributed to providers in June anticipated the promulgation of these amendments by incorporating the technical changes into the methodology underlying the rate calculation, and providers have therefore already been developing plans to implement the new rate methodology based on the incorporation of these amendments. Therefore, providers will not need to make any additional adjustments in fiscal plans as a result of the minor fiscal impact of the amendments.

The amendments also contain several changes that will be positive for providers. The amendments include changes which explicitly state that the new provisions related to the calculation of the capital component do not apply to capital approved prior to July 1, 2014. While this reflects the original intention and is not a change per se, the inclusion of this specific language helps providers to keep faith with financial institutions who can rest assured that anticipated capital reimbursement will continue to be received for projects. In addition, new language was added to explicitly address the correction of arithmetic or calculation errors. In the event that such errors occur, providers have a referenced mechanism to request corrections of these errors. Finally, related to the calculation of the capital component, new items were added to the chart of thresholds for "soft costs," such as security and clerk of the works, which will permit the reimbursement of these items up to the threshold amount. This corrects the inadvertent exclusion of these items in the original proposed regulations.

**Small Business and Local Government Participation:**

OPWDD and DOH met with representatives of providers to discuss the new methodology (including provider concerns) at numerous meetings beginning in August 2013, including the New York State Association of Community and Residential Agencies (NYSACRA) (which represents some providers that have fewer than 100 employees). OPWDD and DOH posted material about the original proposed regulations on the respective agencies' websites, and OPWDD notified all providers affected by proposed regulation of the materials posted. In addition, OPWDD and DOH conducted six training sessions for providers by videoconference throughout NYS during April-May 2014. As noted above, DOH sent each provider affected by the new methodology the rate sheet and documents that described the impact of the new regulations (including the emergency/proposed amendments) on the specific provider. OPWDD and DOH received public comments on the original regulations and answered numerous questions. Many of the changes contained in these emergency/proposed amendments were made as a result of the concerns raised by the regulated parties through one or more of these vehicles. OPWDD is also posting materials about these emergency/proposed amendments on its website and is notifying all affected providers about the availability of these materials.

**Rural Area Flexibility Analysis**

**Effect on Rural Areas:**

Description of the types and estimation of the number of rural areas in which the rule will apply: OPWDD services are provided in every county in New York State. 43 counties have a population of less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. Additionally, 10 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga, Orange and Saratoga.

The emergency/proposed amendments make changes to the newly-adopted regulations that revise the rate methodology for ICF/DD facilities. The changes in these amendments clarify the new methodology and contain corrections that are necessary for its proper implementation.

Many of the amendments correct technical errors in the original text or

add clarifying material. In general, these provisions do not change the impact of the original regulations on providers, including providers in rural areas, or have positive impacts. However, several technical amendments make changes to the original text that may translate into a minor increase or decrease in the rates and may have a modest negative impact on some providers of ICFs/DD in rural areas. For example, the change from "billed units" to "rate sheet capacities" in the methodology may result in immaterial positive or negative differences in the final rates. These immaterial differences will not impose an adverse economic impact on providers in rural areas and in any case, the overall funding to providers will remain the same because of budget neutrality. The amendments do not change any requirements for recordkeeping or other compliance requirements that are contained in the original regulations.

Finally, these amendments do not impose any requirements on local governments, and (as noted in the Regulatory Impact Statement) have no fiscal impact on local governments, including local governments in rural areas.

**Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:**

There are no additional reporting, recordkeeping and other compliance requirements and professional services imposed by these amendments. The Department does not anticipate that regulated entities will require new professional services as a result of this new rule.

**Costs:**

The proposed rule imposes no new costs on regulated entities.

**Minimizing Adverse Impact:**

As noted above, some of the technical changes may affect the rates either positively or negatively. DOH does not expect that these immaterial differences would impose an adverse economic impact on providers in rural areas. In any case, the overall funding to providers will remain the same because of budget neutrality.

DOH has reviewed and considered the approaches for minimizing adverse impact on providers in rural areas as suggested in section 202-bb(2)(b) of the State Administrative Procedure Act. The emergency/proposed regulations minimize adverse economic impact in several ways. First, the anticipated fiscal impact of the amendments is expected to be slight because only minor changes in the rates result from the technical amendments. In addition, DOH notes that the rate sheets distributed to providers in June anticipated the promulgation of these amendments by incorporating the technical changes into the methodology underlying the rate calculation, and providers have therefore already been developing plans to implement the new rate methodology based on the incorporation of these amendments. Therefore, providers will not need to make any additional adjustments in fiscal plans as a result of the minor fiscal impact of the amendments.

The amendments also contain several changes that will be positive for providers. The amendments include changes which explicitly state that the new provisions related to the calculation of the capital component do not apply to capital approved prior to July 1, 2014. While this reflects the original intention and is not a change per se, the inclusion of this specific language helps providers to keep faith with financial institutions who can rest assured that anticipated capital reimbursement will continue to be received for projects. In addition, new language was added to explicitly address the correction of arithmetic or calculation errors. In the event that such errors occur, providers have a referenced mechanism to request corrections of these errors. Finally, related to the calculation of the capital component, new items were added to the chart of thresholds for "soft costs," such as security and clerk of the works, which will permit the reimbursement of these items up to the threshold amount. This corrects the inadvertent exclusion of these items in the original proposed regulations.

**Rural Area Participation:**

Participation of public and private interests in rural areas: OPWDD and DOH met with representatives of providers to discuss the new methodology (including provider concerns) at numerous meetings beginning in August 2013, including providers in rural areas, such as NYSARC, the NYS Association of Community and Residential Agencies, NYS Catholic Conference, and CP Association of NYS. OPWDD and DOH posted material about the original proposed regulations on the respective agencies' websites, and OPWDD notified all providers affected by the proposed regulation of the materials posted. In addition, OPWDD and DOH conducted six training sessions for providers by videoconference throughout NYS during April-May 2014. As noted above, DOH sent each provider affected by the new methodology the rate sheet and documents that described the impact of the new regulations (including the emergency/proposed amendments) on the specific provider. OPWDD and DOH received public comments on the original regulations and answered numerous questions. Many of the changes contained in these emergency/proposed amendments were made as a result of the concerns raised by the regulated parties through one or more of these vehicles. OPWDD is also

posting materials about these emergency/proposed amendments on its website and is notifying all affected providers about the availability of these materials.

**Job Impact Statement**

A Job Impact Statement is not being submitted for this emergency/proposed rulemaking because this rulemaking will not have a substantial adverse impact on jobs or employment opportunities.

The emergency/proposed amendments make changes to the newly-adopted regulations that revise the rate methodology for ICF/DD facilities. The changes in these amendments clarify the new methodology and contain corrections that are necessary for its proper implementation.

As noted in the Regulatory Flexibility Analysis, the emergency/proposed amendments have no adverse economic impact on providers and do not impose any changes to record-keeping or other compliance activities. While some providers may experience an immaterial adverse economic impact as a result of these amendments, the effect on jobs as a result is expected to be negligible. In any case, other providers would experience a commensurate slight increase in funding and there will be no overall economic impact (and jobs impact) because the methodology is budget neutral. The amendments are therefore expected to have no impact on jobs and employment opportunities with providers.

As noted in the emergency justification, if these amendments were not promulgated, a substantial amount of federal funding would be lost. This loss of substantial funds could adversely impact jobs and employment opportunities in New York State. This potential adverse effect on jobs and employment opportunities is avoided by the promulgation of these amendments.

**EMERGENCY/PROPOSED  
RULE MAKING  
NO HEARING(S) SCHEDULED**

**Rate Rationalization for Community Residences/Individualized Residential Alternatives Habilitation and Day Habilitation**

I.D. No. HLT-28-14-00016-EP

Filing No. 572

Filing Date: 2014-07-01

Effective Date: 2014-07-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Proposed Action:** Amendment of Subpart 86-10 of Title 10 NYCRR

**Statutory authority:** Public Health Law, section 201

**Finding of necessity for emergency rule:** Preservation of public health, public safety and general welfare

**Specific reasons underlying the finding of necessity:** The emergency adoption of these amendments is necessary to protect the health, safety, and welfare of individuals receiving services in the OPWDD system.

The amendments are necessary to properly implement a new rate methodology for residential habilitation provided in Individualized Residential Alternatives (IRAs) and Community Residences (CRs) and day habilitation services. OPWDD and DOH made commitments to the Centers for Medicare and Medicaid Services (CMS) in order to qualify for substantial federal funding, including its commitment to implement the new rate methodology in July, 2014. To fulfill its commitment, OPWDD and DOH adopted proposed regulations to implement the new methodology effective July, 2014 through the regular rulemaking process. However, OPWDD and DOH became aware that substantive changes were necessary to properly implement the methodology subsequent to the proposal of the regulations, which was too late to incorporate the amendments through the regular rulemaking process. The State Administrative Procedure Act (SAPA) sets forth timeframes for the promulgation of regulations (including a mandatory public comment period) and prohibits the adoption of rules containing substantive changes in the terms of proposed regulations. SAPA requires additional rulemaking activities to make substantive changes through the regular rulemaking process which delays the effective date. The only way that the substantive amendments necessary to properly implement the new methodology could be promulgated at the same time that the original regulation is adopted is through the emergency rulemaking process.

If DOH did not promulgate these regulations on an emergency basis, DOH would fail to meet its commitment to CMS and would risk loss of the substantial federal funding that is contingent on this commitment. The loss of this federal funding could jeopardize the health, safety, and welfare of individuals receiving services in the OPWDD system, as without it,

**Appendix V**  
**2014 Title XIX State Plan**  
**Third Quarter Amendment**  
**Long Term Care Services**  
**Responses to Standard Funding Questions**

**LONG TERM CARE SERVICES**  
**State Plan Amendment #11-85**

**CMS Standard Funding Questions**

The following questions are being asked and should be answered in relation to all payments made to all providers reimbursed pursuant to a methodology described in Attachment 4.19-D of this SPA. For SPAs that provide for changes to payments for clinic or outpatient hospital services or for enhanced or supplemental payments to physician or other practitioners, the questions must be answered for all payments made under the state plan for such service.

- 1. Section 1903(a)(1) provides that Federal matching funds are only available for expenditures made by States for services under the approved State plan. Do providers receive and retain the total Medicaid expenditures claimed by the State (includes normal per diem, supplemental, enhanced payments, other) or is any portion of the payments returned to the State, local governmental entity, or any other intermediary organization? If providers are required to return any portion of payments, please provide a full description of the repayment process. Include in your response a full description of the methodology for the return of any of the payments, a complete listing of providers that return a portion of their payments, the amount or percentage of payments that are returned and the disposition and use of the funds once they are returned to the State (i.e., general fund, medical services account, etc.).**

**Response:** OPWDD's ICF/DD rate setting methodology includes a 5.5 percent provider assessment on the gross receipts of the ICF/DD facility. This assessment is authorized by Public Law 102-234, Section 43.04 of the New York State Mental Hygiene Law, Federal Medicaid regulations at 42 CFR 433.68, and Attachment 4.19-D, Part II page 29. All voluntary and State-operated ICF/DDs are subject to this provider assessment. Using "Authorization to Withhold" forms submitted by voluntary providers, OPWDD recoups the assessment from the ICF/DD Medicaid payment before the payment is sent to the voluntary provider. This assessment is deposited into a fund called "Assessments for Business Organizations."

For State operated ICF/DDs, the legislature appropriates an amount for payment of the assessment. Periodically, funds from this appropriation are used to pay the assessment. These amounts are deposited into the general fund of the State Treasury.

Aside from the assessments, providers receive and retain all the Medicaid payments for ICF/DD services.

- 2. Section 1902(a)(2) provides that the lack of adequate funds from local sources will not result in lowering the amount, duration, scope, or quality of care and services available under the plan. Please describe how the state share of each type of Medicaid payment (normal per diem, supplemental, enhanced, other) is funded. Please describe whether the state share is from**

**appropriations from the legislature to the Medicaid agency, through intergovernmental transfer agreements (IGTs), certified public expenditures (CPEs), provider taxes, or any other mechanism used by the state to provide state share. Note that, if the appropriation is not to the Medicaid agency, the source of the state share would necessarily be derived through either through an IGT or CPE. In this case, please identify the agency to which the funds are appropriated. Please provide an estimate of total expenditure and State share amounts for each type of Medicaid payment. If any of the non-federal share is being provided using IGTs or CPEs, please fully describe the matching arrangement including when the state agency receives the transferred amounts from the local governmental entity transferring the funds. If CPEs are used, please describe the methodology used by the state to verify that the total expenditures being certified are eligible for Federal matching funds in accordance with 42 CFR 433.51(b). For any payment funded by CPEs or IGTs, please provide the following:**

- (i) a complete list of the names of entities transferring or certifying funds;**
- (ii) the operational nature of the entity (state, county, city, other);**
- (iii) the total amounts transferred or certified by each entity;**
- (iv) clarify whether the certifying or transferring entity has general taxing authority: and,**
- (v) whether the certifying or transferring entity received appropriations (identify level of appropriations).**

**Response:** For services delivered by non-State operated ICF/DDs, the source of funds for the State share is tax revenues appropriated to OPWDD. When these ICF/DDs bill eMedNY for payment, the Department of Health covers the non-federal share expenditures in the first instance. Throughout the state fiscal year, such expenditures are applied against OPWDD appropriations by the transfer of funds from OPWDD to DOH. The total amount to be transferred from OPWDD to DOH for non-State operated ICF/DDs for the current fiscal year is projected at approximately \$331.7 million.

State tax revenues are the source of funds for the state share for ICF/DD services delivered by OPWDD. The non-federal share is appropriated to the DOH and paid to OPWDD along with the federal share. The total amount appropriated to DOH for ICF/DD services delivered by OPWDD and projected to be transferred to OPWDD for the current fiscal year is approximately \$1.2 billion.

- 3. Section 1902(a)(30) requires that payments for services be consistent with efficiency, economy, and quality of care. Section 1903(a)(1) provides for Federal financial participation to States for expenditures for services under an approved State plan. If supplemental or enhanced payments are made, please provide the total amount for each type of supplemental or enhanced payment made to each provider type.**

**Response:** No supplemental or enhanced payments are made in the ICF/DD program.

- 4. For clinic or outpatient hospital services please provide a detailed description of the methodology used by the state to estimate the upper payment limit (UPL) for each class of providers (State owned or operated, non-state government owned or operated, and privately owned or operated). Please provide a current (i.e., applicable to the current rate year) UPL demonstration.**

**Response:** This plan amendment does not concern clinic or outpatient hospital services.

- 5. Does any governmental provider receive payments that in the aggregate (normal per diem, supplemental, enhanced, other) exceed their reasonable costs of providing services? If payments exceed the cost of services, do you recoup the excess and return the Federal share of the excess to CMS on the quarterly expenditure report?**

**Response:** As this SPA relates to payments to NFP providers, and not governmental providers, this question is not applicable.