

OPWDD ASSESSMENT OF PUBLIC COMMENT

Conforming Changes Related to Chapter 106 of the Laws of 2015

This document addresses comments submitted during the public comment period for emergency proposed regulations that implement Chapter 106 of the Laws of 2015. While OPWDD appreciates and has considered all feedback and information submitted by commenters, this assessment responds only to those comments specific to the content of the emergency proposed regulations.

Comment: Some Commenters advised that the emergency proposed regulations appear to exceed the legislative amendments in Chapter 106 of the Laws of 2015 by significantly restructuring the administrative hearing process, including the replacement of a three-person panel with a hearing officer, and by limiting safeguards for impartiality, fairness, and the due process rights of individuals. Additionally, some Commenters suggested that the proposed regulations will not effectively create a fair and impartial forum in which families can object to potentially inadequate services. Commenters urged OPWDD to modify the language of the regulations to ensure that individuals receive the care that they need and to ensure that families have a voice in the process.

Response: These regulations' provision for a single hearing officer rather than a three-person panel is consistent with OPWDD's management of other types of administrative hearings and likewise will ensure the delivery of an impartial and fair process for individuals and their families. OPWDD will issue guidance on the regulations that will address the many operational details necessary to implement the newly adopted regulatory authority including, but not limited to, notice requirements, the opportunity for parties to be represented by legal counsel, conduct of the hearing, admission of evidence and legal arguments, and the appeal procedure. Consequently, the regulations are being adopted as proposed.

Comment: Some Commenters suggested that existing OPWDD regulations in 14 NYCRR Part 602 pertaining to uniform hearing procedures be applied to out of state residential placements, and that affording individuals with the protections in Part 602 would better serve individuals than the proposed regulations.

Response: The due process protections in 14 NYCRR Part 602 primarily address hearings regarding the potential denial or loss of a property right such as the suspension or revocation of a service provider's operating certificate. As such, the construct posed by Part 602 would not apply to the individuals affected by the emergency proposed regulations, as a determination of the appropriateness of a proposed placement or services does not affect a property interest of that nature. However, individuals affected by the emergency proposed regulations will be offered appropriate due process protections that will be similar procedurally to those provided in Part 602. Those protections will be described in forthcoming guidance on the regulations. Consequently, the regulations are being adopted as proposed.

Comment: Some Commenters recommended that more rigorous hearing procedures be incorporated into the regulations, contending that there is no way to reverse the potential negative effects of a placement once it has been implemented.

Commenters recommend that the regulations be revised to include the following:

- Provide adequate notice of the details of the proposed transfer and the basis for considering it to be appropriate. Send offer of the placement to the family within sixty days of availability of the placement, providing the family with sufficient time to evaluate the placement, speak with staff at the proposed placement, and assist with development of a plan to best meet the needs of the individual.
- Carefully consider the characteristics and needs of the population. Commenters stated that the regulations lack requirements that the hearing officers be qualified to assess clinical evaluations, functional behavioral assessments, behavioral support plans, expert testimony, and other specialized evidence, in order to determine a suitable placement.
- Emphasize early and comprehensive consultation with individuals, their families, and advocates as any transfers from transitional funded or emergency funded care are being considered.
- Add provisions to ensure the independence and expertise of hearing officers. Require that the hearing officer be a licensed New York State attorney who works in private practice and who has not been previously employed by the State or similar agency for a period of at least five years before the hearing, and that the hearing officer have no interests or bias with respect to the final decision concerning placement.
- If a hearing is requested, the tribunal must be fair, competent, and impartial. Require the basic rules for an adversary hearing.
- Require that OPWDD provide a list of qualified individuals to serve as hearing officers, and that hearing officers will be assigned on a rotating, random basis.
- Provide family members with the right to question hearing officers, witnesses, OPWDD staff and the proposed agency staff involved in making the determination about the proposed placement, and anyone else with direct access to the individual, and obtain documentation necessary to evaluate the proposed placement and defend the individual's current program.
- Require that the only two parties involved in the hearing be the family member and OPWDD.
- Provide the right to be represented by legal counsel.
- Require the opportunity for relevant legal arguments.
- Require that OPWDD bear the burden of proof and show that the proposed program is capable of meeting the individual's needs.
- Provide the family the opportunity to challenge evidence and submit countervailing evidence.

- Require the development of a full evidentiary record.
- Require a decision by a fact finder who has expertise to assess the evidence.
- Require that if a hearing officer sustains the family's objection, that should be the final determination, and if the hearing officer sustains OPWDD's staff decision, the family should have the right to appeal to the Commissioner, whose appeal decision will be the final determination.

Response: In finalizing the emergency proposed regulations, OPWDD intends to implement an effective, impartial and efficient construct that considers each individual's need for an appropriate placement or services, and which will provide the individual and his/her family or advocates with effective due process protections. OPWDD will issue guidance on the regulations that will address the many operational details necessary to implement the newly adopted regulatory authority including, but not limited to, notice requirements, the opportunity for parties to be represented by legal counsel, conduct of the hearing, admission of evidence and legal arguments, and the appeal procedure. Consequently, the regulations are being adopted as proposed.

Comment: One Commenter asserted that the proposed regulations should establish clearly that the "basic rules and procedures of an adversary hearing regarding evidence, arguments, legal briefs, etc. should be followed."

Response: In adopting these regulations, OPWDD intends to establish the regulatory authority by which to develop an impartial and efficient hearing construct that will satisfy the parties' need for a more user-friendly forum that is not constrained by the more formal hearing requirements commonly attributed to hearings conducted in the manner required by Article 3 of the State Administrative Procedure Act (SAPA). Nonetheless, OPWDD will issue guidance on the regulations that will address clearly the hearings' many operational details of the hearing process. Consequently, the regulations are being adopted as proposed.

Comment: The same Commenter expressed concerns with OPWDD's intention to issue administrative guidance that will set forth details about the hearing procedures. The Commenter contended that a guidance document can be altered unilaterally by the agency without following SAPA rulemaking procedures, and that therefore it is incumbent upon OPWDD to amend the regulations to include details about the hearing procedures in order to give such procedures lasting effect.

Response: In adopting the regulations, OPWDD intends to establish the regulatory authority that will provide the basis for OPWDD's conduct of an effective process for the transition of the affected individuals to appropriate placements and services, which necessarily includes the administration of an effective adjudication process to address the concerns of those individuals and their families or advocates. That regulatory authority will provide the overall construct to achieve that goal, and will provide OPWDD

with the authority to operationalize the specifics of the transfer process and the related hearing requirements in a manner compliant with those regulatory requirements. The inclusion of operational detail is not a prerequisite to adopting the overall construct that is the purpose of regulatory authority. Consequently, the regulations are being adopted as proposed.