

Enrollment in Medicare Prescription Drug Plans and Fully Integrated Duals Advantage Plans for Individuals with Intellectual and Developmental Disabilities (FIDA-IDD) Amendments to 14 NYCRR Subpart 635-11

FINAL REGULATIONS

Effective Date: September 19, 2018

- **Existing Subpart 635-11 is amended as follows:**
- Enrollment in Medicare Prescription Drug Plans and Fully Integrated Duals Advantage Plans for Individuals with Intellectual and Developmental Disabilities (FIDA-IDD)
- **Existing subdivision 635-11.1(a) is deleted and new subdivision 635-11.1(a) is added as follows:**
 - (a) This Subpart sets forth rules concerning
 - (1) who can enroll beneficiaries or individuals in
 - (i) a Medicare Part D prescription drug plan or in a Medicare Advantage plan with prescription drug coverage; or
 - (ii) a Fully Integrated Duals Advantage Plan for Individuals with Intellectual and Developmental Disabilities (FIDA-IDD) which is authorized to enroll individuals with intellectual and/or developmental disabilities pursuant to section 364-j(27) (c) of the Social Services Law; and
 - (2) who can pursue grievances, complaints, exceptions and appeals in such plans, or services.
 - (3) These rules only apply to beneficiaries who receive services which are operated, certified, authorized or funded by OPWDD.
- **Existing paragraph 635-11.1(b)(1) is amended as follows:**
 - (1) *Act in the [Part D] FIDA-IDD plan review process* means doing any of the following within [the Part D Program] a FIDA-IDD Plan:
- **Existing subparagraph 635-11.1(b)(1)(ii) is amended as follows:**
 - (ii) submitting a complaint to the quality improvement organization [;] or to federal or state government regulatory agencies;

- **Existing subparagraph 635-11.1(b)(1)(iii) is amended as follows:**
 - (iii) requesting and obtaining a coverage determination (including, but not limited to, a request for prior authorization, [an exception to a tiered cost sharing structure,] a formulary exception and a request for expedited procedures);
- **Existing subparagraph 635-11.1(b)(1)(iv) is amended as follows:**
 - (iv) filing and requesting appeals and dealing with or participating in, any part of the appeals process;
- **Existing paragraph 635-11.1(b)(2) is deleted and a new paragraph 635-11.1(b)(2) is added as follows:**
 - (2) *Act in the Part D review process* means doing any of the following within the Part D Program:
 - (i) filing a grievance;
 - (ii) submitting a complaint to the quality improvement organization;
 - (iii) requesting and obtaining a coverage determination (including, but not limited to, a request for prior authorization, an exception to a tiered cost sharing structure, a formulary exception and a request for expedited procedures); and
 - (iv) filing and requesting appeals and dealing with any part of the appeals process.
- **Existing paragraph 635-11.1(b)(3) is deleted and a new paragraph 635-11.1(b)(3) is added as follows:**
 - (3) DDRO means an OPWDD Developmental Disabilities Regional Office.
- **Existing paragraph 635-11.1(b)(4) is deleted and a new paragraph 635-11.1(b)(4) is added as follows:**
 - (4) DDSOO means an OPWDD Developmental Disabilities State Operations Office.
- **New paragraph 635-11.1(b)(5) is added as follows:**
 - (5) *Enroll and enrollment* means enrollment in, and disenrollment from:
 - (i) a PDP; and/or
 - (ii) a FIDA-IDD plan.
- **New paragraph 635-11.1(b)(6) is added as follows:**

Note: New material is underlined and deleted material is in [brackets].

- (6) *FIDA-IDD* or *FIDA-IDD plan* means a Fully Integrated Duals Advantage Plan for Individuals with Intellectual and Developmental Disabilities (FIDA-IDD) authorized to enroll individuals with intellectual and/or developmental disabilities under section 364-j(27)(c) of the Social Services Law.
- **New paragraph 635-11.1(b)(7) is added as follows:**
- (7) *Party* means someone or an entity or organization.
- **New paragraph 635-11.1(b)(8) is added as follows:**
- (8) *PDP* means a prescription drug plan offered under the Medicare Part D Program or a Medicare advantage plan that provides prescription drug coverage offered under the Medicare Part D Program.
- **Existing section 635-11.2 is amended as follows:**
 - Section 635-11.2. [Enrollment]PDP enrollment and reviews for persons residing in a residential facility operated or certified by OPWDD or a family care home
 - **Existing subdivision 635-11.2(d) is amended as follows:**
- (d) In all other situations, the chief executive officer (CEO) (see section 635-99.1 of this Part) of the agency operating the person's residential facility or sponsoring the family care home, or a designee of the CEO, may enroll the person or act in the Part D review process. The CEO or designee may also enroll the person or act in the Part D review process when any party specified in subdivisions (a)-(c) of this section who would otherwise enroll or act in the Part D review process is unwilling or unavailable. For the purposes of this subsection only, if the person's residential facility is operated by OPWDD, the CEO of the agency is the director of the DDSOO that operates the residential facility.
- **Existing paragraph 635-11.2(d)(1) is amended as follows:**
- (1) If a CEO or designee enrolls a person, he or she shall give written notice of such enrollment to the person's correspondent or advocate, and the person's Medicaid service coordinator[.], or other person identified as that person's care coordinator.
- **Existing subparagraph 635-11.2(d)(2)(iii) is amended as follows:**
- (iii) If the agency or sponsoring agency does not agree with the request, the agency or sponsoring agency shall notify the correspondent or advocate in writing of the disagreement. The notice shall also inform the advocate or correspondent that he or she may appeal in writing to the [DDSO director] DDRO director for the region within which the person's residential facility is located if the residential facility is not operated by OPWDD. If the person's residential facility is operated by OPWDD, then the notice shall inform the advocate or correspondent that he or she may appeal in writing to the OPWDD Commissioner or his or her designee.

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- **Existing subparagraph 635-11.2(d)(2)(iv) is amended as follows:**
 - (iv) If the advocate or correspondent appeals in writing to the [DDSO]DDRO director or Commissioner, the [DDSO] director or Commissioner shall review the request and relevant information and shall decide whether to enroll the person in a different PDP. Such decision shall be in writing and shall be sent to the correspondent or advocate and agency or sponsoring agency.
- **Existing section 635-11.3 is amended as follows:**
- Section 635-11.3 PDP [E]enrollment and reviews for persons not residing in a residential facility or a family care home
- **Existing section 635-11.4 is deleted and a new section 635-11.4 is added as follows:**

Section 635-11.4. FIDA-IDD enrollment and reviews for persons residing in a residential facility operated or certified by OPWDD or a family care home

- (a) If a person has the ability to choose a FIDA-IDD Plan on his or her own, or with the assistance of supported decision making, the person may
 - (1) enroll himself or herself in a FIDA-IDD Plan;
 - (2) act in the FIDA-IDD review process;
 - (3) disenroll himself or herself from a FIDA-IDD Plan;
 - (4) appoint another party to take actions on his or her behalf;
 - (5) seek assistance with the above decisions and actions.
- (b) If a person lacks the ability to choose a FIDA-IDD plan, disenroll from a FIDA-IDD Plan, or act in the FIDA-IDD review process, but has a guardian lawfully empowered to enroll him or her in a FIDA-IDD plan, the guardian may take any of the actions enumerated in subdivision (a) of this subpart.
- (c) If a person lacks the ability to choose a FIDA-IDD Plan and does not have a guardian lawfully empowered to enroll him or her in a CCO, then any of the following parties, in the order stated, may take any of the actions enumerated in subdivision (a) of this subpart:
 - (1) an actively involved (see section 633.99(ax) of this Title) spouse;
 - (2) an actively involved parent;
 - (3) an actively involved adult child;

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- (4) an actively involved adult sibling;
 - (5) an actively involved adult family member;
 - (6) the Consumer Advisory Board for the Willowbrook Class, but only for members of the Willowbrook Class.
- (d) If the first surrogate on the list in subdivision (c) is not reasonably available and willing to make enrollment decisions and enroll the individual in a FIDA-IDD Plan or act in the FIDA-IDD review process, and is not expected to become reasonably available and willing to make an enrollment decision and enroll the individual in a FIDA-IDD or act in the FIDA-IDD review process, the surrogate who has the highest priority on the list and who is willing and available shall have the authority to make enrollment decisions and enroll the individual in a FIDA-IDD or act in the FIDA-IDD review process.
- (e) If more than one party exists within a category in subdivision (c) of this subparagraph utilizing the standard of active involvement, consent shall be sought first from the party with a higher level of active involvement or, when the parties within a category are equally actively involved, consent shall be sought from any of such parties.
- (f) If the person lacks the ability to choose a FIDA-IDD, does not have guardian lawfully empowered to enroll him or her in a FIDA-IDD, and there are no parties identified in (c) above, then the chief executive officer (CEO) (see section 635-99.1 of this Part) of the agency operating the person's residential facility or sponsoring the family care home, or a designee of the CEO, may take any of the actions enumerated in subdivision (a) of this subpart. For the purposes of this subsection only, if the person's residential facility is operated by OPWDD, the CEO of the agency is the director of the DDSOO that operates the residential facility.
- (g) If the CEO enrolls the person in the FIDA-IDD plan or acts in the FIDA-IDD review process, he or she shall give written notice of such enrollment and/or action to (1) the person's correspondent or advocate, if one is available; (2) the person's Medicaid service coordinator, or other person identified as that person's care coordinator; (3) the DDRO director for the region encompassing the person's residence.
- (h) If a party specified in subdivisions (a) through (d) of this section, in the order so specified, makes a decision to enroll in a FIDA-IDD plan; not to enroll in a FIDA-IDD plan; or to disenroll from a FIDA-IDD plan; that decision shall be considered the final decision of the affected individual and any party in a subordinate position, as specified in subdivisions (a) through (d) of this section, may not change that enrollment decision. The party that enrolls the individual shall also be the party authorized to act in the FIDA-IDD review process.
- **New section 635-11.5 is added as follows:**

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Section 635-11.5. FIDA-IDD Plan Enrollment and reviews for persons not residing in a residential facility or a family care home

- (a) If a person has the ability to choose a FIDA-IDD Plan on his or her own, or with the assistance of supported decision making, the person may
 - (1) enroll himself or herself in a FIDA-IDD Plan;
 - (2) act in the FIDA-IDD review process;
 - (3) disenroll himself or herself from a FIDA-IDD Plan;
 - (4) appoint another party to take actions on his or her behalf;
 - (5) seek assistance with the above decisions and actions.
- b) If a person lacks the ability to choose a FIDA-IDD plan, disenroll from a FIDA-IDD Plan, or act in the FIDA-IDD review process, but has a guardian lawfully empowered to enroll him or her in a FIDA-IDD plan, the guardian may take any of the actions enumerated in subdivision (a) of this subpart.
- (c) If a person lacks the ability to choose a FIDA-IDD Plan and does not have a guardian lawfully empowered to enroll him or her in a CCO, then any of the following parties, in the order stated, may take any of the actions enumerated in subdivision (a) of this subpart:
 - (1) an actively involved (see section 633.99 of this Title) spouse;
 - (2) an actively involved parent;
 - (3) an actively involved adult child;
 - (4) an actively involved adult sibling;
 - (5) an actively involved adult family member;
 - (6) the Consumer Advisory Board for the Willowbrook Class, but only for members of the Willowbrook Class.
- (d) If the first surrogate on the list in subdivision (c) is not reasonably available and willing to make enrollment decisions and enroll the individual in a FIDA-IDD Plan or act in the FIDA-IDD review process, and is not expected to become reasonably available and willing to make an enrollment decision and enroll the individual in a FIDA-IDD or act in the FIDA-IDD review process, the surrogate who has the highest priority on the list and who is willing and available shall have the authority to make enrollment decisions and enroll the individual in a FIDA-IDD or act in the FIDA-IDD review process.
- (e) If more than one party exists within a category in subdivision (c) of this subparagraph

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utilizing the standard of active involvement, consent shall be sought first from the party with a higher level of active involvement or, when the parties within a category are equally actively involved, consent shall be sought from any of such parties.

- (f) If the person lacks the ability to choose a FIDA-IDD, does not have guardian lawfully empowered to enroll him or her in a FIDA-IDD, and there are no parties identified in (c) above, the CEO (or designee) of the agency providing service coordination for the person may take any of the actions enumerated in subdivision (a) of this subpart.
- (g) If that CEO enrolls the person in the FIDA-IDD plan or acts in the FIDA-IDD review process, he or she shall give written notice of such enrollment and/or action to (1) the person's correspondent or advocate, if one is available; and (2) the DDRO director for the region encompassing the person's residence.
- (h) If a party specified in subdivisions (a) through (d) of this section, in the order so specified, makes a decision to enroll in a FIDA-IDD plan; not to enroll in a FIDA-IDD plan; or to disenroll from a FIDA-IDD plan; that decision shall be considered the final decision of the affected individual and any party in a subordinate position, as specified in subdivisions (a) through (d) of this section, may not change that enrollment decision. The party that enrolls the individual shall also be the party authorized to act in the FIDA-IDD review process.

- **New section 635-11.6 is added as follows:**

Section 635-11.6. Other responsibilities and rights of agencies and sponsoring agencies regarding PDP enrollment and reviews

- (a) No CEO, officer, designee or employee of an agency or sponsoring agency shall solicit, accept or receive from a PDP, pharmacy or contractor of a PDP or pharmacy, for personal use or benefit (other than for the personal use or benefit of the person being enrolled), any payment, discount or other remuneration in consideration of, or as a result of, enrolling the person in a PDP.
- (b) No CEO, officer, designee or employee of an agency or sponsoring agency shall charge, accept or receive payment from the person, family or anyone else for enrolling the person in a PDP, for providing advice and assistance in choosing a PDP or for acting for the person in the Part D review process.
- (c) When a CEO or designee is authorized to act by this section or appointed to act in the Part D review process for a person, the CEO or designee may appoint a party outside of the agency to act in the Part D review process for the person.
- (d) When a CEO or designee enrolls a person he or she shall choose a PDP based on the best interests of the person.
- (e) Nothing in this Subpart shall be deemed to diminish or remove the authority of a physician to request a coverage determination or an expedited redetermination on behalf of a

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beneficiary.

- **New section 635-11.7 is added as follows:**

Section 635-11.7. Other responsibilities and rights of CEOs and DDSOO and DDRO directors or designees regarding FIDA-IDD plan enrollment and reviews

- (a) No CEO or DDRO or DDSOO director or designee shall solicit, accept or receive from a FIDA-IDD plan operator, or an agent of the plan, for personal use or benefit (other than for the personal use or benefit of the person being enrolled), any payment, discount or other remuneration in consideration of, or as a result of, enrolling the person in a FIDA-IDD plan.
- (b) No CEO or DDRO or DDSOO director or designee shall charge, accept or receive payment from the person, family or anyone else for enrolling the person in a FIDA-IDD plan, for providing advice and assistance in choosing a FIDA-IDD plan or for acting for the person in the FIDA-IDD review process.
- (c) When a CEO or DDRO or DDSOO director or designee is authorized to act by this section or appointed to act in the FIDA-IDD review process for a person, the director or designee may appoint a party outside of the agency to act in the FIDA-IDD review process for the person.
- (d) When an CEO or DDRO or DDSOO director or designee enrolls a person in a FIDA-IDD plan or acts in the FIDA-IDD review process for a person he or she shall act based on the best interests of the person.
- (e) Nothing in this Subpart shall be deemed to diminish or remove the authority of a physician to request a coverage determination or an expedited redetermination on behalf of a beneficiary.

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