

**Assessment of Public Comment**  
**Proposed 14 NYCRR Subpart 641-2 – Rate Setting for Non-State Providers:**  
**Intermediate Care Facilities for Persons with Developmental Disabilities**

OPWDD received numerous comments from providers, provider associations and a consultant. Below is the assessment of the comments received and OPWDD’s responses. Several of the responses note in parentheses that the regulations have been amended in response to the comment. In these responses, OPWDD is referring to the emergency/proposed amendments to Subpart 641-2 that were adopted and went into effect the same day the regulations proposed in April were adopted. Because these amendments were not finalized when the summary of the assessment of public comment was submitted to the Department of State for publication, the summary does not mention these amendments.

**1. Values for Budget Neutrality Adjustment and Regional Averages**

COMMENTS: 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.

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. The proposed regulation as written does not provide sufficient transparency. A provider cannot determine its own rate based upon the information provided in the regulation. The lack of detail, and lack of a process to review the state’s methodology for creating regional averages all underscore the serious shortcomings in the rates.

RESPONSE: OPWDD and DOH have 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. The regional averages will be posted on the Department of Health’s (DOH) website and therefore will be accessible to providers.

**2. Implementation Date**

COMMENT: Rates should not be implemented July 1, 2014 because providers have not yet been provided with their rates. It is unreasonable to impose new rates effective July 1, when providers have not seen their new rates. The lack of timely notice of rates does not allow for adequate time to plan. Providers have yet to see what the final rates will be and the implementation date is less than a month away.

RESPONSE: The methodology will be implemented on July 1, 2014.

**3. State operated providers**

COMMENT: There is no rational basis to discriminate between state operated and voluntary operated ICFs/DD in the creation of rates. Voluntary providers compete for the same workforce and provide the same supports and services as the state, yet the rate methodology does not include the cost of state operated ICFs/DD in the development of regional rates.

RESPONSE: The methodology will not be changed to include State operated programs in the development of regional rates.

**4. DOH Regions**

COMMENT: 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, DOH 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 DOH.

COMMENT: The use of DOH regions fails to appropriately group similar wage and cost structures and economies on a rational basis. The creation of upstate urban and rural groupings fails to address the very real regional cost differences which exist across the state and the groupings blend urban and rural counties in ways that are irrational. The use of these regional groupings combined with the use of average costs of care without an acuity

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adjustment using a valid assessment tool leads to rates which are not economic, efficient or likely to lead to quality outcomes.

RESPONSE: OPWDD and DOH consider that the DOH regions are appropriate for use in this methodology.

**5. Region 1 Providers**

COMMENT: The regulation discriminates against Region One providers. Based upon data that has been released, OPWDD Region One providers will see overall losses of \$6.8 million under rate rationalization or 58% of the total statewide savings arising from the new rate rationalization methodology. This takes into consideration both winners and losers. The seventeen counties of OPWDD Region One bear a disproportionate share of the cost of rate rationalization. If Region One providers provided approximately the same percentage of services, the region's loss under the rate methodology might be understandable. It is not. Region One voluntary providers currently represents only 9% of the total ICFs/DD operated by the voluntary sector statewide. Region One providers only provide 19% of statewide certified housing, including ICFs and provide 15% of all day habilitation units billed statewide.

RESPONSE: DOH and OPWDD believe the methodology does not discriminate against any group of providers.

**6. CFR data**

COMMENT: Even though independent auditors certify the CFRs, OPWDD internal auditors have expressed concerns that there are misallocations of costs inconsistent with CFR guidelines. OPWDD has completed random audits and has concluded that there is substantial misreporting of costs by providers. These findings should have triggered a wide scale review of all CFRs, but to date the audits have been limited to providers who filed rate appeals. There is no indication that the misallocation issue is limited to providers that filed rate appeals, and as such there is a strong likelihood that the entire database is flawed. In spite of this, OPWDD and DOH are relying on the CFRs to reimburse residential and day program providers.

RESPONSE: OPWDD and DOH are not changing the methodology in response to this comment.

**7. Facility Cost Component and State Wide Budget Neutrality Adjustment**

COMMENT: The regulation should state that the value of the Budget Neutrality Adjustment will be revised annually to include the value of services expansion and other funding increases added after June 30, 2014.

RESPONSE: OPWDD and DOH have decided that no change to the regulation is necessary at this time in response to the comment. However, the comment will be taken into consideration when subsequent amendments are made to the regulation.

**8. Capital Component**

COMMENT: The capital thresholds included in the proposed regulations are more than six 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.

RESPONSE: OPWDD and DOH will not change the regulation at this time, but will consider the comment when subsequent amendments are made to the regulation.

COMMENT: The following three comments all pertain to property costs approved prior to July 1, 2014.

- The inclusion of language that “DOH may retroactively adjust the capital component” 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 635-6 if it exceeds reimbursement under the new proposed

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- 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....*”
- 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.
  - OPWDD indicated in meetings with providers that there was no intention to alter or impact existing PPAs. Concern was expressed about the possible dire consequences of calling into questions that state's commitment to provide reimbursement under PPAs currently in effect. There was assurance from both OPWDD and DOH staff that existing PPAs would be honored as issued. Since there is no intention to affect current PPAs and we do not want to raise questions from lenders, bond holders, and DASNY about the validity of current PPAs, the regulations should contain language in each of the property sections to the effect that the property reimbursement section of new regulations only applies to PPAs issued on or after the July 1, 2014.

RESPONSE: OPWDD and DOH will not change the regulation at this time, but will consider the comment when subsequent amendments are made to the regulation.

(Note: OPWDD and DOH have amended the regulations to state that the capital cost thresholds only apply to PPAs issued on or after July 1, 2014.)

COMMENT: In addition to the changes requested in the comments immediately above, another comment said that the language in the proposed regulation needs to be modified to state that DOH’s ability to retroactively adjust the capital component is limited to adjustments made to “reflect capital costs approved pursuant to Subpart 635-6 or pursuant to. . . [the capital component paragraph of the regulation].”

RESPONSE: OPWDD and DOH will not change the regulation in response to this comment.

COMMENT: 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: OPWDD and DOH are not changing the regulation at this time, but will take this comment into consideration.

## **9. Trend Factor**

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

## **10. Initial Period**

COMMENT: The definition of “initial period” (7/1/14- 12/31/14 for calendar year providers and 7/1/14-6/30/15 for fiscal year providers) is not needed, because rebasing will occur on 7/1/15 for all providers, minimal changes will occur on 1/1/15, and the first year of transition is 7/1/14-6/30/15 for all providers. 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.

The “initial period” is defined as July 1, 2014 through December 31, 2014 for providers reporting on a calendar year basis or July 1, 2014 through June 30, 2015 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 1, 2014 through June 30, 2015 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 30, 2014. 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.

## **11. Appeals and Corrections to Rates**

COMMENT: There should be an appeal process, and a 90 day correction period from the beginning of the rate period for either provider or State error.

RESPONSE: DOH and OPWDD have 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. (Note: OPWDD and DOH have amended the regulation to allow a 90 day correction period. OPWDD and DOH have not changed the regulations to provide for an appeal process.)

## **12. Template Funding**

COMMENT: Template funding should be addressed in the regulations.

RESPONSE: DOH and OPWDD have 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. (Note: The regulation has been amended to address template funding.)

## **13. Base rate vs. base operating rate**

COMMENT: The ICF regulations should use the term “base operating rate” in both the definition and transition sections.

RESPONSE: OPWDD and DOH are not changing the regulation at this time but will take this comment into consideration. (Note: The regulation has been amended to use the term “base operating rate” in both sections.)

## **14. Day Program Services Component in ICF regulation**

COMMENT: The language is confusing. The provider association suggested different language.

RESPONSE: OPWDD and DOH are not changing the regulation at this time, but will take this comment into consideration. (Note: The regulation has been amended to clarify the wording of the provision concerning day program services.)

## **15. ICFs/DD Serving Individuals with Complex Needs and Effect of Rate Reductions**

COMMENTS: The revised rate methodology does not accurately take into account the full extent of the psychiatric, behavioral and medical needs of the people served in ICFs/DD. These individuals have a very high level of need and there was no acuity measure used to establish the ICF rates and distinguish between one individual and another. This process lacks a person centered approach for the individuals with the most

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significant needs. The cuts in the ICF programs can only be viewed as discriminatory and do not recognize or adequately address the needs of individuals served in ICF facilities, especially those who are dually diagnosed with psychiatric and developmental disabilities. The agencies that specialize in serving specific populations, i.e., those with significant behavioral challenges and/or a high level of medical needs were not captured in this process. This new rate methodology should not be implemented until the CAS (or other assessment tool) can be validated and put into practice.

Instituting this rate methodology will result in harm to the individuals served in these programs, who are the most vulnerable in the field. The negative impact of the cuts is projected to be significant. The cuts will result in curtailment and destabilization of service provision. Over the last 2 years, providers have been asked to do more with no increase in rates. Changes in regulatory requirements, participation in the People First Waiver pilot program, the inclusion of CQL and POMs as well as the rising costs associated with service delivery have all impacted our bottom line and are not reflected in these rate cuts. In addition, with the roll out of PROMOTE and the increase in staff training as a result of core competencies, additional costs are likely over the next year. With the implementation of Justice Center requirements, the current hiring process has tripled in length resulting in extra overtime costs which were not a factor back in 2011. These additional costs are not reflected in the calculations used to determine the proposed rate cuts.

Individuals supported in ICF/DD voluntary operated homes are some of the most vulnerable individuals supported by OPWDD. The reduction in rates will adversely affect them and will result in less service. Without the appropriate funding to meet the needs of the individuals, staffing levels, both clinical and direct support will have to be reduced. The generic provider community cannot absorb the clinical needs of individuals living in ICF/DD homes. The community is not equipped to either understand or provide the intensive level of clinical services individuals currently receive in their ICF/DD home. OPWDD implementation of the new rates will result in less service and as a result the gains individuals have received will be lost.

As stated in the *Regulatory Flexibility Analysis* of the proposed rulemaking announcement, the proposed regulation will shift resources across provider agencies, resulting in some agencies obtaining a higher reimbursement rate and other agencies a lower reimbursement rate. New operating and capital cost components, as highlighted in the proposed rule, are addressed in a manner that does not account for those agencies that will receive a lower reimbursement rate that also serve as the “outliers”.

It is important to restructure rates to balance system inequities which were a product of past practices. For the purposes of the proposed regulation to restructure current ICF/DD

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reimbursement rates, it is important to acknowledge those agencies that will be adversely impacted by the proposed reimbursement methodology in a manner that will fundamentally alter the ability of the agency to provide the necessary services currently delivered. These agencies are considered outliers as a result of certain circumstances, such as serving complex populations including, but not limited to individuals with developmental disabilities who are frail and elderly and the dually diagnosed who present themselves with significant disabilities and concurrent behavioral challenges. The proposed regulation lacks any recognition of this small group of agencies who will experience a decrease in reimbursement and will not be able to accommodate the reduction without compromising the level of professional consequence of the person's medical and behavioral complexities. OPWDD and DOH should offer these agencies alternative options in order to comply with the proposed regulations or to develop a grandfather clause, with an expiration date, whereby such agencies are able to maintain an appropriate rate with a far more graduated reduction and other identified actions through a mutually acceptable plan.

A new reimbursement strategy must be one that promotes network stability and structural reform and incorporate a glide-path over the course of several years (at least five) to allow for natural balancing of rates to occur. Otherwise, a system that dictates big "winners" and big "losers" will have a much more profoundly disruptive impact on a fragile field. The regulation should contain language which requires OPWDD and DOH to assess the efficacy of the transition, on an annual basis, to ensure a consistent and smooth transition and one which does not negatively impact the individuals living in ICFs/DD. The need for annual assessment of the transition is especially apparent as the system will soon move into a managed care environment and can serve to validate the new regional/cost based methodology. Such language might complement the proposed language contained in 641-2.3 (Rates for providers of ICF/DD services) as DOH will periodically update base years.

RESPONSE: OPWDD and DOH are not making changes to the regulation in response to this comment.

### **16. Transition to New Methodology**

COMMENT: We are grateful the State of New York sought a more gradual implementation of the new rate methodology for ICF/DDs and understand the transition period described in section 641.2.7 (Transition to new methodology) of the proposed regulation is not reflective of the State's initial multi-year request. The three-year phase-in of the new rate structure, as proposed, will negatively impact not only the agencies which operate ICFs/DD, but the individuals living in ICFs, especially those with severe developmental disabilities, behavior problems, the elderly and frail and those with complex needs. A five-year transition is not only more consistent with the timelines associated with other similarly profound policy

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changes, but would, moreover, better support successful rate reform that creates the modernized fiscal platform and that will lend to a phase-in that would appear more seamless to individuals and families, while still continuing to promote the safety, health and well-being of people being served.

RESPONSE: OPWDD and DOH are not making changes to the regulation in response to this comment.