DDAWNY

DEVELOPMENTAL DISABILITIES ALLIANCE OF WNY

April 19, 2021

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Via E-Mail ONLY regsqna@health.ny.gov

Dear Ms. Ceroalo:

On behalf of DDAWNY, the Developmental Disabilities Alliance of Western New York, these comments are being submitted in response to amendments being proposed to 10 NYCRR Subpart 86-10, concerning the rate methodology for Residential Habilitation services in Supervised Individualized Residential Alternatives (IRAs), Community Residences (CRs) and for Non-State Providers of Day Habilitation.

DDAWNY is a collaborative group of member voluntary agencies providing supports and services to people with developmental disabilities. While honoring individual agency missions, it is the intent of the Alliance to assist agencies to develop relationships, promote unified strategies and share risks for the mutual aim with and for the benefit of people with disabilities.

DDAWNY member agencies employ over 22,400 individuals in the seventeen Western and Finger Lakes counties of New York State providing supports and services to over 33,000 individuals with developmental disabilities and their families and/or circle of supports. DDAWNY has also formed a Family Committee to give voice to the people served in the disability arena, but whose voices are often unheard.

DDAWNY has reviewed and pursuant to section 202 of the State Administrative Procedure Act is pleased to provide comment on the proposed changes to the current rate methodology for the Medicaid funded Home and Community Based Settings (HCBS) service of Residential habilitation.

According to the Department of Health (DOH), “OPWDD’s proposed regulatory amendments are necessary due to the approval of an amendment to OPWDD’s Comprehensive Home and Community-Based Services (HCBS) 1915(c) Waiver by the

Centers for Medicare and Medicaid Services." DOH indicates the proposed regulations change calculations of the occupancy adjustment for IRAs by eliminating the adjustment "based on a system-wide assessment of vacancy utilization" and limiting reimbursement for periods when individuals are not present in those residences.

According to DOH, its statutory authority to develop rate setting methodologies and to promulgate rules and regulations regarding rate setting methodology applying to facilities under the jurisdiction of OPWDD is derived from Mental Hygiene Law (MHL) Section 43.02. MHL §43.02 provides in relevant part:

> "(a)…rates or fees for services provided by any facility or program licensed, operated or approved by the office for people with developmental disabilities, shall be certified by the commissioner of health; provided however, that such methodologies shall be subject to approval by the office for people with developmental disabilities and shall take into account the policies and goals of such office.
> …
>
> "(c) …the commissioner of the office for people with developmental disabilities…shall adopt rules and regulations to effectuate the provisions of this section. Such rules and regulations shall include, but not be limited to, provisions relating to: …
>
> > "(ii) methodologies used in the establishment of the schedules of rates or fees pursuant to this section, provided, however, that the commissioner of health shall adopt rules and regulations including methodologies developed by him or her for services provided by any facility or program licensed, operated or approved by the office for people with developmental disabilities and shall take into account the policies and goals of such office."

DOH indicates the proposed regulations further legislative objectives embodied in MHL sections 13.07, 13.09(b), 16.00 and 43.02; Public Health Law (PHL) sections 201(1)(v) and 206; and Social Services Law (SSL) sections 363-a, 365-a(2)(c), and SSL §365-n(7).

DDAWNY agrees several of these provisions of law grant DOH the authority to act as the single state agency to supervise the administration of the medical assistance plan under title XIX of the federal Social Security Act, known as Medicaid in this state, to make amendments to the state plan for medical assistance, to submit waiver applications under the federal social security act, to promulgate appropriate regulations to implement the Medicaid program and to enter into Medicaid Provider agreements with DDAWNY member agencies.

However, DDAWNY takes issue with the assertion that these proposed regulations further the legislative objectives of the Mental Hygiene Law. In particular, MHL §13.07 (c) provides that the office of people with developmental disabilities have the responsibility to see that persons with developmental disabilities are:

> "provided with services including care and treatment, that such services are of high quality and effectiveness, and that the personal and civil rights of persons receiving such services are protected. The services provided shall seek to promote and attain independence, inclusion, individuality and productivity for persons with developmental disabilities."

DDAWNY believes the proposed regulatory changes, particularly the elimination of the current 5% occupancy factor, effective May 1, 2021; limiting reimbursement for retainer days to 50 percent of a provider's established rate; and limiting the number of therapy days the provider may bill each year to 96 days per individual and limiting reimbursement for therapy days to 50 percent of a provider's established rate, will cause a significant retrenchment in provider support for individuals with developmental disabilities, reduce the quality and effectiveness of care and treatment, discourage the use of community resources to meet the needs of individuals with developmental disabilities, increase rates of institutionalization and limit the ability of OPWDD customers to live in the home of their choice; work or engage in activities that contribute to the community; have meaningful relationships; and have good health.

DDAWNY believes several of these changes are arbitrary and capricious, fail to comply with federal and state law, do not take into account the policies and goals of the office of people with developmental disabilities and violate the equal protection clause of both the United States and New York State Constitutions. DDAWNY believes several of these proposed changes are unreasonable and the reasons advanced by DOH are devoid of factual support for the actions being proposed, affording DOH no rational basis to implement the proposed changes to the current rate methodology for Medicaid.

DDAWNY recognizes that DOH has broad power to regulate in the public interest (see *Agencies for Children's Therapy Services, Inc v New York State Department of Health*, 136 AD3d 122, 22 NYS 3d 524) and deference is ordinarily afforded to the department's interpretation unless it is irrational or unreasonable *(Matter of Sisters of Charity Hospital v Daines*, 84 AD3d 1757. However, DDAWNY strongly believes these proposed changes are inconsistent with the underlying purpose of the statute, inconsistent with the federal requirements used to determine allowable costs and the facts simply do not support the rational being offered to advance these regulatory changes.

DDAWNY has previously commented on many of the proposed regulatory changes identified in this SAPA filing in response to amendments proposed by DOH and OPWDD to the OPWDD Comprehensive Home and Community Based Services (HCBS) Waiver (NY.0238-Amendment 03) for the period beginning October 1, 2020.

DDAWNY provided those comments to both OPWDD and DOH at the time and DDAWNY incorporates by reference all of the relevant comments and concerns raised in our July 1, 2020 correspondence with Commissioner Zucker and Commissioner Kastner in these comments at this time.

The proposed regulation repeals the current Section 86-10.2 and replaces it with a new section 86-10.2. Specifically, the proposed amendment to 10 NYCRR Subpart 86-10 would repeal the current "Occupancy Factor" definition, which provides:

> "(p) Occupancy factor. Beginning July 1, 2015 such factor will be an adjustment made prospectively at the beginning of the applicable rate year, based upon the previous years' experience. Such adjustment shall be provider specific and shall be the lower of the provider's actual vacancy or five percent."

and replace it with a new "Occupancy Adjustment" definition which is defined as:

> "(w) Occupancy Adjustment. An adjustment to the calculated daily rate of a Voluntary Agency which provides Supervised Residential Habilitation to account for days when Medicaid billing cannot occur because the individual has passed away or has moved to another site.
>
> (1) For the rate periods beginning July 1, 2019, Voluntary Providers receive an occupancy adjustment to the operating component of their rate for vacancy days. The occupancy adjustment percentage is calculated by dividing the sum of the agency's rate period reported retainer days, service days and therapy days by 100% of the agency's certified capacity. The certified capacity is calculated taking into account capacity changes throughout the year, multiplied by 100% of the year's days. This adjustment will begin on July 1, 2019 and be recalculated on an annual basis based on the most current and complete twelve months of experience.
> (2) For the period beginning May 1, 2021, the occupancy adjustment will be 0%."

The proposed regulation newly defines "Retainer days", "Service Days" and "Therapy Day". Retainer days are defined as:

> "(af) Retainer days. Days of Medical leave or an associated day where any other institutional or in-patient Medicaid payment is made for providing services to the beneficiary. A provider is limited to being paid 14 Retainer days per year, multiplied by certified capacity. Effective on or after May 1, 2021, Retainer days will be reimbursed at a rate of 50 percent of the provider's established rate."

Service days are defined as:

"(ah) Service days. A day when paid Supervised IRA staff deliver residential habilitation to a person who is either present in the Supervised IRA or is absent from the IRA and receives residential habilitation services from paid Supervised IRA staff, and those services are of the same scope, frequency and duration as the services provided when the person is resident in the Supervised IRA."

Therapy Day is defined as:

"(al) Therapy Day. A therapy day is a day when the individual is away from the supervised residence and is not receiving services from paid Residential Habilitation staff and the absence is for the purpose of visiting with family or friends, or on vacation. The therapy day must be described in the person's plan of care to be eligible for payment and the person may not receive another Medicaid-funded residential or in-patient service on that day. Effective May 1, 2021 or after, a provider is limited to being paid 96 therapy days per rate year per person. All therapy days will be reimbursed at a rate of 50 percent of a provider's established rate."

In addition, the proposed regulation adds a new definition of "Authorized Rate Period Units, or Authorized Units" as follows:

"(e) Authorized Rate Period Units or Authorized Units. Units approved by OPWDD Budget Office to deliver Day Habilitation Services. OPWDD Budget Office adjusts the units based on addition or subtraction of individuals as well as addition or subtraction of sites. These units are tracked on an ongoing basis and reported to DOH on a semi-annual basis (January and July). Based on the unit update the operating portion of the final target rate will not change. The capital portion will be adjusted by the change in units, which will change the overall Day Habilitation rate."

The proposed regulation also adds definitions of "Allowable Agency Administration", "Authorized Rate Period Units, or Authorized Units", "Base Period CFR, or Base Year CFR", "Budget Neutrality Adjustment", "Capital Costs", "Consolidated Fiscal Report (CFR)", "Depreciation", "Facility", "Final Average Rate", "Rate", "Rate Period", "Rebasing", and "Wage Equalization" to the new 10 NYCRR section 86-10.2.

The proposed regulation would eliminate the use of this occupancy factor in rate setting for supervised Residential Habilitation. Currently this adjustment to the daily rate of a Voluntary Agency is used to account for days when Medicaid billing cannot occur because an individual has passed away or moved to another setting. Elimination of this occupancy factor will act as a disincentive for seeking to move individuals into less costly Supportive Residential Habilitation settings and non-certified supportive apartment settings. The loss of the factor will lead to the reduction in the number of Supervised Residential beds as providers will seek to maximize the use of available beds and limit losses due to vacancies.

The elimination of the occupancy factor will reduce the availability of certified bed capacity for individuals seeking to leave institutional settings, especially individuals currently residing in 7-15 person ICF/DD institutions. CMS has sought to reduce the number of individuals in these larger institutional beds, yet as of the end of FFY 2017 4700 individuals still resided in voluntary operated ICF/DD beds, including nearly 3400 in 7–15-person capacity ICF/DDs.

DDAWNY strongly objects to the elimination of the occupancy factor which was an important component of the OPWDD Methodology Transformation and the movement from a monthly payment structure to a daily payment structure for these services. If OPWDD and DOH wish to reform the rate methodology for residential habilitation, they need to address the reform in a holistic manner, with broad stakeholder involvement, similar to the 2013 -2014 process, not piecemeal, solely addressing perceived budget challenges and to the detriment of a truly person-centered process of service delivery.

Beginning in 2014, as part of rational rate transformation, a/k/a rate rationalization, many of these terms had previously been defined and used in the rate setting mechanisms outlined both in the OPWDD Comprehensive Home and Community Based Services (HCBS) Waiver (NY.0238) as submitted and approved by the Federal Government and promulgated by DOH in 10 NYCRR §§ 86-10.3 and 86-10.6. In particular, 10 NYCRR §86-10.6 provided for a three-year transition from the old monthly reimbursement methodology to a new daily reimbursement methodology. FY2018 was the first year this new daily reimbursement methodology was fully utilized and FY2019 was the first year this new rate methodology was annualized for budgetary purposes.

Under the old methodology a full month residential habilitation service payment was made for any non-State provider operating a community residence and providing residential habilitation services to an individual for no less than twenty-two days in any month. A partial monthly payment was made for individuals residing in a community residence for less than twenty-two days but at least eleven days. The previous methodology also allowed a provider to file an appeal for additional compensation in the event of year end fiscal shortfalls. Originally these appeals were based upon the reimbursable rate for a particular service, however in 2011 OPWDD shifted to a vacancy appeal methodology. Under the vacancy methodology, the maximum amount a provider could bill for a fiscal year presupposed full utilization or 100% patient or resident occupancy. According to OPWDD, vacancy appeals looked at the loss of dollars to a service provider that were specifically related to not having full occupancy at a residence, (see, *Matter of Chautauqua County Ch. Of NYSARC v Delaney*, 58 Misc3d 1216(A); 95 NYS3d 124; 2018 WL 700197); 14 NYCRR §686.13(i).

The new methodology eliminated rate appeals based upon fiscal year shortfalls. Instead of a rate appeals mechanism, the new daily rate methodology contemplated the

use of retainer days, therapeutic leave days and vacant bed days in order to appropriately provide compensation to non-state providers of residential habilitation services in community residences, including IRAs to address the compensation shortfalls that would adversely impact providers and to appropriately compensate providers for their allowable costs. In addition, providers would have their payment rates rebased every two years to account for the actual cost of providing residential habilitation services. The determination of allowability of cost is required to be based on reasonableness and relationship to individual care and generally accepted accounting principles (14 NYCRR §686.13(b)(1)(ii)(b)) and in accordance with the Medicare Provider Reimbursement Manual (HIM-15) (14 NYCRR §686.13(b)(1)(ii)(d)).

DDAWNY believes the elimination of an occupancy factor adjustment, the 50% reduction in retainer day and therapy day payments and the 96-day limitation on therapy day payments is unreasonable, in violation of generally accepted accounting practices and not in accordance with federal guidance as contained in HIM-15. These proposed changes fundamentally alter the 2014 rate methodology, which moved the system from a monthly rate (fully funding allowable costs, based upon 22 days of occupancy) to a daily rate for residential habilitation services (fully funding allowable costs based upon 365 days of occupancy).

Under the 2014 Waiver rate rationalization, the way the rates were developed was to determine the allowable costs for a program at 100% occupancy and divide that cost by the maximum possible billing days. At the time, it was determined to use a 365-day divisor for the establishment of a daily rate. In developing the new rate structure, OPWDD and DOH recognized that in doing away with rate appeals, other mechanisms needed to be incorporated into the rate in order to appropriately compensate providers for allowable costs, where those costs were divided by 365 days. This is because it is not possible for providers to reduce allowable costs by changing or reducing staffing as a result of temporary vacancies, hospitalizations or home visits. DOH indicates the proposed rulemaking changes “are necessary to reflect historical utilization and efficiencies”. DOH indicates the proposed regulations “are designed to preserve Medicaid funding for direct service delivery to individuals with developmental disabilities by reducing payments to residential providers for periods when the individual is away from the residence.” However, DOH does not articulate a rational for elimination of reimbursement for allowable costs when there are vacancies, hospitalizations or family visits occur within the context of a rate methodology which provides for the reimbursement of allowable costs over 365 days.

DOH advances no mechanism within the rate methodology structure for providers to recoup these allowable costs. If DOH wishes to eliminate the vacancy adjustment and limit the use of retainer days and therapy days, it could have proposed a reduction in the number of days in the year over which allowable costs are to be reimbursed. Instead of a divisor of 365 days, DOH could have used a divisor of 356 days (the average length of stay for the current waiver amendment, which is based on OPWDD’s 10/1/2017 to 9/30/2018 372(S) report data for Waiver Year four of

NY.0238.R05.). Using this divisor, would increase the daily rate paid providers to reimburse them for their allowable costs, and would be justification for the elimination of the occupancy factor and the limits on Therapy Day and Retainer day payments. Another option that would address vacancies and days of hospitalization or family visits would have been to propose a return to the vacancy waiver appeal process as in the previous rate methodology. DOH simply offers no rational reason to not pay for the reimbursement of allowable costs when individuals are not physically present in an IRA.

Providers have very limited means to operate more efficiently and reduce allowable costs in a home when an individual is absent from the home. OPWDD by regulation, requires minimum staffing. Staffing patterns are determined based on house size, minimum safe standards promulgated by OPWDD, and the Life Plan of individuals as developed by the Care Coordination Organizations, which are supposed to incorporate person-centered planning principles, which require higher staffing levels in order to facilitate community involvement and inclusion. OPWDD requires sufficient staffing to assure health and safety issues are addressed, including fire safety, evacuation and protective oversight, see 14 NYCRR §686.16 (5) and (6); 14 NYCRR §635-7.4; ADM 2012-02 Fire Safety; 14 NYCRR §633.10; 20-ADM-07 Levels of Supervision.

OPWDD requires providers to ensure sufficient personnel be available to supervise, operate and maintain the premises of a community residence, based upon considerations as to the number of individuals and their level of functioning and need, support staff requirements, and physical plant demands, 14 NYCRR §686.9. OPWDD requires each supervised community residence to have a residence house manager, who is responsible for the continuous direction and day today operation of the residence. 14 NYCRR §686.6. OPWDD requires providers to maintain services deemed vital to the continued safe operations of an IRA. These services include telephone, electric, gas, fuel, water, septic tank, heat, air conditioning, smoke or heat detection equipment or sprinkler systems, see 14 NYCRR 635-7.4(b). Other allowable costs that cannot be reduced based upon a vacancy or temporary absence include landscaping and maintenance of the residence, broadband access, property insurance and transportation related expenses, including lease payments on the IRA vans and state mandated auto insurance.

It is a given that vacancies occur within the system. These vacancies cannot be filled quickly for a variety of reasons. OPWDD uses the Front door process to manage waiver services. Using its Protocol for Certified Residential Opportunities (CRO) process, OPWDD determines who can be offered a certified residential opportunity. OPWDD currently fails to refer, on a timely basis, individuals most appropriate for certain supervised residential beds. Elimination of the occupancy factor will force provider agencies to offer vacant beds to individuals who may not be appropriate based upon a truly person-centered planning process. For example, individuals with a forensic background, including SORA classified individuals or those with severe behavioral issues, including fire starting behaviors may be inappropriately placed in an IRA due to

fiscal considerations of the provider. DDAWNY believes this type of fiscal pressure interferes with the creation of a person-centered service environment that "helps people lead richer lives." `[1] DDAWNY also believes this policy change may also be in violation of the Americans with Disabilities Act (ADA) as expressed in federal regulations and *Olmstead v. L.C.*, 527 U.S. 581, 119 S. Ct.2176, 144 L.Ed. 2d 540 (1999).

IRAs are not Airbnbs. Providers cannot rent out an IRA bed by the day. Providers have no ability to recoup their allowable residential habilitation services costs when a vacancy occurs or an individual transfers to either a higher institutional level of care or transitions to a more integrated community setting or goes out into the community overnight with family or friends or seeks necessary medical care overnight. OPWDD strictly controls occupancy. 14 NYCRR §671.1(c). OPWDD must approve all applications to permit vacant IRA beds to be converted into temporary use beds, 14 NYCRR §686.15. Use of vacant certified beds for temporary purposes can only occur if there is no waiting list for admission to the residence, 14 NYCRR §686.15(a)(2)(i). IRAs are a person's home. The IRA is deemed a family unit, MHL §41.34(f). Individuals have rights to their home and providers cannot unilaterally eliminate those rights or reduce mandatory costs driven by regulation and law.

In most cases extended vacancies are the result of necessary hospitalizations. In the I/DD service system, many people with significant medical issues often require extended periods of hospitalization due to complicating behavioral factors or co-morbidities. In addition, some individuals have significant mental health issues that may result in the need for extended periods of inpatient psychiatric care due to behavioral issues. In both instances, it would not be unusual for a resident to be admitted to a hospital for weeks or months at a time. Under the proposed rule-making amendment, providers are mandated to keep residential slots open and unfilled throughout the entire hospital stay or other absence from the residence. This is the opposite of the rule for nursing homes, where after two weeks vacant beds can be filled with new residents. During long hospital stays, agencies will have insufficient funding to pay for mandatory staffing levels.

The proposed additional cuts to the vacancy rate constitute discrimination against service recipients who have serious medical and/or psychiatric problems. Reduction in funding during extended hospital stays is an example of discrimination in funding for these individuals due to the very nature of their disability. Reduced funding hurts the individual in the hospital, the remaining residents, the provider supporting these individuals and the entire system. Again, DDAWNY believes this proposal may violate the Americans with Disabilities Act (ADA).

The State's proposal to cut funding when residents visit family members will act as a disincentive for community integration goals fundamental to the HCBS waiver.

[1] OPWDD Comprehensive 1915(c) HCBS Waiver. NY.0238.R06.03, page 10.

In its approved 1915(c) waiver, New York State has indicated Residential Habilitation services are limited to individuals who reside in provider managed or OPWDD certified residential settings. The services to be delivered and included in the residential habilitation rate are:

- Habilitation services at the residence;
- Protective oversight services at the residence;
- Supervision services at the residence;
- Nursing supervision of direct care staff and coordination of resident's health care needs, including prescriptions, medication administration and medication administration training and oversight, coordinating needed medical appointments, follow-up reports from medical appointments, follow-up and interface with hospital staff regarding Emergency Room visits and other hospitalizations;
- Reimbursement of the services and supplies related to program-related transportation, including transportation to and from recreational and community inclusion activities;
- Non-emergency transportation to and from all outpatient medical, dental and clinical service appointments required by residents;
- Habilitation services promoting community inclusion, socialization, and recreational activities outside of the residence during weekday evenings and anytime on weekends;
- Protective oversight services promoting community inclusion, socialization, and recreational activities outside of the residence during weekday evenings and anytime on weekends;
- Supervision services promoting community inclusion, socialization, and recreational activities outside of the residence during weekday evenings and anytime on weekends
- The payment and provision of nutrition services directly related to the habilitation service, including meal planning and monitoring, assessment of dietary needs and weight changes, development of specialized diets, diet education, and food safety and sanitation; and
- The payment and provision of psychology services that support the person's need for behavioral supports in the service setting, such as behavioral assessment and intervention planning, delivery and review or monitoring of behavioral interventions and behavioral support services. Psychology services must be provided by Licensed Psychologists, Licensed Clinical Social Workers or Behavioral Intervention Specialists.

A number of these Residential Habilitation services do not depend upon face-to-face interaction with the Medicaid recipient. These include the fixed cost of transportation, nursing services, including supervision of DSP staff and coordinating with hospital staff for an individual who is hospitalized and psychology services including behavioral care planning and assessment. The proposed regulations would

significantly reduce provider reimbursement for these allowable costs without any factual basis.

The proposed cuts will severely limit funding for individuals simply because they require hospitalization due to medical or psychiatric illness or choose to take a therapeutic leave to spend time with family members. It is nothing less than discrimination against individuals with I/DD to eliminate the Occupancy Factor and cut reimbursement during hospitalizations, needed placement in a rehabilitation facility, or during family visits. Under the proposed cuts, if an IRA resident receives health care in another setting, their placement is reserved for them after their stay, and the rate for their care is reduced to 50% of the customary daily rate. The proposed cuts represent disparate treatment for individuals with serious medical or psychiatric conditions that directly impacts the level of services that can be provided.

The rationale offered by OPWDD for these cuts is that if an individual is not physically in his or her residence, there is no reason for the residential provider to be paid in full during such absences since the provider incurs no costs for that individual. However, this claim is invalid, and any claimed savings are entirely illusory. First, 80% of the cost of residential programs is salary paid to direct care staff, clinical staff and residence supervisors. These costs for direct care staffing are unaffected – and certainly can't be reduced – simply because one resident of a six- or seven-person IRA is out of the house. Staff is provided around the clock usually with three 8-hour shifts per day. If a resident is in the hospital, a direct care staff member simply can't be placed on unpaid leave until the hospital stay is over.

The absence of a single resident does not in any way reduce the need for a full complement of staff to provide for the needs and ensure the health and safety of the rest of the residents. To the contrary, when a resident is admitted to the hospital, staff are in most cases assigned to provide coverage, advocate for the individual, interface and consult with hospital staff, and ensure that the individual's needs are met. Both OPWDD and DOH have issued guidance on the requirements for hospitalization coverage by OPWDD certified residential facility staff when an individual is hospitalized and the appropriate role of OPWDD program staff in providing companionship services and facilitating communication between an individual with I/DD and hospital staff.[2] These requirements actually result in more staff time and increased staffing costs, not the opposite.

Similarly, if a resident goes home with their family for the weekend or goes on vacation with their family, staffing needs for the rest of the IRA residents remain the same. Since OPWDD still runs its own certified residential programs, it well knows that the absence of one resident has no impact on the staffing needs in a residence and that a cut of 50% in reimbursement leaves the residence underfunded.

[2] OPWDD Health Care Hospital Coverage Guidelines, May 24, 2006; DOH DAL Role of OPWDD staff in hospital setting, June 6, 2014

In developing the current rate setting methodology, New York State and CMS agreed that the rate methodology must be "understandable, delineates all elements in the rate methodology, and describes how all components are factored into the methodology. The methodology must assure that the rates produced are economic and efficient and lead to quality outcomes for beneficiaries."[3]

DDAWNY strongly objects to the changes being proposed to the Supervised Residential Habilitation rates. These proposed rate changes move New York away from a cost-based rate structure toward an arbitrary budget-driven rate structure that meets the preference of the State agency to live within undisclosed, outdated, self-imposed budgetary cost targets. Moreover, OPWDD has targeted voluntary non-profit residential service providers, without regard for the damage these rate changes will cause these providers, how these changes will impact the availability of certain safe housing options, reduce opportunities for individuals currently residing in more restrictive institutional placements to move into more inclusive, integrated settings in the community and damage the quality of care to the beneficiaries seeking certain community based residential options.

OPWDD could have mitigated or even eliminated its resource shortfall by strictly controlling agency overtime or shifting more service delivery from the State-operated programs to services and programs run by voluntary providers. State-operated residential programs are significantly more expensive and less efficient than programs run by the voluntary sector. Other options include a re-estimate of agency spending as a result of the COVID-19 pandemic. Indeed, as a result of the COVID-19 pandemic, OPWDD is saving substantial money. Day habilitation services have been closed for over a year and it is unclear when these programs will be allowed to reopen and when full occupancy will be permitted. Community, site-based respite is not being authorized, and providers report a substantial reduction in the level of Community Habilitation services being delivered. OPWDD has been quite candid – these rate reductions are required in order for OPWDD to address its 2020-21 state fiscal plan resource allocations, not for the purpose of ensuring that the rates produced are "economic and efficient and lead to quality outcomes for beneficiaries" as required by CMS.

DOH in its notice of proposed rulemaking has indicated that these changes are necessary "due to the approval of an amendment to OPWDD's Comprehensive Home and Community-Based Services (HCBS) 1915(c) Waiver by the Centers for Medicare and Medicaid Services". DDAWNY believes the Waiver amendment merely provides the State with Federal authority to alter the 2019 Waiver agreement, which had continued the 2014 Waiver agreement cost-based "rational rate transformation" a/k/a rate rationalization. The waiver authority does not require the State to implement this

[3] CMS 11-EW-00234/2, Attachment H of Special Terms and Conditions (STC) for New York's Federal-State Health Reform Partnership Section 1115(a) Medicaid Demonstration retrieved at: https://www.health.ny.gov/health_care/managed_care/appextension/special_terms_and_conditions_04_2013.htm

reduction. For example, the waiver authorized the rate setting changes effective October 1, 2020. DOH and OPWDD indicated in the Waiver amendment "This Waiver Amendment includes rate setting provisions to effectuate requirements of the approved 2020-2021 New York State Budget". DOH and OPWDD did not implement the rate setting changes in FY21, instead deferring these changes until May 1, 2021. The recently enacted 2021-2022 New York State Budget contains significant federal and state resources that were not contemplated when the 2020 Waiver amendment was submitted and ultimately approved by CMS. In addition, the Biden Administration is proposing a significant increase in Federal support for HCBS funding as part of the America Jobs Plan. DDAWNY believes the State should hold off implementation of these rate setting changes until the State has a clearer picture of any additional Federal funding which might become available for these services in the current state fiscal year.

DDAWNY would also point out, the State included significant state saving in the Waiver program from the conversion of various OPWDD waiver Community Habilitation services to State Plan Community First Choice Option (CFCO), however it also indicated it would monitor trends and may adjust outlying years if needed. Thus, it is clear, the approved Waiver does not require the state to implement these changes and that changes in utilization and savings from COVID-19 pandemic programmatic closures should be taken into account before New York implements these draconian cuts.

DDAWNY is aware the approved 2020 Waiver includes Cost Neutrality Estimates which adjust downward the average cost per unit for Supervised Residential Habilitation services by 2.8% to reflect New York State Budget Savings Actions for Waiver Years 2 through 5. DDAWNY believes the waiver year 1, waiver year 2 and waiver year 3 Cost Neutrality Estimates can and should be revised downward as a result of the HHS declared Public Health Emergency and the 2.8% reduction in provider rates will not be necessary to meet required Cost Neutrality Estimates at least until a new Rate methodology is agreed to.

DDAWNY has supported the development of a cost-based rate structure and is committed to working with OPWDD and DOH to develop and support a rate reimbursement methodology that promotes equity, sustainability, alignment of the financial platform, and incentives for the appropriate delivery of supports and services leading to the outcomes desired by people with developmental disabilities and their circle of support based upon their properly assessed needs.

The State in developing the OPWDD Transformation Methodology was guided by the following principles:

- Pay reasonably and adequately for quality care for individuals
- Encourage cost-effective supports and services and promote efficiencies
- Be transparent and administratively efficient; be predictable and facilitate timely payments

- Encourage supports and services in the appropriate (least restrictive) setting; ensure adequacy of alternative settings; encourage service portability; promote service innovation
- Update methodology periodically and when necessary; promote service innovation
- Provide a good pricing foundation for transition to Managed Care
- Include a transition that provides a smooth shift from current rates to the proposed pricing; ensure system stability
- Comply with Federal Medicaid rules, and
- Be consistent with available resources, budget constraints and transformation goals

The rate changes being proposed in this proposed rulemaking amendment fails to follow these principles. There has been a lack of stakeholder involvement in the development of these changes. The changes are being proposed in order to allow OPWDD to fund state mandated minimum wage increases and a four percent increase in wages for direct support and clinical staff, which had previously been promised by the Executive and enacted by the Legislature as part of the FY2020 budget process, and to fund the 2019 rebasing of provider allowable costs within the new rate rationalization rate structure without any increase in overall state support for the non-profit providers, who provide nearly 85 percent of the service delivery to individuals with I/DD. DOH has not articulated reasons why the current rate structure cannot accommodate these rate driven changes or the Legislatively approved wage increases.[4] MHL §43.02 no longer requires DOB approval of OPWDD rates, only certification by DOH. The proposed change in the rate methodology mid-cycle is the opposite of the predictability the OPWDD Methodology Transformation was intended to provide.

OPWDD in its response to Public Comments on the 2020 Waiver amendment indicated:

> "Thousands of respondents expressed concerns about the proposed funding adjustments for Supervised Residential services including the …revisions to reimbursement for Retainer Days, Vacancy Days, Therapy Days and elimination of the Occupancy Adjustment."

Unfortunately, OPWDD, in response to these thousands of comments merely indicated:

> "OPWDD concluded that by targeting payment for the non-delivery of services rather than implementing reductions to rates paid for services delivered, OPWDD would best be able to preserve essential community-based services while also achieving the required budget savings."

[4] The current rate methodology already contains a statewide budget neutrality adjustment factor to ensure the total target reimbursement is equivalent to the total annual base reimbursement

OPWDD's response is factually inaccurate. By virtue of a rate structure that assumes reimbursement for all allowable costs over a 365-day period and refusing to acknowledge that nearly all of these costs, with very few exceptions, are required to be incurred pursuant to OPWDD regulatory requirements and many Medicaid habilitation services, including nursing services, administrative services and psychology services, to name just a few are incurred whether the individual being served is present in the IRA or not, OPWDD want to renege on the funding commitments made when the 2014 Rate rationalization methodology was adopted. In addition, the budgetary savings were achieved in part because the COVID-19 pandemic dramatically reduced estimated OPWDD services spending and enhanced Federal Medicaid Assistance Percentage funding (eFMAP) eliminated any budgetary shortfall in FY21.

Meanwhile, OPWDD told CMS that "recommendations regarding service expansion and rate setting reform could not be incorporated into the Amendment application as such requests require additional collaboration and public input between stakeholders and NYS." DDAWNY strongly believes this proposed rulemaking should be deferred in order to allow that dialog to occur and for time to reform the current rate structure in a manner that will support our workforce and the individuals we serve.

DDAWNY continues to object to the State's failure to issue timely rebased rates, resulting in significant periods of underpayments and overpayments to providers billing based upon a previous rate cycle. This causes massive disruption in the financial affairs of providers, who are forced to address significant revenue shortfalls as the result of recoupment claw-backs with no time to plan and reducing the opportunities to identify and implement efficiencies in order to live within these new rates of payments. These proposed mid-cycle rate methodology changes merely exacerbate the problem, cause system instability, are not predictable and fail to support the efficient delivery of services.

State operated programs are not subject to these rate reductions. DDAWNY continues to object to two different rate methodologies in New York, one for state-operated service delivery, which includes a yearly trend factor and one for voluntary-operated service delivery, which, until this year,[5] has not seen a trend in nearly a decade. Voluntary providers compete for the same workforce and provide the same supports and services as the state provides using its employees. There is a fundamental conflict of interest where New York State can propose funding reductions for the voluntary sector and not propose the same funding changes for its own employees. DDAWNY also believes this funding disparity violates the Equal Protection clause of both the State and Federal Constitution.

[5] The enacted FY22 State Budget includes a 1% COLA for OPWDD voluntary providers and a 2% salary increase for OPWDD state workers providing Residential Habilitation services in State operated IRAs.

The impact of these rate reductions eviscerates the effort to provide Direct Support Professional (DSPs) with a living wage, are unreasonable and will only lead to further system instability, staff turnover, and will not improve the quality of services in the community. As a result of the COVID-19 pandemic, this industry faces a potentially catastrophic inability to hire and retain staff. Our industry has been particularly hard hit by the COVID-19 pandemic. The sectors that have thrived during the pandemic have been on a hiring binge, often paying higher wages than the service sector, including OPWDD providers. Amazon alone has added 500,000 employees in 2020 with a wage floor of $15/hour. Companies like Walmart, Target, Home Depot, Lowes and local grocery stores, such as Wegmans, Tops, Price Chopper have all been hiring aggressively and at wages close to or exceeding $15/hour. Meanwhile the average DSP is earning approximately $13.64 in the upstate New York region. The fear of getting sick from COVID-19, the lack of in-person schooling and daycare are keeping many would be workers out of the workforce, especially in the service sector. Based upon the March 2021 Census Household Pulse survey, 6.3 million people are not working because of the need to care for a child who is not in a school or a day care center. A further 2.1 million currently care for an older person in their home. According to a recent New York Times article, combined, those numbers amount to nearly 14% of adults not working for reasons other than being retired.

The simple, Economics 101 answer to what a company or non-profit provider should do when it has trouble recruiting enough workers is to pay them more. Unfortunately, the current rate setting methodology makes it impossible for providers to do this. The proposed regulatory changes to the rate methodology will only make a very bad situation, a catastrophic situation.

Now is not the time for the State to impose these cuts. In the midst of the COVID-19 pandemic, OPWDD voluntary not-for-profit service providers, especially residential providers operating IRAs are faced with unprecedented challenges. Faced with a global pandemic, voluntary providers have gone to heroic efforts to keep the over 23,000 individuals in these certified settings safe and healthy. The proposed cuts would result in a reduction in reimbursement by as much as 7.5% for certain residential programs with significant vacancies, including vacancies due to deaths from COVID-19.

The OPWDD provider community has already incurred significant hardships in connection with the COVID-19 public health emergency. Providers have experienced challenges with access to testing, staffing vacancies due to illness and family obligations, and shortages of PPE. Agencies have had to scramble to obtain PPE from private suppliers with absolutely no financial assistance and very little support from the state. Providers have been forced to develop contingency plans for quarantine and isolation in their residential programs without any state operational or financial support. Residential programs were left to finance the cost of the emergency on their own, without any financial support from the state to meet the increased costs of responding to the impact of the emergency.

Instead of making cuts during an already vulnerable time, New York State should be focused on working towards a slow and steady return to pre-COVID service delivery without jeopardizing the precarious financial position of so many voluntary agencies. The public health crisis is far from over. The workforce crisis is getting worse by the day. These cuts will only lead to further destabilization of the entire system of supports for people with I/DD.

DDAWNY appreciates the opportunity, pursuant to SAPA, to comment on the proposed rule making changes to the current rate methodology for the Medicaid funded Home and Community Based Settings (HCBS) service of Residential habilitation and will continue to work as a partner with the State and Federal authorities to improve the lives of individuals with Developmental Disabilities, their families and their circle of supports.

Respectfully Submitted

DDAWNY, the Developmental Disability Alliance of Western New York

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