

Office for People With Developmental Disabilities Guidance Document - Certificate of Need Process

Pursuant to Mental Hygiene Law §16.09, an agency must get approval from the Commissioner of the Office for People With Developmental Disabilities (OPWDD) before commencing construction of any public or private facility which requires an operating certificate (OC). Construction includes building, substantial acquisition, alteration, reconstruction, improvement, extension or modification of a facility.

Pursuant to OPWDD regulations at 14 NYCRR 620¹, the Certificate of Need (CON) process requires an individual, association, corporation, or public or private agency to submit an application to OPWDD for authorization to proceed with projects described in the regulation. CONs ensure that all program development projects requiring an OC from OPWDD are included in the plans of statewide, regional and county authorities. It also provides the Commissioner with the opportunity to modify the parameters of the proposed program, including type, capacity, or even continued inclusion in the statewide plan. The process expedites the review of projects that are in conformance with the statewide plan to allow for the development and operation of needed and appropriate programs without undue delay.

A CON is needed for **Administrative Review Projects** and **Substantial Review Projects**, defined below. The OPWDD CON process **does not** apply to any:

- Proposed action by a place/entity required to receive approval from the Commissioner of Health or the Public Health Council under Article 28 of the Public Health Law.
- Place/entity that does not require an Operating Certificate under MHL Article 16.
- Facility listed in MHL §13.17 (this includes the DDSOs).²

Administrative Review Projects³

Administrative review projects include any of the following proposed actions:

1. Development or operation of a community residence;
2. Development of all other new programs requiring an OC, and whose acquisition, construction or capital expenditure for physical plant and/or equipment/assets in support of the programs, or a combination thereof, is estimated to be under \$600,000;
3. Acquisition, construction, or capital expenditure for physical plant and/or equipment/assets in support of an existing program, or a combination thereof, estimated to be under \$600,000 but more than \$30,000;
4. Relocation of an existing program or part thereof which involves acquisition of property and/or renovation or reconstruction by purchase costing less than \$600,000; or which involves acquisition of property and/or renovation or reconstruction by other means which, if acquired by purchase, would have cost less than \$600,000;

¹ 14 NYCRR Part 620 is included in the Appendix.

² 14 NYCRR 620.1.

³ 14 NYCRR 620.5.

5. Expansion or contraction of specific services currently offered;
6. Any change of ownership of a facility, program, or program site whether by purchase, donation, merger or otherwise;
7. An increase or decrease in certified capacity of an existing program;
8. An incorporation of a corporation, the certificate of which requires the approval of the Commissioner;
9. Any amendment of a certificate of incorporation of an existing corporation extending its powers of purpose to enable it to operate a new program or facility;
10. Amendment of a certificate of incorporation which does not add or delete the power to provide services for persons who are developmentally disabled;
11. The conversion of a program operated exempt from Mental Hygiene Law Article 16 to a program that is subject to Mental Hygiene Law Article 16; and
12. The termination of an existing program.

The proposed project is included in the planning process as evidenced by inclusion in OPWDD's operational planning documents. If a proposed project is inconsistent with operational planning documents, it shall be considered to be a substantial review project.

Substantial Review Projects⁴

Substantial review projects include one or more of the following:

1. Any acquisition of property (regardless of whether it allows for any change in service or certified capacity) by purchase which will or is expected to cost \$600,000 or more, including costs of any renovation or reconstruction; or by other means which, if acquired by purchases, would have cost \$600,000 or more including costs of any renovation or reconstruction;
2. Any construction or capital expenditure which is estimated to cost \$600,000 or more, regardless of whether it allows for any change in service or certified capacity; and
3. Unless all involved planning bodies concur that the project should proceed and agree to waive the substantial review process, the process also applies to any administrative review project which, subsequent to the issuance of the original certification of need, but prior to issuance of an operating certificate: costs \$600,000, or more; exceeds certified capacity by 10% or 5 persons, whichever is greater; or changes the proposed class of operating certificate.

The CON Process

Prior to formal submission of an application for a CON, and as early as possible, the applicant must consult with applicable local authorities, local governmental units and the appropriate health systems agency to ensure that the proposed project is needed and appropriate. If a project should, at the time it moves forward to completion, result in an increase in cost or in client capacity or change in the class of OC approved at the time of CON, it is necessary to submit an amended application for the CON to address the change(s).

⁴ 14 NYCRR 620.6.

Submitting an Application for a CON⁵

An application for certification of need for a new program or construction is made in writing in the form and format approved by OPWDD. The applicant attests to their awareness of the requirements for operation in accordance with an OC and the obligation to be certified prior to initiating operation and must provide any other information required.

OPWDD advises the applicant of the procedures and schedules a review at the time of the submission of the application. All corporations that intend to provide services under the auspices of OPWDD must hold a Certificate of Incorporation attesting to their authorization to deliver specified services to individuals who are developmentally disabled. No application for approval of a Certificate of Incorporation or Certificate of Amendment will be approved unless:

1. The appropriate certification of need application has been submitted;
2. The application, reviews, and proposed certificate show:
3. Compliance with all legal requirements applicable to the corporation or proposed corporation; compliance with applicable regulations of the Commissioner; and
4. The members of the board of directors, officers, owners, partners and stockholders are of such character, experience, competence and standing as to give reasonable assurance of their ability to conduct the affairs of the program in the public interest and so as to provide proper care for the persons to be served by the proposed facility or program.

The Commissioner may approve a certificate of incorporation or certificate of amendment of a certificate of incorporation prior to the completion of any of the procedures required if they are satisfied that the requirements will be fulfilled prior to the granting of any State aid.

Review of CON Application for Administrative Review Projects⁶

The review of a CON application for completeness must be done within 10 business days of receipt. Within an additional five business days, the applicant is notified by certified mail of any lack of information, which must be provided by the applicant within 30 calendar days or such additional time as may be requested by the applicant and approved by the Commissioner. Failure to provide the information in the designated time constitutes a withdrawal of the application. If no additional information is requested within this period, the application is considered complete. Once there is a determination of receipt of a complete application, the applicant is notified that the review has begun.

A copy of a complete application proposing an administrative review project is immediately forwarded by certified mail to the office of the appropriate local governmental unit which is then given 10 business days from receipt in which to review the application and make recommendations. No final action may be taken until the time period has expired or opinions have been rendered by the local governmental unit, whichever is earlier.

⁵ 14 NYCRR 620.7.

⁶ 14 NYCRR 620.9.

A copy of a complete application for a new program or construction, which is expected to be more than \$30,000 but less than \$600,000 and is funded by Medicaid, must be immediately forwarded by certified mail to the appropriate regional health systems agency. The agency will then have 10 business days from receipt in which to review the application and make recommendations to OPWDD. No final action will be taken until this time period has expired or an opinion has been rendered by the health systems agency, whichever is earlier.

A complete application for a new program or construction which is proposed to be funded through Medicaid will be immediately forwarded to the designated State health planning and development agency by certified mail and that agency will have 10 business days from receipt to review the application and advise OPWDD of its opinion as to whether the CON application is acceptable. No final action can be taken on whether the application is acceptable until this time period has expired, or an opinion has been rendered by the designated agency, whichever is earlier.

After this time period, but within 30 business days of determination of receipt of a complete application, the Commissioner may approve or disapprove the application without further review, as long as it is an administrative review project.

If a local governmental unit or health systems agency considers a proposed administrative review project to be inconsistent with OPWDD's operational planning documents, and the issues cannot be resolved between the objecting party and OPWDD, a hearing may be held.⁷ If the charge of inconsistency is sustained by the hearing process, the proposal will be considered a substantial review project.

Review of CON for Substantial Review Projects⁸

The Commissioner must review the application for a CON for completeness within 10 business days of receipt. Within an additional five business days, the applicant is notified by certified mail of any missing information, which must be provided within 30 calendar days or such additional time as may be requested by the applicant and approved by the Commissioner. Failure to provide this information within the designated time period constitutes a withdrawal of the application. If no additional information is requested, the application is considered complete.

Upon determination of receipt of a complete application for a Medicaid funded program, the Commissioner immediately notifies the applicant that review has begun and provides copies of the application to the designated State health planning and development agency, the appropriate health systems agency, and the appropriate local governmental unit. Each party has 60 business days to review the application and submit findings and recommendations to the Commissioner unless these planning bodies have reached an agreement with OPWDD and agree to waive the substantial review process.

Upon receipt of a complete application, OPWDD provides a copy of the application to the office of the appropriate local governmental unit. Within 90 business days of receipt of the complete

⁷ See the procedure outlined in 14 NYCRR 602 outlined later in this document.

⁸ 14 NYCRR 620.10.

application, the Commissioner makes a decision on the application based on a review of recommendations by OPWDD staff, the report of the health systems agency, and the advice of the designated State health planning and development agency and the local governmental unit.

Review of all applications for CON must take into consideration consistency with OPWDD's operational planning documents, current and accurate State budget information, current need data, and the standard criteria of:

- (1) The character and competence of the operator(s);
- (2) The fiscal viability and cost-effective feasibility; and
- (3) The probability of operating in conformance with regulation.

The Commissioner may: approve the project and authorize it to proceed with development; approve the project, but deny the requested capital funding; approve the project, but deny operating funds through Federal or State programs; conditionally approve the project, with or without authorization to proceed; or disapprove the project.

Disapproval of a Project⁹

When the Commissioner intends to disapprove a project, the applicant, and the health systems agency, the designated State health planning and development agency and the local governmental unit must be notified. OPWDD must provide a report of findings and the basis for the decision, and afford the applicant an opportunity to be heard before disapproving the project.

If the Commissioner intends to disapprove a project that the health systems agency or the local governmental unit has recommended for approval, s/he must notify the health systems agency, the local governmental unit and the applicant, of the intended action and provide all parties with copies of the report. These parties are afforded the opportunity to be heard in a hearing.¹⁰ If a hearing is requested, it is held in accordance with the regulations of the Commissioner.

If the Commissioner intends to approve a project over a recommendation of disapproval by the health systems agency or the local governmental unit, s/he must notify that agency and the applicant of her/his intent. All parties are provided with copies of the findings and basis of decision, and the health systems agency and the local governmental units are afforded an opportunity to be heard before taking the action.

When a decision is made, the Commissioner notifies the applicant and all reviewers. The applicant is also advised of the procedure for submitting additional information necessary for the development of a program prior to consideration for the granting of an OC.

⁹ 14 NYCRR 620.11

¹⁰ See the procedure outlined in 14 NYCRR 602 and outlined later in this document.

Terms of approval for acquisition of property or construction¹¹

Within 120 calendar days of the granting of a CON for a project involving construction and/or acquisition, the applicant must provide for review, acceptable architectural design development plans. Failure to provide this information within this time frame constitutes withdrawal from the proposed project, unless the applicant has formally contacted OPWDD and received approval for an extension.

Within 150 calendar days of the approval of the design development plans, the applicant must submit final drawings and specifications including cost estimates. Failure to provide this information within this time frame constitutes a withdrawal from the proposed project unless a request for an extension has been made and approved. The applicant may not enter into a contract for construction until notified in writing of the approval of final drawings and specifications.

The applicant has to request prior approval of any changes relating to the scope of the project, the cost of construction of major items or equipment proposed during construction. When completed, an onsite inspection of the construction and equipment must be made to assure that it agrees with the prior approval.

Hearing Process

Request for Hearing¹²

The proposed action will be final, unless a written request for a hearing is made to the Commissioner within 10 days of service of the notice of the proposed action. The request must include a declaration of the issues alleged to be involved and documentation of the party's position as to each issue it has identified.

OPWDD issues to the parties a notice of hearing and a statement of issues. The statement of issues must contain: a reference to the particular sections of the statutes and regulations at issue, if any; and a specific statement of the matters asserted or at issue. The Commissioner must consider those requests for amendments to the statement of issues which are received at least 7 days prior to the initial hearing date.

A notice of appeal or hearing includes: notice of the date, time, place of the hearing, or procedure to perfect the appeal and the name and address of the hearing officer; a statement of the legal authority and jurisdiction under which the proceeding is to be held; notice that failure to appear at a hearing or to process an appeal as directed may result in a recommendation of default by the hearing officer; and notice that interpreter services are available at no charge, upon written request within a reasonable time prior to any scheduled hearing.

¹¹ 14 NYCRR 620.12.

¹² 14 NYCRR 602.2 and 602.3.

Notice of hearing and statement of issues must be served on the parties at least 10 days prior to any scheduled hearing date. Except for good cause shown, requests for adjournments must be made to the hearing officer at least three days prior to the commencement of the hearing or date any written submission is due. Other adjournments may be granted by the hearing officer for good cause and with due regard for the convenience of all parties. All parties are notified in writing of adjournments to a specified date, time and place.

Except as otherwise provided, a party may serve on the hearing officer, the individual or division of OPWDD issuing the statement of issues and all other parties to the proceeding an answer or responsive pleading signed by that party. The answer or responsive pleading specifies which allegations are admitted, denied and those that the party has insufficient knowledge or information upon which to form a belief.

Hearing Officer

The hearing officer must be an attorney at law who is a member in good standing of the New York State bar. No hearing officer may preside who has any interest or bias with respect to the matter involved in the proceeding.¹³

The hearing officer has the power to: rule upon requests, including requests for adjournments; set adjourned dates, times and places of hearings; administer oaths and affirmations; issue subpoenas requiring the attendance and testimony of witnesses and the production of books, records, contracts, papers and other evidence, provided that each party shall effect his or her own service and bear the cost of appropriate fees; examine witnesses; admit and exclude evidence and witnesses; limit the number of times any witness may testify, repetitious examination or cross-examination, and the amount of corroborative or cumulative testimony; request and/or hear oral argument; request written arguments required by this Part or in addition to those required by this Part; make maximum use of preliminary steps to refine issues and to encourage resolution by the parties; and do all acts and take all measures necessary for the maintenance of order and the efficient conduct of the hearing and processing of an appeal.

At any time prior to the issuance of the Commissioner's determination, the hearing officer may direct the parties to appear for a conference to consider matters which will tend to simplify the issues or expedite the proceeding. Such conferences may be conducted by telephone.

The parties are not prohibited from holding conferences on their own initiative to consider matters which will tend to simplify the issues or expedite the proceeding. Prior to the issuance of the Commissioner's determination, the parties may enter into a stipulation for the resolution of any or all issues. The Commissioner may issue a consent order upon agreement or stipulation of

¹³ Hearing officers may be employees of OPWDD and such employment and responsibilities thereof, without an additional showing, shall not be considered an interest, bias or failure to qualify under this section. However, hearing officers who are employees of OPWDD shall not have responsibilities which involve the legal representation of OPWDD's position in any administrative hearings or appeals.

the parties. A consent order has the same force and effect as the Commissioner's determination issued after a hearing.

The Appeal

A party may appear in person or be represented by an employee or member of its board of directors, if such representative is designated in writing by the board of directors to represent the party, or by an attorney who must file a written notice of appearance.

In the event a party or its representative does not appear at a scheduled hearing, or fails to meet other deadlines or the hearing officer without prior notice of inability to appear, the hearing officer may recommend to the Commissioner a default decision against that party.

The party requesting the hearing presents its case first. The burden of proof is on the party requesting the hearing to demonstrate that the Commissioner's decision to approve or disapprove the application for the CON is not supported by facts and conclusions which address the standards for approval.

Conduct of Hearing and Evidence

The hearing officer is not bound by the rules of evidence observed by courts, except that the rules of privilege recognized by law must be respected. Each party has the right to make opening and closing statements, present evidence and witnesses, and cross-examine witnesses. Adjournments may be granted by the hearing officer for good cause and with due regard for the convenience of all parties. All parties must be notified in writing of adjournments to a specified date, time and place. Unless otherwise ordered in the public interest by the Commissioner, hearings are open to the public. Each witness is sworn or given an affirmation.

If evidence at a hearing relates to the identity, condition or clinical record of an individual, the hearing officer excludes all others from the room except parties to the proceeding, their counsel, the witness being examined, others essential to the presentation of its case by a party and any others the presence of whom is consented to by all parties, the hearing officer and the person whose identity, condition, or clinical record is being examined. The record of this proceeding will not be available to anyone outside the OPWDD, other than a party to the proceeding or their counsel, except by order of a court.

All parties have the right to make oral arguments before a hearing officer. Such oral argument may be curtailed in the discretion of the hearing officer, provided that a party shall be given the opportunity to submit his or her argument in writing.

A verbatim recording of the proceedings is made by OPWDD. A transcription of the recording shall be made available to any party requesting it upon payment of the cost of transcription. If more than one party requests a transcript, the cost may be allocated between the parties.

Memoranda of law and legal briefs may be required by the hearing officer, or may be submitted by any party. The hearing officer will fix the time within which memoranda of law or legal briefs

may be filed. The party submitting the memoranda of law or legal briefs must provide copies to all parties.

The record of the appeal must include: notice of proposed action; the initial request of appeal; the notice of hearing or appeal; statement of issues; answer and any other responsive pleadings; letter appointing hearing officer; motions and requests submitted and rulings thereon; transcripts or recordings of conferences or testimony taken at the hearing; exhibits; stipulations, if any; memoranda of law, legal briefs and other written material that may have been submitted and filed in connection with the appeal; the hearing officer's initial and final reports and recommendations; any decision, determination, or order rendered; and any other jurisdictional documents or other documents or material properly submitted into the record.

After receipt and review of any recording or transcript and any legal briefs and any other material properly a part of the record and memoranda of law, the hearing officer prepares the initial report, including findings of fact and proposed outcome(s).

Within 20 days after service of the hearing officer's initial report, each party may submit written exceptions to and arguments on that report. Within 10 days after service of the exceptions and arguments, each party may submit written replies to the exceptions and arguments. The exceptions and arguments and the replies must be submitted to the hearing officer, with a copy served on each of the other parties.

After receipt of exceptions, arguments and replies, if any, the hearing officer submits a final report, including findings of fact and proposed outcome(s), to the Commissioner, along with the record of the hearing, including any exceptions, arguments and replies received.

After the conclusion of a hearing, but prior to the Commissioner's determination, a hearing may be reopened for the presentation of new evidence upon petition and in the discretion of the hearing officer. The petition to reopen the hearing must state, in detail, the nature of the new evidence and the reasons for the failure to submit the evidence prior to the conclusion of the hearing. The Commissioner may, upon his or her own motion and upon reasonable notice, reopen a hearing for the presentation of additional evidence.

The Hearing Decision

After receipt of the hearing officer's final report and recommendation and the record, the Commissioner may: upon his/her own motion and upon reasonable notice, reopen the appeal for the presentation of additional evidence; direct the hearing officer to make additional findings, recommendations or otherwise clarify his/her report; or make a final determination.

The Commissioner's determination must be in writing and contain findings of fact and, if applicable, conclusions of law. A copy of the Commissioner's determination is served on the parties and is final five days after mailing.

PRE-OPENING PROCESS (CERTIFICATE OF NEED [CON] PROCESS)

The provider must demonstrate the following in order to apply for an initial operating certificate (OC):

- ◆ there is a need for the program;
- ◆ the board of directors demonstrates character and competence;
- ◆ the agency is fiscally viable; and,
- ◆ services, premises and staff are adequate and appropriate.

This is the CON process (Certificate of Need Process).

CON describes the following:

- ◆ conditional approval in accordance with Part 620;
- ◆ program type;
- ◆ program address;
- ◆ program certified capacity; and,
- ◆ identify the action that has been approved.

PROVIDER AGENCY'S RESPONSIBILITIES

1. Submit all required documents in accordance with established timelines. Ensure that documents meet regulatory requirements.
2. Ensure that the physical plant of the facility is in move-in, operational condition on the date of the pre-opening visit.
3. Ensure that the program is operational by the opening date (for example, staff are hired and trained).

REQUIRED DOCUMENTS

- ◆ CON approval;
- ◆ Certificate of Occupancy (CO) or architect's sign-off;
- ◆ Life Safety Code (LSC) compliance records;
- ◆ staffing plan;
- ◆ personnel records (applications for employment, letters of hire, staff training records, etc.);
- ◆ program policies and procedures (Parts 624, 633, 635);
- ◆ site-specific policies/procedures (emergency plans, site-specific protective oversight plan, space utilization plan, etc.);
- ◆ acceptable Plan of Corrective Action (POCA) (if applicable); and,
- ◆ DARS Form – documents approved by the Division of Administration and Revenue Support.

NEW YORK CODES, RULES AND REGULATIONS

*** This document reflects those changes received from the ***

*** NY Bill Drafting Commission, through August 3, 2012 ***

TITLE 14. DEPARTMENT OF MENTAL HYGIENE
CHAPTER XIV. OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES
PART 620. CERTIFICATION OF NEED FOR ADMINISTRATIVE REVIEW PROJECTS,
SUBSTANTIAL REVIEW PROJECTS AND TERMS OF APPROVAL FOR ACQUISITION OF
PROPERTY OR CONSTRUCTION

14 NYCRR Part 620 Notes (2012)

Part 620 Notes

Statutory authority: *Mental Hygiene Law, §§ 13.07, 13.09 (b), 43.01, 43.02*

Added Part 620 on 12/01/88.

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PROPERTY OR CONSTRUCTION

14 NYCRR § 620.1 (2012)

§ 620.1 Applicability

(a) This Part supersedes *14 NYCRR Parts 51* and *53* as it relates to services operated by or under the auspices of the Office of Mental Retardation and Developmental Disabilities (hereinafter known as OMRDD).

(b) Except as specified below, this Part applies to any individual, association, corporation or proposed corporation, or public or private agency which proposes an administrative review project (see glossary, section 620.13 of this Part) or substantial review project (see glossary) as listed in section 620.5 or 620.6 of this Part and submits an application for certification of need (see glossary) for that project.

(c) This Part shall not apply to any proposed actions by a place/entity required by article 28 of the Public Health Law to receive approval for such actions from the Commissioner of Health and/or the Public Health Council.

(d) This Part shall not apply to any place/entity for which an operating certificate is not required by article 16 of the Mental Hygiene Law.

(e) This Part shall not apply to any facility (see glossary, section 620.13 of this Part) set forth in *section 13.17 of the Mental Hygiene Law*, or to family care homes.

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(f) This Part applies to proposed administrative review or substantial review projects which are submitted to OMRDD for approval after the effective date of this Part (December 1, 1988). Projects submitted prior to the effective date of this Part shall be processed to decision in accordance with the criteria and procedures in effect and applicable to the project at the time of submission.

Section statutory authority: Public Health Law, § A28; Mental Hygiene Law, § A16, § 13.17

Statutory authority: *Mental Hygiene Law*, §§ 13.07, 13.09 (b), 43.01, 43.02

Added 620.1 on 12/01/88. NEW YORK CODES, RULES AND REGULATIONS

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14 NYCRR § 620.2 (2012)

§ 620.2 Statutory authority

(a) *Section 5.07(b) (1) of the Mental Hygiene Law* requires that there be a statewide comprehensive five-year plan for the provision of all State and local services for persons who are developmentally disabled which is formulated from local comprehensive plans.

(b) *Section 13.09(b) of the Mental Hygiene Law* grants the commissioner (see glossary, section 620.13 of this Part) the authority to adopt rules and regulations necessary and proper to implement any matter under his or her jurisdiction.

(c) *Section 16.00 of the Mental Hygiene Law* grants the commissioner the authority to adopt and promulgate any regulation reasonably necessary to implement and effectively exercise the powers and perform duties set forth in article 16 of the Mental Hygiene Law, which are necessary to maintain the consistent high quality of services provided within the State to its citizens who are mentally retarded and developmentally disabled.

(d) Article 16 of the Mental Hygiene Law addresses the planning process for services between OMRDD and the local governmental unit (see glossary, section 620.13 of this Part).

Section statutory authority: Mental Hygiene Law, § A16, § 5.07, § 13.09, § 16.00

Statutory authority: *Mental Hygiene Law*, §§ 13.07, 13.09 (b), 43.01, 43.02

Added 620.2 on 12/01/88.

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14 NYCRR § 620.3 (2012)

§ 620.3 Background and intent

(a) To ensure that all program (see glossary, section 620.13 of this Part) development projects ultimately requiring an operating certificate from OMRDD are included in the plans (see glossary) of statewide, regional and county authorities.

(b) To affirm that planning is considered to be a long-term and continuous process.

(c) To affirm that plans are to be developed at the county level, integrated at regional levels (B/DDSO service areas and health system agency (see glossary, section 620.13 of this Part) regions), and coalesced in the statewide 5.07 plan and OMRDD operational planning documents (see glossary).

(d) To clearly establish that an application for certification of need is a controlling mechanism to ensure that a project, as proposed, conforms with the parameters as specified in the planning process.

(e) To clearly establish that, as a controlling mechanism, the requirement for the submission of an application for certification of need provides the commissioner with the opportunity to modify any parameters of the proposed program, including type, capacity, or even continued inclusion in the statewide plan (see glossary, section 620.13 of this Part).

(f) To expedite the review of projects that are in conformance with the statewide plan to allow for the development and operation of needed and appropriate programs without undue delay.

Statutory authority: *Mental Hygiene Law, §§ 13.07, 13.09 (b), 43.01, 43.02*

Added 620.3 on 12/01/88.

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14 NYCRR § 620.4 (2012)

§ 620.4 Project planning

(a) The development of a comprehensive service delivery system to meet the needs of persons who are mentally retarded and/or developmentally disabled begins with the identification of those needs and the types of programs with the service capability to meet such needs. This shall be done through joint

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planning efforts on a county, regional and statewide basis by OMRDD, local governmental units and local health systems agencies. The local governmental units and local health systems agencies shall be given the opportunity to review operational planning documents developed by OMRDD, and to make recommendations to the commissioner.

(1) OMRDD shall project the number of persons who are developmentally disabled in need, as identified by a data based system, on no less than a triennial basis.

(2) OMRDD shall develop a proposal for an ideal service/program mix to meet the needs of the identified population and provide this information to the following planning bodies on no less than a triennial basis:

- (i) B/DDSO-for the services area under each B/DDSO's coordination;
- (ii) local governmental unit-for each county;
- (iii) health systems agency-for the locale within each agency's jurisdictional area.

(3) The appropriate B/DDSO, representing OMRDD at the local level, shall collaborate with the local governmental units and the health system agencies in its service area and assist them to the extent necessary in the development of local and regional plans.

(4) OMRDD, utilizing input from local and regional planning bodies, shall develop a statewide plan and operational planning documents.

(5) Appropriate operational planning documents, reflecting specific program development needs, shall be reviewed by the appropriate local governmental units and health systems agencies which shall be given the opportunity to comment upon such documents prior to actualization. It is at this time in the planning process that both the local governmental units and the health systems agencies are to consider and comment upon:

- (i) the availability of facilities or services which may serve as alternatives or substitutes for the whole or any part of the proposed program and/or construction;
- (ii) the adequacy of financial resources and sources of future revenue; and
- (iii) the public need for the facility or services at the time and place and under the circumstances proposed.

(6) While planning bodies will have the opportunity for review of applications for certification of need at a subsequent time, it is at the point in the project planning process that OMRDD allocates funds for program development and/or construction that input from the local governmental units and the health systems agencies is of primary significance.

(b) Prior to formal submission of an application for certification of need, and as early as possible, it is required that the applicant consult with applicable local authorities, local governmental units and the appropriate health systems agency to ensure, to the extent possible, that the proposed project is needed and appropriate. In order to avoid unnecessary expenditures for the development of the application, and the more complex or expensive the anticipated project, the more attention must be paid to early and extensive contact with county, regional, and B/DDSO planning authorities.

(c) If either an administrative review or substantial review project should, at the time it moves forward to completion, result in an increase in cost or in client capacity or change in the class of operating certificate approved at the time of certification of need, it shall be necessary to submit an amended application for certification of need to address the change(s). If, for an administrative review project, costs exceed \$ 600,000 or certified capacity is exceeded by 10 percent or five persons (whichever is greater), or there is a change in the operating certificate, section 620.6(b)(3) of this Part shall apply.

Statutory authority: *Mental Hygiene Law, §§ 13.07, 13.09 (b), 43.01, 43.02*

Added 620.4 on 12/01/88

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14 NYCRR § 620.5 (2012)

§ 620.5 Administrative review projects

(a) Applications for certification of need for administrative review projects shall be submitted, reviewed and approved in accordance with sections 620.7 and/or 620.9 of this Part.

(b) Administrative review projects include any of the following proposed actions:

(1) development or operation of a community residence (see glossary, section 620.13 of this Part);

(2) development of all other new programs requiring an operating certificate, and whose acquisition (see glossary), construction (see glossary), or capital expenditure for physical plant and/or equipment/assets in support of the programs, or a combination thereof, is estimated to be under \$ 600,000;

(3) acquisition, construction, or capital expenditure for physical plant and/or equipment/assets in support of an existing program, or a combination thereof, estimated to be under \$ 600,000 but more than \$ 30,000;

(4) relocation of an existing program or part thereof:

(i) which involves acquisition of property and/or renovation or reconstruction by purchase costing less than \$ 600,000; or

(ii) which involves acquisition of property and/or renovation or reconstruction by other means which, if acquired by purchase, would have cost less than \$ 600,000;

(5) expansion or contraction of specific services currently offered;

(6) any change of ownership of a facility, program, or program site whether by purchase, donation, merger or otherwise;

(7) an increase or decrease in certified capacity of an existing program;

(8) an incorporation of a corporation, the certificate of which requires the approval of the commissioner subject to the provisions of section 620.8 of this Part;

(9) any amendment of a certificate of incorporation of an existing corporation extending its powers of purpose to enable it to operate a new program or facility subject to the provisions of section 620.8 of this Part;

(10) amendment of a certificate of incorporation which does not add or delete the power to provide services for persons who are mentally retarded and developmentally disabled, subject to the provisions of section 620.8 of this Part;

(11) the conversion of a program operated exempt from article 16 of the Mental Hygiene Law to become subject to article 16 of the Mental Hygiene Law; and

(12) the termination of an existing program.

(c) The proposed project is included in the planning process as evidenced by inclusion in OMRDD's operational planning documents. If a proposed project is inconsistent with operational planning documents, it shall be considered to be a substantial review project.

Section statutory authority: Mental Hygiene Law, § A16

Statutory authority: *Mental Hygiene Law, §§ 13.07, 13.09 (b), 43.01, 43.02*

Added 620.5 on 12/01/88.

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14 NYCRR § 620.6 (2012)

§ 620.6 Substantial review projects

(a) Applications for certification of need for substantial review projects shall be submitted, reviewed and approved in accordance with sections 620.7 and 620.10 of this Part.

(b) Excluding community residences in all instances, substantial review projects include one or more of the following:

(1) any acquisition of property (regardless of whether it allows for any change in service or certified capacity) by purchase which will or is expected to cost \$ 600,000 or more, including costs of any renovation or reconstruction; or by other means which, if acquired by purchases, would have cost \$ 600,000 or more including costs of any renovation or reconstruction;

(2) any construction or capital expenditure which is estimated to cost \$ 600,000 or more, regardless of whether it allows for any change in service or certified capacity; and

(3) unless all involved planning bodies concur that the project should proceed and agree to waive the substantial review process, the process shall also apply to any administrative review project which, subsequent to the issuance of the original certification of need, but prior to issuance of an operating certificate:

(i) costs \$ 600,000, or more;

(ii) exceeds certified capacity by 10 percent or 5 persons, whichever is greater; or

(iii) changes the proposed class of operating certificate.

Statutory authority: *Mental Hygiene Law*, §§ 13.07, 13.09 (b), 43.01, 43.02

Added 620.6 on 12/01/88.

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14 NYCRR § 620.7 (2012)

§ 620.7 Requirements for submitting an application for certification of need for a new program or construction

(a) An application for certification of need for a new program or construction shall be in writing in the form and format approved by OMRDD. An original application and eight copies shall be filed with OMRDD.

(b) The applicant shall attest to his or her awareness of the requirements for operation in accordance with an operating certificate and the obligation to be certified prior to initiating operation and shall provide any other information as the commissioner may require.

(c) OMRDD shall advise the applicant of the procedures and schedule for review at the time of the submission of the application.

(d) The standards of this Part shall be applied to all applications at appropriate points in the program development process. Review and approval of a certification of need application does not in and of itself ensure program certification.

Statutory authority: *Mental Hygiene Law*, §§ 13.07, 13.09 (b), 43.01, 43.02

Added 620.7 on 12/01/88.

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14 NYCRR § 620.8 (2012)

§ 620.8 Approval of a certificate of incorporation or certificate of amendment

(a) All corporations that intend to provide services under the auspices of OMRDD, and for which this Part is applicable, shall hold a certificate of incorporation attesting to their authorization to deliver specified services to persons who are mentally retarded or developmentally disabled.

(b) No application for approval of a certificate of incorporation or certificate of amendment will be approved unless:

(1) the appropriate certification of need application has been submitted;

(2) the application, reviews, and proposed certificate show:

(i) compliance with all legal requirements applicable to the corporation or proposed corporation;

(ii) compliance with applicable regulations of the commissioner; and

(iii) the members of the board of directors, officers, owners, partners and stockholders are of such character, experience, competence and standing as to give reasonable assurance of their ability to conduct the affairs of the program in the public interest and so as to provide proper care for the persons to be served by the proposed facility or program; and

(3) with respect to projects subject to OMRDD's jurisdiction, the commissioner may approve a certificate of incorporation or certificate of amendment of a certificate of incorporation prior to the completion of any of the procedures required in this Part if he or she is satisfied that the requirements will be fulfilled prior to the grant of any State aid.

Statutory authority: *Mental Hygiene Law, §§ 13.07, 13.09 (b), 43.01, 43.02*

Added 620.8 on 12/01/88.

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14 NYCRR § 620.9 (2012)

§ 620.9 Review of certification of need application for administrative review projects

(a) The commissioner shall review the application for certification of need for completeness of information within 10 business days (see glossary, section 620.13 of this Part) of receipt. Within an additional five business days, the applicant shall be notified by certified mail of any lack of information, which shall be provided by the applicant within 30 calendar days or such additional time as may be requested by the applicant and approved by the commissioner. Failure to provide such information within the designated time shall constitute withdrawal of the application. If no additional information is

requested within said period, the application shall be considered complete. Upon determination of receipt of a complete application, the commissioner shall immediately notify the applicant that review has begun.

(b) A copy of a complete application proposing an administrative review project shall be immediately forwarded by certified mail to the office of the appropriate local governmental unit in the area to be served; and shall allow it 10 business days from receipt in which to review the application and make recommendations to the commissioner. The commissioner or designee shall take no final action until such period has expired or opinions have been rendered by the local governmental unit, whichever is earlier.

(c) A copy of a complete application for a new program or construction (other than for a community residence), the cost of which is expected to be more than \$ 30,000 but less than \$ 600,000 and funded by Medicaid, shall be immediately forwarded by certified mail to the appropriate regional health systems agency and shall allow it 10 business days from receipt in which to review the application and make recommendations to the commissioner. The commissioner or designee shall take no final action until such period has expired or an opinion has been rendered by the health systems agency, whichever is earlier.

(d) A complete application for a new program or construction which is proposed to be funded through Medicaid shall be immediately forwarded to the designated State health planning and development agency (see glossary) by certified mail and it shall be allowed 10 business days from receipt in which to review the application and advise the commissioner of its opinion as to whether the application for certification of need be considered as acceptable. The commissioner shall take no final action on whether the application is acceptable until such period has expired or an opinion has been rendered by the designated State health planning and development agency, whichever is earlier.

(e) After such period as allowed the health system agency, the designated State health planning and development agency or local governmental unit, but within 30 business days of determination of receipt of a complete application, the commissioner may approve or disapprove the application without further review, as long as the application meets the criteria for an administrative review project set forth in section 620.5 of this Part.

(f) If a local governmental unit or health systems agency considers that a proposed administrative review project is inconsistent with OMRDD's operational planning documents, and the issues cannot be resolved between the objecting party and OMRDD, a hearing may be requested in conformance with Part 602 of this Title. If the charge of inconsistency is sustained by the hearing process, the proposal shall be considered a substantial review project.

Statutory authority: *Mental Hygiene Law*, §§ 13.07, 13.09 (b), 43.01, 43.02

Added 620.9 on 12/01/88.

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14 NYCRR § 620.10 (2012)

§ 620.10 Review of certification of need application for substantial review projects

7/8/2014

(a) The commissioner shall review the application for certification of need for completeness of information within 10 business days of receipt. Within an additional five business days, the applicant shall be notified by certified mail of any lack of information, which shall be provided by the applicant within 30 calendar days or such additional time as may be requested by the applicant and approved by the commissioner. Failure to provide such information within the designated time shall constitute withdrawal of the application. If no additional information is requested within said period, the application shall be considered complete.

(b) Upon determination of receipt of a complete application for a Medicaid funded program, the commissioner shall immediately notify the applicant that review has begun and provide copies of the application to the designated State health planning and development agency, the appropriate health systems agency, and the appropriate local governmental unit. Each party shall have 60 business days to review the application and submit findings and recommendations to the commissioner unless these planning bodies have reached an agreement with OMRDD and agree to waive the substantial review process.

(c) Upon receipt of a complete application, the commissioner shall provide a copy of such application to the office of the appropriate local governmental unit in the area to be served.

(d) The commissioner shall, within 90 business days of receipt of the complete application, make a decision on the application based on his or her review of recommendations by OMRDD staff, the report of the health systems agency, and the advice of the designated State health planning and development agency and the local governmental unit.

Statutory authority: *Mental Hygiene Law*, §§ 13.07, 13.09 (b), 43.01, 43.02

Added 620.10 on 12/01/88

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14 NYCRR § 620.11 (2012)

§ 620.11 Commissioner's decision regarding certification of need for all projects

(a) Review of all applications for certification of need shall take into consideration consistency with OMRDD's operational planning documents, current and accurate State budget information, current need data, and the standard criteria of:

- (1) the character and competence of the operator(s);
- (2) the fiscal viability and cost-effective feasibility; and
- (3) the probability of operating in conformance with regulation.

(b) The commissioner's decision may be:

7/8/2014

- (1) approval of the project and authorization to proceed with development; or
- (2) approval of the project, but denial of requested capital funding; or
- (3) approval of the project, but denial of operating funds through Federal or State programs; or
- (4) conditional approval of the project, with or without authorization to proceed; or
- (5) disapproval of the project.

(c) If the commissioner intends to disapprove the project, he or she shall notify the applicant, and the health systems agency, the designated State health planning and development agency and the local governmental unit of his or her intent and provide the report of findings and the basis for the decision, and shall afford the applicant an opportunity to be heard in accordance with Part 602 of this Title before taking such action.

(1) If the commissioner intends to disapprove a project of which the health systems agency or the local governmental unit has recommended approval, he or she shall notify the health systems agency, the local governmental unit and the applicant, of the intended action and provide all parties with copies of the report.

(2) Said parties shall be afforded the opportunity to be heard in accordance with Part 602 of this Title. If such hearing is requested, it shall be held in accordance with the regulations of the commissioner.

(d) If the commissioner intends to approve a project over a recommendation of disapproval by the health systems agency or the local governmental unit he or she shall notify that agency, as well as the applicant, of his or her intent. Further, he or she shall provide all parties designated in subdivision (c) of this section, with copies of the findings and basis of decision, and shall afford the health systems agency and the local governmental unit an opportunity to be heard in accordance with Part 602 of this Title before taking such action.

(e) When a decision is reached, after a hearing if necessary, the commissioner shall notify the applicant and all reviewers of the decision, and shall also advise the applicant of the procedure to be followed in submitting additional information necessary for the development of a program prior to consideration as satisfactorily having met the requirements for an operating certificate.

Statutory authority: *Mental Hygiene Law*, §§ 13.07, 13.09 (b), 43.01, 43.02

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14 NYCRR § 620.12 (2012)

§ 620.12 Terms of approval for acquisition of property or construction

(a) Within 120 calendar days of the commissioner's certification of need for a project involving construction and/or acquisition, the applicant shall provide for the commissioner's review acceptable

architectural design development plans. Failure to provide such information within the time frame specified shall constitute withdrawal from the proposed project, unless the applicant has formally contacted OMRDD and received approval for an extension.

(b) Within 150 calendar days of the commissioner's approval of the design development plans, the applicant shall submit final drawings and specifications including cost estimates. Failure to provide such information within the time frame specified shall constitute withdrawal from the proposed project unless a request for an extension has been made and approved.

(c) The applicant shall not enter into a contract for construction until notified in writing of the approval of final drawings and specifications.

(d) The applicant shall request prior approval of any changes relating to the scope of the project, the cost of construction of major items or equipment proposed during construction.

(e) Upon completion, an onsite inspection of the construction and equipment shall be made to assure that such are in accordance with the prior approval of the commissioner.

Statutory authority: *Mental Hygiene Law*, §§ 13.07, 13.09 (b), 43.01, 43.02

Added 620.12 on 12/01/88.

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14 NYCRR § 620.13 (2012)

§ 620.13 Glossary

(a) Acquisition. The obtaining of property by such methods as purchase, lease, donation, or inheritance.

(b) Administrative review project. Any project as listed in section 620.4 of this Part which does not or is not expected to incur costs in excess of \$ 600,000, and which may, therefore, be subject to an administrative review pursuant to section 620.9 of this Part for certification of need.

(c) Agency, (designated State health planning and development (SHPDA)). An agency within the Department of Health (DOH), as designated by the Governor, which is responsible to administer the State's health planning and development functions, including preparation of the State Health Plan and assisting the State Health Coordinating Council (SHCC).

(d) Agency, Health Systems (HSA). An agency designated pursuant to *section 2904-b of the Public Health Law*, which is responsible for analyzing the needs and conditions within the health service area and applying the national guidelines for health planning in the development of its health systems plan and annual implementation plan.

(e) B/DDSO. The local administrative unit, responsible to the Division of Program Operations of OMRDD, that has major responsibility for the planning and development of community residential and

other program services. The B/DDSO is responsible for coordinating the service delivery system within a particular service area, planning with community and provider agencies, and ensuring that specific placement of persons with developmental disabilities and program plans and provider training programs are implemented. In New York City, this unit is called the Borough Developmental Services Office (BDSO); elsewhere in the State it is called the Developmental Disabilities Services Office (DDSO).

(f) Certification of need. A process whereby any individual, association, corporation or proposed corporation, or public or private agency which proposes a project as set forth in this Part formally states that intent and applies for the authorization to proceed.

(g) Commissioner. The Commissioner of the Office of Mental Retardation and Developmental Disabilities, or his or her designee.

(h) Construction. The erection, building, alteration, reconstruction, improvement, extension or modification of a building.

(i) Days - business. In computing "days", the "day" that the notice is received shall be included. Saturdays, Sundays, and legal holidays are not included in counting business days. Legal holidays are:

- (1) New Year's Day.
- (2) Martin Luther King's Birthday.
- (3) Washington's Birthday.
- (4) Memorial Day.
- (5) Independence Day.
- (6) Labor Day.
- (7) Columbus Day.
- (8) Veteran's Day.
- (9) Thanksgiving Day.
- (10) Christmas Day.

(j) Documents, operational planning. Those documents (currently referred to as "flag forms"), which clearly designate the type of programs needed to be developed, the general geographic location, and the type and number of clients to be served.

(k) Facility. Any place certified or operated by OMRDD in which services are provided for persons who are mentally retarded and/or developmentally disabled.

(l) Need, certification of. See certification of need.

(m) Plans. Formal statements or documents representing future courses of action. Plans relevant to this Part include:

(1) County plan. That local services plan or unified services plan of a county or the city of New York prepared and approved in accordance with article 41 of the Mental Hygiene Law.

(2) Health systems plan. The health systems plan prepared by the health systems agency as required by section 1513 of the National Health Planning and Resources Development Act of 1974 (P.L. 93-641) (The National Health Planning Act).

(3) Annual implementation plan. The annual implementation plan based on the health systems plan prepared by the health systems agency in accordance with section 1513 of the National Health Planning Act.

(4) State health plan. The State health plan prepared and/or reviewed, approved and revised by the Statewide Health Coordinating Council in accordance with section 1524 of the National Health Planning Act.

(5) Statewide plan. The statewide multi-year developmental disabilities plan prepared by OMRDD in accordance with *section 5.07 of the Mental Hygiene Law*, OMRDD's related annual implementation and strategic management plans.

(n) Program. A planned combination of services for the purpose of meeting certain specified common needs of a group of mentally retarded and developmentally disabled persons, the operation of which is authorized by an operating certificate issued by the commissioner.

(o) Project. For purposes of this Part, an administrative review project (q.v.) or substantial review project (q.v.).

(p) Residence, community. For purposes of this Part a residential facility certified by OMRDD under Part 686 of this Title.

(q) Substantial review project. Proposed acquisition of property or construction which is estimated to cost \$ 600,000 or more, excluding community residences, and subject to a substantial review pursuant to section 620.10 of this Part for certification of need.

(r) Unit, local governmental. The unit of local government given authority in accordance with the Mental Hygiene Law by local government to provide local and unified services for persons who are mentally retarded and/or developmentally disabled.

Statutory authority: *Mental Hygiene Law, §§ 13.07, 13.09 (b), 43.01, 43.02*

Added 620.13 on 12/01/88.