

Response to Public Comment on the OPWDD Comprehensive Home and Community Based Services (HCBS) Waiver Renewal and the New York State OPWDD Home and Community Based Settings Transition Plan Response to Public Comments

On August 1, 2014, OPWDD posted for public comment a copy of the comprehensive Home and Community Based Services (HCBS) waiver renewal application which describes key changes to the application that will take effect October 1, 2014. The posting includes OPWDD's HCBS Settings Transition Plan as required by the Centers for Medicare and Medicaid Service's (CMS's) recently adopted rules that contain standards for home and community based settings and that require the State to submit a transition plan at the time of an HCBS waiver renewal. This transition plan is required to set forth the actions the State will take to bring the waiver into compliance with the federal regulatory standards. The Application and Transition Plan was available on OPWDD's website for 30 days. In this document, which is organized by topic areas raised by respondents, OPWDD provides responses to questions and concerns received during this comment period.

New York State has requested an extension of its current waiver, allowing a 90-day period extension so that the waiver renewal will be effective January 1, 2015. To ensure continuity of federal funding for self-directed services, changes to self direction will be effective on October 1, 2014 with the approval of CMS.

HCBS WAIVER RENEWAL

WAIVER ACCESS and CAPACITY

- 1. A respondent asked why the waiver enrollment numbers drop by almost 4,000 enrollees to a first year waiver number of 75,465 in the first year of the renewal. The respondent cited a June 2013 enrollment number of 79,000.**

The 79,000 number is based upon the waiver estimate for waiver year 5 which was included in the 2009 waiver application. The waiver data available in 2009 was trended over five years, which resulted in a number that clearly exceeded the actual utilization by the final waiver year.

The numbers referenced in the current waiver application are based on the number of participants who utilized waiver services during waiver year 4 which was adjusted based upon the number of individuals who have been added or removed to the waiver during the intervening period plus an expectation of additional participants during the waiver year.

- 2. A reviewer recommended that for the priority Setting for enrollment the waiver be amended to define Priority 1 enrollment to include people who currently live in other institutional settings (nursing homes and private residential schools)**

A broad category for Priority One waiver eligibility is the imminent danger of becoming homeless or other imminent risk to health and safety. By aging out of a residential school, or no longer meeting the level of care for a nursing home, a person would meet this criterion. It should be noted that OPWDD has also reserved waiver capacity for individuals leaving institutions (see next question).

- 3. Several reviewers noted that OPWDD had ‘reserved capacity’ for people leaving institutions, but that these numbers did not appear to be sufficient in relation to the OPWDD Transformation Agenda’s ICF Transition Plan and people leaving other settings such as Nursing Homes and Residential Schools.**

The reserved capacity level was determined to address both the needs of people transitioning from ICFs to the HCBS waiver and from other institutional settings. There is always some attrition from the waiver each year, and the reserve capacity took into account that factor in an effort to balance the transition plan with the needs of individuals entering the waiver from non-certified settings.

- 4. A respondent recommended that the waiver application be amended to include specific time frames for the completion of OPWDD eligibility determinations, assessments, Notice of Decisions, ISP development and HCBS waiver enrollment.**

In its ongoing efforts to ensure consistent access to services across the state, OPWDD has implemented the Front Door, which is a process for assessing individual needs and allocating service resources based upon a standardized process. Part of the Front Door guidance clearly outlines the expected timeframe for a regional office to complete pertinent authorizations from the point at which all required documentation, accurately completed, and is received by the Regional Office.

- 5. Several respondents recommended that OPWDD eliminate the requirement that a physician sign the initial Level of Care instrument that is completed as part of an individual’s application to enroll in the HCBS waiver.**

The LCED instrument requires the same eligibility level as that of the ICF (i.e. ICF/DD Level of Care); since the ICF is a medical model, a physician’s review and signature is needed to establish initial eligibility in the program.

It should be noted that in the last waiver application, OPWDD modified its requirement for subsequent LCED reviews to allow for a QIDP to review and recertify a person’s level of care.

- 6. Several respondents stated that clarification was needed regarding the requirement that a minimum number of waiver services (one or more) be provided to an individual in order for him/her to be eligible for waiver services. It was, however, noted that the need for services on a less than monthly basis was acceptable, if the waiver enrollee requires regular monthly monitoring which is documented in the service plan. Respondents felt the requirement was unclear, and questioned whether consistent monitoring of this requirement is sufficient to assess whether these individuals should continue in the waiver.**

The current requirements for waiver eligibility are, as the respondents note, a need for monthly service and/or monthly monitoring plus a less frequent service being delivered. NYS recognizes the complexity of determining the service needs of individuals who have varying levels throughout the year. The State remains dedicated to ensuring that the service needs of an individual are met through the variety of waiver and state paid service options available.

- 7. One respondent recommended that the State consider developing two 1915 (c) waivers with one devoted entirely for people assessed to be in need of intensive (24-7) supports and the other waiver for people assessed to be in need of less intensive community supports. This intensive supports waiver would carry a waiting list if necessary due to “waiver slot” limitation and provide for a prioritization to fill those opportunities as they become available**

OPWDD welcomes recommendations from the field, and will once again consider this possibility as the service system moves toward a Managed Care environment.

- 8. A respondent noted that a person’s physical move from one catchment or region to another county follow Medicaid process without delay, closure or re-enrollment.**

OPWDD agrees with this comment. It is the expectation that a waiver eligible person be transitioned seamlessly from one Regional Office catchment area to another. As the agency finalizes the redesign of the Front Door protocol, the streamlining of inter-district transfer will be assessed for improvement.

9. A respondent commented that DOH should exercise closer review and oversight of OPWDD access to services.

OPWDD agrees with this comment. As part of its oversight of the OPWDD waiver, DOH annually reviews a large sample of service plans and supporting documentation to ensure that the services provided are appropriate for the individual. In addition, OPWDD and DOH meet quarterly regarding waiver operations. The development of the Eligibility, Assessment and Authorization (EAA) tool and the analysis of data collected from the tool will facilitate OPWDD's management, and DOH's oversight of the enrollment process.

10. A respondent suggested that the "Documentation of Choices" form that is required as part of the individual enrollment process is insufficient. The form solely documents the person's choice between the HCBS waiver and services in an ICF. In keeping with the more holistic intent of the HCBS settings regulations, the focus of the form should be on the array of choices that a person makes as part of the waiver enrollment and service development process (for example, self-direction vs. provider managed services).

A requirement for the waiver is that an individual and his/her representative (if applicable) be informed of the option to receive institutional care or to select Waiver services. The Documentation of Choices form demonstrates this choice. The Front Door process is designed so that all individuals and families who come to OPWDD for services are informed of the full range of options, including the option to self direct services. Further, it is the expectation of OPWDD that a service coordinator discusses the option of various service providers who offer the service(s) authorized by OPWDD. It is also the expectation that the service coordinator advocate for additional services that might be appropriate for a person, along with a justification for the services.

Fair Hearings

1. A reviewer noted that the State provides the opportunity to request a Fair Hearing under 42 CFR §431 Subpart E, to individuals: (a) who are not given the choice of home and community-based waiver services as an alternative to institutional level of care specified for this waiver; (b) who are denied the service(s) of their choice or the provider(s) of their choice; or (c) whose services are denied, suspended, reduced or terminated. The reviewer also noted that the issue of timeliness of decisions is not mentioned as a Fair Hearable issue. Other reviewers suggested that the opportunity for fair hearings be expanded to include issues listed in federal regulation, as well as to completed evaluations and DDPs.

OPWDD must make assurances regarding the identified hearing issues specific to the HCBS program. Fair hearings are available for all other issues as required by law.

Qualified Provider Enrollment/Execution of Medicaid Provider Agreements

1. A reviewer noted that one of the performance measures in the Waiver is the Uniformity of development/execution of provider agreements throughout all geographic areas covered by the waiver. The respondent noted that OPWDD conducts a review of local need for a new provider prior to an entity being able to deliver a service in a new area. This practice, and the practice that a single provider may be required to obtain eMedNY provider IDs to operate in different regions creates delays in service provision.

In 2011, OPWDD implemented a new process for reviewing and approving service providers. This process was designed to ensure consistent review and approval of qualified service providers through a two step process of local and central office review of providers. The onus is on OPWDD to ensure that service providers are qualified on all levels, from direct care staff to Board oversight, to provide quality services to a vulnerable population. This process allows OPWDD to meet this charge, while maintaining a viable pool of high quality and fiscally stable service providers without flooding the service area.

Although a provider may be authorized to provide services, in order to submit claims for these services, the provider is required to request authorization to submit claims to eMedNY. This request cannot be made until OPWDD has done its due diligence in reviewing the agency applying to be a service provider.

Individual Service Plan (ISP)

1. Several respondents recommended that the State only require that the ISP be updated at a minimum on an annual basis instead of two times a year. The ISP would still need to be updated as necessary throughout the year based on individual change.

In order to ensure appropriate service oversight, OPWDD will continue the requirement that service plans be reviewed at least twice per year.

2. A recommendation was received that the current requirement that a preliminary ISP (PISP) be developed by the Medicaid Service Coordinator (MSC) should be revised, and that this function transfer to OPWDD as part of the assessment process. The PISP should also be changed to require the inclusion of a personal resource allocation (PRA), a targeted value, initial list of services to be approved along with their frequency and duration. The PISP would serve as an approval for entry into the waiver and initial approval of services.

We have modified the Front Door process so that OPWDD will issue the PISP for those who are new to OPWDD services which will identify approvable services including frequency and duration. The MSC will be expected to work with the person and his/her advocate to finalize a request for the desired services, including frequency and

duration, and the desired service providers, and submit that request for authorization.. The MSC can also request additional services for the person if needed.

Medication Management and Administration section of the waiver

- 1. Several respondents noted that the waiver will need to be updated to reflect the recently enacted budget for 2014-15 which provides for expansion of the Nurse Practice Exemption to allow non-nursing staff, who are trained and certified, to perform certain nursing related tasks, under the direct supervision of a registered nurse, in non-certified settings. It was further noted that this legislation is critical in helping people with developmental disabilities to live in the most integrated setting possible.**

OPWDD is currently working with the NYS Education Department to develop a Memorandum of Understanding (MOU) that will authorize implementation of the expanded exemption of the Nurse Practice Act. When the MOU is finalized, the waiver will be revised to reflect these changes.

Day Services and Community Habilitation

- 1. A respondent noted that under the current waiver day habilitation and community habilitation cannot be provided in a home certified as an IRA. The recommendation was made that this restriction should be removed in the HCBS waiver renewal. While it is understood that day habilitation is about community integration there are specific but limited times when the service is needed to be delivered in a residential setting. For example, when there is weather or personal health related issues, the person's habilitation plan can delineate day habilitation activities that the individual wants to do on a temporary basis from their home. In the end this should be the individual's choice and decision and not be subject to an arbitrary rule.**

There is no prohibition for Day Habilitation to be provided in a residential location; OPWDD has historically allowed for this service provision in very specific, well documented circumstances, such as when a person is elderly or cannot travel in cold weather because of a health condition. OPWDD will be reviewing this practice as part of its larger review to ensure that waiver services comport with the federal HCBS Settings requirement.

Effective 10/1/14 to support this service flexibility, Community Habilitation is allowed to be provided to individuals who reside in certified settings, however, the service cannot be provided in the certified setting. Individuals residing in certified locations will have limits as to when the service can be provided to prevent duplicative billing (i.e. not on weekends or weekday evenings).

2. A respondent noted that artificial barriers to choice need to be removed in the waiver renewal. One such barrier is the current restriction on when community habilitation can be offered to people who live in certified settings. The limit is predicated on days of the week and time of day (the service can't be offered on weekends and in the evening).

Limits on the provision of community habilitation in certified settings are necessary to prevent duplicative billing, especially where providers may bill in units greater than quarter hour units. CMS insists that limitations on combinations of residential habilitation and community habilitation be maintained.

Intensive Behavioral Services

1. Several comments were received that urged the State to redesign Intensive Behavioral (IB) Services, in order to provide the service more flexibly and to better support families in need of behavioral support services for their family member living at home. Comments questioned the strict eligibility assessments and the timeframe limitations that would limit families from intermittently receiving the service in response to changing behavioral needs of their family member.

OPWDD agrees and is looking at ways to make IB services more readily available. While IB Services is available from several approved waiver providers across the state, we have learned of recent concerns being expressed by parents and providers related to limited access to these services. In response to these concerns, OPWDD will initiate the following actions beginning in the fall of 2014:

- *Review and as needed revise the criteria to access IB services to be more flexible and responsive to identified behavioral needs of individuals.*
- *Provide greater education and increase available units of IB services to facilitate opportunities for this service for individuals who require this higher intensity level of clinical involvement.*
- *Engage providers of clinical services in discussion to facilitate provider partnerships for the delivery of these important services. If necessary, seek additional providers of service to increase access.*

Respite

1. Several comments were received regarding respite. One respondent urged the State to eliminate the CMS-allowable provision of respite in Intermediate Care Facilities (ICFs). Another respondent questioned the statement in the waiver application that HCBS waiver-funded respite cannot be delivered in a family care home.

NYS has made every effort to ensure that there are sufficient providers of respite to allow that the service is available for individuals with a variety of needs. As such, ICFs will remain an acceptable location for Respite service provision if the location is appropriate for the person being served.

Respite may be provided in a Family Care Home. Section C1/C3 of the waiver application under the waiver service definition lists a Family Care Home as an acceptable setting for Respite. Likewise, section C2 also identifies Family Care Homes as an acceptable location for respite services.

Environmental Modifications and Assistive Technology

- 1. The waiver renewal should allow nonprofit agencies to provide Environmental Modifications and Assistive Technology which are currently limited to the State.**

Under the current and renewed waiver application, agencies across NYS may supervise the implementation of an Environmental Modification or Assistive Technology request under contract to OPWDD. OPWDD is the biller of record for these services, and submits a Medicaid claim once the service has been completed by the subcontracted agency.

Given advances in technology, OPWDD is looking to make future changes to the waiver to allow ease of administration and access to these services.

Transportation

- 1. Several respondents recommended that the State seriously consider adding transportation as a separate and distinct HCBS waiver service. The submission noted that transportation is now a cost component within many of the current HCBS waiver services. By having it as a distinct service it would enable the State to better understand the cost of each waiver service without transportation while also enabling the State to get a better handle and bring greater focus on transportation.**

The costs for transportation are distinguished only in two situations.

Transportation is available under the IDGS service. IDGS is available for an individual who chooses to self direct his/her services using budget authority. Transportation would be available up to the limit of IDGS funding, for the person to travel to and from self directed services.

Additionally, individuals who reside in non-certified settings may access transportation services to medical appointments under the Medicaid State Plan.

- 2. Comments suggested that we work with individuals with developmental disabilities, families, advocates, the nonprofit providers, nonprofit and for-profit transportation vendors, and local governments to better coordinate systems of transportation that cross populations and maximize the use of existing resources.**

OPWDD is participating in the Governor's Office efforts to pilot a mobility management program. OPWDD is involved in the development of this program, along with many other state agencies.

EMPLOYMENT and PREVOCATIONAL SERVICES

- 1. Several respondents commented on the changes to Supported Employment and the related Employment Plan developed as part of the OPWDD Transformation Agenda. In both self-directed services and provider delivered services, respondents asked that volunteer work be an allowable outcome of Supported Employment services.**

The September 2011 CMS Bulletin on Employment Related Services defines Supported Employment as "supports that assist individuals in obtaining and maintaining competitive or self-employment in an integrated work setting in the general workforce where the individual is compensated at or above the minimum wage." Prevocational Services are defined as "services that provide learning and work experience, including volunteer work, where the individual can develop skills that contribute to employability in paid employment in integrated community settings." Based on these definitions voluntary activities are considered prevocational and not supported employment.

- 2. Respondents criticized the limitations related to funding of services in non-integrated work settings such as innovative packing and manufacturing centers.**

All Prevocational and Supported Employment services must be provided in settings that are consistent with the new HCBS regulations related to "community settings."

- 3. A respondent noted that 'Group' Supported Employment should not be allowable in the waiver and such services do not comport with the HCBS settings requirements.**

OPWDD will allow small group employment services that are consistent with federal guidance found in the September 2011 CMS Bulletin on Employment Related Services allows for small group supported employment services which are defined as "services and training activities provided in regular business, industry and community settings for groups of two to eight workers with disabilities. Examples include mobile crews and other business-based workgroups employing small groups of workers with disabilities in employment in the community. Group supported employment services must be provided in a manner that promotes integration into the workplace and interaction between participants and people without disabilities in those workplaces." Small group employment placements that meet these requirements are consistent with the HCBS settings requirements.

4. **Several respondents questioned the limitation that Supported Employment cannot be provided in a certified location. The argument made is that such a limitation precluded individuals living in certified residences from participating in microenterprise or self-employment activities with the support of their job coach, since these many of these employment activities typically occur in a person's home.**

Supported employment services cannot be delivered in a certified setting. These services are typically provided outside of an individual's residence. OPWDD will develop further guidance as it relates to how supported employment services can be used to assist individuals in pursuing self employment goals, whether they live in certified residences or not.

5. **A provider noted that the current rates paid for Prevocational Services varied widely between providers, often in the same geographic area.**

The Department of Health will be developing a new rate methodology for Prevocational Services which will address this issue.

RATE REFORM

1. **Several respondents noted their understanding of the intent of rate reform and appreciated DOH and OPWDD's engagement with providers throughout the process. Particularly noted was the State's intent to implement a more gradual implementation of the new rate methodologies, although it was noted that the transition period as written in the final regulation is not reflective of the State's initial multi-year request. The three-year phase-in of the new rate structure was criticized by several respondents who commented that the short timeframe to implement the rates will negatively impact individuals being served (especially individuals residing in ICFs/DD with severe developmental disabilities and behavior problems, the elderly and frail and those with complex needs)**

NYS actively advocated for as long a transition period as possible in its negotiations with CMS. The time period represents the transition period agreed upon by the Federal government. NYS continues its discussions with CMS on other items which may help to lessen any adverse impacts on individuals and agencies during the transition period.

- 2. Comments received stressed preference for a rate reform methodology that promotes network stability and structural reform, and incorporates a gradual transition over the course of several years (at least five) to allow for natural balancing of rates to occur.**

NYS actively advocated for as long a transition period as possible in its negotiations with CMS. The time period represents the transition period agreed upon by the Federal government.

- 3. Several respondents suggested that OPWDD and DOH assess the efficacy of the transition, on an annual basis, to ensure a consistent and smooth transition that does not negatively impact the individuals being served. Submissions received by OPWDD further recommend the waiver renewal submission reflect such an annual assessment especially for the duration of the rebalancing of the rates.**

Although no change to the waiver application is being made, OPWDD will assess the implementation of the new methodology going forward and address any issues during ongoing discussions with CMS.

- 4. A respondent noted that the DOH regions used in the rate reform methodology fail to group similar wage and cost structures and economies on a rational basis. In particular, the creation of 'Upstate Metro' and 'Rest of State' groupings fail to address very real regional cost differences.**

Although DOH regions are slightly different from OPWDD regions, they are largely aligned, and therefore, are appropriate for use in the rate setting methodology. The regions were chosen to align with long term managed care regions currently being used by DOH in preparation for OPWDD's transition to managed care.

- 5. Concern was raised by one respondent regarding the downward pressure that rate reform would cause on Direct Care Professional wages.**

NYS will take this concern under advisement and will determine if an annual revision to the rate would be appropriate. Any revisions would be reflected in a rate change. See also #3 above.

- 6. One respondent also criticized that the State and not-for-profit methodologies differ, and that parity should exist concerning reimbursement in both systems.**

This concern has been noted, however, the rate methodology will not be revised.

Self Direction Service Design

- 1. One respondent commented that the current waiver is contradictory in that it states in the Overview section of Appendix E-Participant Direction of Services that “an individual may choose to self-direct some or all of their waiver services” but in the Participant Services section of the waiver (Appendix C) for many services (supported employment, day habilitation, pre-vocational, pathway to employment, residential habilitation, environmental modification, assistive technologies) the box is not checked under service delivery method that indicates that the person can self-direct. It is not only a contradiction but is not in line with the OPWDD service system transformation and goals established therein.**

As noted in the comment, not all services will be available for self direction by individuals. Of the services an individual chooses to receive that are available for self direction, some or all of them may be self directed by the individual and some may be provider directed.

- 2. One respondent commented that there are multiple caps identified in the waiver. It was requested that OPWDD post an explanation of why each cap was established and how the cap was determined.**

CMS indicated that they would require the implementation of caps on various waiver services. OPWDD negotiated the limits to items such as Environmental Modifications by reviewing historic billing levels and determining a level that would not diminish services for waiver recipients.

It should be noted that caps on services in comparable NYS waivers, such as those managed by the Department of Health, are noticeably lower than the OPWDD limits.

- 3. One respondent commented that NYS has indicated that it does not impose an individual cost limit in Appendix B-2 and that the limit of self directed services to the PRA violated this statement, and is not reliable.**

States are permitted to implement limits within certain services under the waiver and NYS clearly defines this PRA limitations in the waiver as required by CMS. NYS utilizes the PRA as the ceiling for self directed services with a level that is based upon the need of individuals with a similar assessed need. CMS has reviewed the methodology for establishing the PRAs, and has approved them as appropriate for self directed services.

- 4. One respondent requested that participants be allowed to be the Common Law Employer as defined in Appendix E-2, and that providers be allowed to hire Self-hired Common Law Employees or Independent contractors for self directed service provision.**

OPWDD is working to make the option of common law employer available to individuals. We do not believe that self-directed habilitation or respite waiver services can be delivered by an independent contractor. The self directed habilitation services (Community Habilitation & Supported Employment) and waiver respite services that are provided by 'self-hired' staff are described in a person centered plan and are directed by the person and or the person's family/circle.

- 5. Several respondents raised concerns about the short time-frame for implementation of the new self direction methodology and the length of time it took OPWDD to finalize the methodology (particularly Individualized Goods and Services-IDGS) with the federal Centers for Medicare and Medicaid Services (CMS). Families noted that they have had insufficient information and that the WebEx/conference call on the waiver was not held until the close of the public comment period, and that a planned call with families involved in self-direction is not being held until September 9th.**

OPWDD recognizes that the time frame was short. Outreach began in the spring of 2014 to stakeholders, including individuals and families. Although it must be acknowledged that the pace of change has been rapid, OPWDD is continuing to plan outreach with individuals and families to communicate the changes, as well as gather information to continuously improve self-directed services.

- 6. A large number of respondents raised significant concerns about the proposed fee methodology for reimbursing the Fiscal Intermediaries. The state has proposed three fee levels that are differentiated based on the extent to which the Fiscal Intermediary is managing payroll functions for the individual.**

The fees were determined through analyzing currently available cost data during the first year and include assumptions about items such as workload, plan complexity, etc. OPWDD is committed to monitoring the impact that these fees have on fiscal intermediaries. Several strategies are being put in place to assist FIs with the transition, and were discussed with FIs at an all day training session on September 23rd.

- 7. Many respondents commented that the self direction methodology focused on 100% state paid housing subsidies and the methodology for calculating Live-in Caregiver reimbursement. Respondents, particularly in New York City, commented that the state-paid housing subsidies are insufficient. Several families submitted comments that recent changes to the housing and Live-in Caregiver methodology are not sensitive to the cost of living and thus make acceptable, independent housing arrangements out of reach for individuals.**

The regional totals for Live-in Caregiver regional maximums are based the 2012 monthly payment standards for the ISS Housing Subsidy calculation for a two bedroom apartment. The payment values are based on Housing and Community Renewal county-based payment standards.

- 8. Many individuals who submitted comments focused on the proposed methodology for Individual Directed Goods and Services (IDGS) and the reimbursement available for the “consultant clinicians” category that can be purchased using these funds.**

The state has negotiated with CMS that clinician’s support can be purchased on a ‘consultant basis’ to assist with the oversight and delivery of services by self-hired staff. This is allowed by CMS because our NYS Medicaid State plan does not allow clinics to bill Medicaid for time spent training Medicaid-funded staff (i.e., direct support professionals). Thus, for individuals who self-hire staff, IDGS can be used to purchase clinician assistance with training of staff that the person self-directs. The clinician must be a licensed professional recognized by the NYS Office of the Professions or eligible under OPWDD regulations and the rate of payment is based on statewide 90th percentile wages from the Bureau of Labor Statistics.

- 9. Respondents asked how “job developers”, previously funded under CSS, would be funded under the new self directed services.**

Job development continues to be available as a self directed option under the new methodology. Job development falls within the service definition of Supported Employment (or SEMP), and as such in the new methodology a self-hired job-developer cannot be paid more than the hourly rate a provider agency would be paid.

- 10. One respondent raised concerns about being able to continue to use self direction funds to purchase medically necessary nutrition consultation.**

A consultant for nutrition would be allowed under IDGS if they met the NYS requirements for a certified nutritionist or certified dietician and are delivering a ‘consultant service’ (see #8 above)

- 11. One respondent commented that the annual allotment for camp expenses (\$4,000/year) was inadequate.**

The annual allotment is based on current utilization. OPWDD may revisit the annual threshold in the future.

- 12. Several respondents commented that limiting reimbursement for ‘community classes’ to classes that are integrated and open to people without disabilities is discriminatory. One respondent particularly cited the need for people with Autism to participate in specialized classes and training programs that address their unique needs.**

Individual Directed Goods and Services are intended to promote an individual’s integration into the community. Funding only community classes that are not segregated helps assure that goal.

- 13. OPWDD worked with CMS to fund “transition programs” through IDGS. The criteria for these programs is that they are vocationally focused and limited to a two-year time period. In the interest of life-long learning, one respondent objected to the two-year limitation for transition programs through IDGS and suggested that additional funding be provided for academic tutors.**

Transition Programs for Individuals with IDD may be purchased as an Individual Directed Goods and Services and is specific to a non-credit bearing transition program, is limited to two years. An academic tutor is not allowed through IDGS and should be pursued through the school district as needed

- 14. Several respondents suggested that IDGS be expanded to address funding for indirect staff time, staff training, and hiring ‘consultants’ to manage service delivery for the person.**

There are several ways to address indirect staffing costs. OPWDD has provided guidance on how to address indirect staff time in the total staffing costs. Also, Self-Directed Staffing Support is available through Individual Directed Goods and Services. Finally, OPWDD is drafting Support Brokers guidance regarding the ways in which the broker can assist the person to manage his/her self-directed services.

- 15. One respondent advised that the proposed methodology for hippo therapy (equine assisted therapy) is not sufficient.**

The hourly amount paid to the therapist can be up to the 90th percentile for the regional hourly wage for the therapeutic or consultant’s professional discipline (i.e., the standard occupational code) published by the Bureau of Labor Statistics (BLS). We may evaluate the need for a change in the future.

- 16. There was a concern raised about the need to better understand the options for transportation funding under IDGS. Several respondents noted that while the state is temporarily funding vehicle leases with 100% state-funds following the federal prohibition against purchasing or leasing vehicles with federal funding, once these current leases are complete individuals will need to make different arrangements.**

Yes, while these lease arrangements will be phased out, OPWDD has provided additional guidance on transportation options that may be funded within Individual Directed Goods and Services.

- 17. Several respondents objected to the limitation of over-PRA funding, and concern was raised that the special funding for people leaving institutions was limited to one year.**

Personal Resource Allocations (PRAs) are individualized budget limits and are based on historical utilization data. Prior to the upcoming reform, the state allowed individualized budgets to exceed the PRA under certain circumstances. Based on CMS requirements, we cannot continue this policy with federal funding. To ensure continuity of care OPWDD, for some period of time, will allow current plans to continue with the over-PRA amount being funded with 100% state funding. In addition, the current allowance for special funding levels for people leaving institutional settings remains in place. To ensure continuity of care OPWDD is temporarily allowing some plans to be funded with 100% state funds when they exceed the individual's PRA. In addition, the Specialized Template Funding for people leaving institutional settings will continue. OPWDD remains committed to ensuring that people's needs are met so that they can remain in the community. OPWDD is working on a alternative methodology to address the costs for this population.

- 18. One respondent noted that the limitation of wages for specialized staff delivering self-directed Community Habilitation or Supported Employment is not sufficient and thus limits the level of professionals that can be engaged in the service.**

CMS has directed the state that the payment amount for self-directed services cannot exceed the amount that an agency would be paid for the same service. Regional rates were established using (provider directed) services wage and fringe data, and clinical oversight and administrative costs.

New York State OPWDD Home and Community Based Settings Transition Plan Response to Public Comments

- 1. Respondents who commented on the OPWDD Home and Community Based settings transition plan strongly supported the ideals of integration and full community engagement that the new federal regulations promote. Several respondents noted that there are costs associated with coming into compliance with the new federal regulations, and these cannot be solely born by providers. The federal and state governments should ensure that the reimbursement methodologies support the transitions needed for full compliance with these regulations.**

Through OPWDD's transition plan, OPWDD is in the process of developing an HCBS Settings Assessment Tool based upon the final CMS regulations and CMS Exploratory Questions. The tool will assist in assessing the level of adherence to the new HCBS regulations and help provide baseline data in which to identify the major challenges and issues that the system will need to address for full compliance with the new rules. The information learned through administration of the HCBS Assessment Tool will be used by OPWDD to update its initial transition plan to CMS and to identify systemic issues that will need to be addressed by the system overall.

- 2. Several respondents praised OPWDD's efforts to prepare for the implementation of the new regulations in a public and meaningful way. Comments cited the regulatory analysis of state and federal rules to evaluate the degree to which current NYS regulations comport with the new federal rules, and the public engagement in working groups and general public outreach. Respondents noted that it was important that this transparency continue over the course of the implementation of the HCBS settings transition plan. In this vein, respondents recommended:**
 - The interagency working group of state agencies be expanded to include stakeholders,**
 - That public hearings be held, and**
 - The state Most Integrated Settings Coordinating Council (MISCC) serve as the conduit for information regarding the State's overall plan.**

OPWDD appreciates respondents noting our efforts to ensure full transparency. OPWDD agrees that it is important to continue this transparency and will continue to make every effort to do so as we continue with transition planning and related activities. OPWDD's Regulatory Reform/HCBS Settings Steering Committee includes representation from all stakeholder groups including individuals receiving services, self-advocates, parent representatives, and provider representatives. OPWDD has been providing regular updates from this stakeholder workgroup on its website.

OPWDD will share the respondents recommendations for the interagency work group and the Most Integrated Settings Coordinating Council (MISCC) with the appropriate state officials and we are confident that these recommendations will be carefully considered as these groups continue their important work.

- 3. One respondent understood that OPWDD’s work regarding new quality review tools to evaluate compartment with the new federal rules, assessment of system readiness with DQI on-site reviews, and initial regulatory analysis are but preliminary steps. None the less the respondent disagreed with statements in the transition plan such as, “there appears to be substantial alignment between OPWDD regulations, including in intent, principles and the major key elements.” The respondent cited several differences between state and federal and state regulations, such as:**
- **14 CRR-NY686.7(a)(2) “Admission to a supervised residence shall be based primarily on the applicant having a diagnosis of a developmental disability ... and that his/her need for supervision and services can adequately be met.” The respondent noted that the CMS regulations, “the new CMS regulations do not permit people to be excluded from a residential option on the basis of “level of disability of the clients”; nor do they permit OPWDD to operate or fund a residential program that cannot “adequately” meet the needs of any person who chooses to live in that option; nor do they permit OPWDD to deny people the right to choose any particular HCBS-compliant residential option on the basis of the hours of “oversight and guidance” they need”**
 - **14 CRR-NY 633.4(a) (3): “It is the responsibility of the agency/facility or the sponsoring agency to ensure that rights are not arbitrarily denied. Rights limitations must be documented and must be on an individual basis, for a specific period of time, and for clinical purposes only.” The respondent commented that this NYS regulation does not equate to the federal regulatory requirement that people living in provider operated residential settings may not have their rights limited without attempts being made to meet the individuals’ needs by less restrictive means, or to first implement positive behavioral supports to address situations in which a person’s autonomy may need to be limited.**

As OPWDD indicated in our waiver application, OPWDD recognizes that additional analysis is needed to ensure compliance with the intent and language of the actual federal regulations including the need to evaluate compliance based on each person’s perspective and experience in the setting. Accordingly, OPWDD plans to commence a comprehensive on-site residential assessment of a sample of certified residential settings and individuals residing there. This assessment will provide OPWDD with baseline data on the degree of compliance with the federal regulations and will enable OPWDD to engage in more targeted transition activities to address any system changes necessary for the transition to full compliance.

OPWDD has also been working extensively with its Regulatory Reform/HCBS Settings Steering Committee to update its HCBS Settings Administrative Memorandum from 2013 for the final HCBS regulations for OPWDD certified residential settings. This ADM includes necessary interpretative guidance on the broad concepts outlined in the HCBS settings final regulations. In addition, OPWDD has worked with and shared its HCBS Settings Assessment Tool and lengthy accompanying guidance document with this work group and on OPWDD's HCBS Settings Transition Plan Web Page under Stakeholder Work Group Resources.

Once OPWDD completes its HCBS Settings Assessment for its certified residential settings, OPWDD will work on the revision and promulgation of new regulations reflecting the federal HCBS settings standards and during this process, OPWDD will evaluate the need for any other regulatory or guidance changes to reflect full alignment with the federal HCBS settings and person centered planning regulations.

- 4. A respondent stated that OPWDD made inaccurate claims in its waiver application about the ability of current DQI review tools to capture non-compliance with several key elements of the federal regulations. An example cited is that federal regulations require that the person-centered planning process include people chosen by the individual, while the OPWDD DQI Medicaid Service Coordination (MSC) protocol includes a probe for reviewers to assess whether, "other persons of the individual's choice are invited to develop the ISP." Thus, the respondent notes that a failure to meet the federal-level requirement would not be captured as non-compliance in the state review instrument.**

As OPWDD indicated in our waiver application, OPWDD recognizes that additional analysis is needed to ensure compliance with the intent and language of the actual federal regulations. Accordingly, OPWDD plans to commence a comprehensive on-site residential assessment of a sample of certified residential settings and individuals residing there. This assessment will provide OPWDD with baseline data on the degree of compliance with the federal regulations and will enable OPWDD to engage in more targeted transition activities to address any system changes necessary for full compliance.

5. In addition to the current review tools being insufficient to address the intent of the new federal regulations, this respondent stated further that OPWDD's claims that unannounced visits to group homes are conducted is false, and that the visits are announced several days in advance, and allows providers to "doctor" records and make temporary modifications to physical space. This practice prevents reviewers from getting a true picture of services at certified residences.

OPWDD survey/inspection visits to certified sites are unannounced in accordance with NYS Mental Hygiene Law requirements. OPWDD may also conduct other types or reviews /audits where there may be prior notice to providers.

6. ***A respondent recommended that the state pursue a full five-year period for implementation of the HCBS settings transition plan, and cites the October 1, 2016 date for establishing adverse actions as an indication that OPWDD is not allowing for the full transition period.***

The OPWDD initial preliminary Transition Plan for certified residential settings states the following "October 1, 2016: Formalize the full incorporation of all HCBS settings requirements into OPWDD's certification requirements and processes including survey tools, protocols, processes, and accountability initiatives for October 1, 2016 implementation. This includes adverse actions for non-compliance for any components of the CMS HCBS settings requirements that weren't already required by OPWDD prior to the CMS regulations being finalized."

Under its preliminary initial transition plan OPWDD intends to incorporate the HCBS Settings requirements for certified residential settings into certification standards in 2016, subject to CMS approval of the OPWDD HCBS Settings Transition Plan for certified residential settings. The transition plan and timeline for non-residential settings has not yet been determined as we are awaiting CMS guidance on interpretation of the HCBS Setting requirements to non-residential settings.

However, OPWDD will carefully consider the respondent's concerns about the October 2016 timeline for incorporating the HCBS settings standards into its certification standards and will confer with CMS on this timeline for any potential opportunities to reconsider it.

- 7. A respondent asked that provider association members receive copies of the draft HCBS Settings Administrative memorandum, on-site assessment tool, and the cross-walk of OPWDD regulations, and that these items be available on the OPWDD website.**

The cross walk of OPWDD regulations mentioned by the respondent is an internal document prepared by OPWDD staff as part of the analysis of OPWDD regulations and the new HCBS Settings rules. OPWDD will share this document with anyone who requests it. The drafts of the HCBS Settings Administrative Memorandum and On-Site Assessment tool are publically available on OPWDD's HCBS Settings Transition Plan web page under Stakeholder Work Group Resources http://www.opwdd.ny.gov/opwdd_services_supports/HCBS/stakeholder-workgroup-resources. These documents continue to be "works in progress" while we continue to consider and integrate the input and feedback received to date. Once these documents are final for the purpose of the HCBS Settings Assessment, they will be shared publically on OPWDD's website as well as with all OPWDD providers, provider associations, the Self Advocate Association of New York State, Parent to Parent, and other stakeholder groups.

- 8. A key to the successful implementation of the new regulations is the expansion of training associated with person centered planning, to ensure there is a sufficient workforce prepared to work with individuals and their families in the development of person centered plans.**

OPWDD thanks you for your comment. OPWDD currently offers Person Centered planning for service coordinators and support brokers. OPWDD is also reviewing options to expand training opportunities across the service system as it continually strives to improve the Person Centered Planning Process.

- 9. Throughout the implementation of the Transformation Plan and the implementation of the HCBS settings transition plan, OPWDD must strive to develop better ways to communicate with individuals and families to ensure there is broad understanding of the changes taking place.**

OPWDD agrees. We continue to be open to all stakeholder input and feedback on how OPWDD can better communicate with individuals and families. OPWDD will continue to use stakeholder groups throughout this process and will rely on stakeholder representatives to serve as liaisons to facilitate communications and involvement with individuals, families and staff and board members of provider agencies.