

Elizabeth J Misa, Deputy Medicaid Director
Office of Health Insurance Programs
NYS Department of Health
Empire State Plaza, Corning Tower
Albany, NY 12237

January 11, 2016

Dear Ms. Misa:

This communication is from the provider associations listed below who represent virtually all OPWDD providers in New York State who serve over 53,000 individuals in certified day programs and 28,000 in certified residential programs. We are writing to express our strong opposition to your December 18, 2015 letter announcing that as of April 1, 2016 all OPWDD certified day and residential providers must use only Medicaid enrolled transportation providers. This new and unexplained interpretation of longstanding federal and state regulation that has governed the provision of OPWDD certified day and residential services since July 1, 1996 (and even prior for residential) will be hugely disruptive to thousands of individuals with intellectual and developmental disabilities for many reasons, and as such we are urging your letter be rescinded and this new interpretation of regulations and policy be disbanded.

For the past 20 years, OPWDD has regulated and certified its day and residential programs in such a manner to promote the full integration of individuals into their greater community. The methods of transporting individuals to ensure this integration are urged to incorporate the same person-centered service approach that is typical of other OPWDD regulated services in both the day and residential environments with the health and safety of individuals at the core. Towards that end, residential and day programs are expected to replicate, as close as possible, home environments and daytime activities that people without developmental disabilities would typically experience. This is why for the past 20 years, OPWDD has managed, certified and regulated its services in such a way that the transportation systems have been considered (and funded) as integral parts of the day and residential supports. In fact, throughout the past two years of DOH's rate reform of OPWDD certified programs, this same integrated approach has continued throughout all their rate-setting reforms of certified day and residential programs.

What has also become very clear in the past three weeks is the virtual universal bewilderment concerning the reasons such new requirements should be imposed. Throughout all discussions regarding necessary funding and policy changes with OPWDD and DOH over the past several years, no one has cited any reasons to disrupt the current system of providing transportation services to individuals receiving services in OPWDD certified Day and residential programs. In fact, even since this letter was issued on 12/18/15, no one in either DOH or OPWDD has been able to identify any serious problem that has existed which would necessitate such a significant disruption in the transportation services provided daily to thousands of individuals throughout New York State.

We believe these new requirements solve no identified problem yet will be highly disruptive due to many factors. Among them include:

- The majority of transportation to the 53,000 individuals in OPWDD certified day programs is 5 day per week door-to door service due to the complex needs of the individuals served.
- The imposition of new requirements with significant new costs will nullify existing transportation contracts in NYC and other parts of the state, affecting an estimated 10,000+ individuals.
- In situations where the current transporter cannot become a Medicaid provider, there will be continuity of service issues for those affected individuals and possible disruption in their day service while alternate door-to door transportation can be secured.
- Enrollment as a Medicaid transporter and ambulette service will increase insurance costs by as much as \$7,000 per vehicle
- Reclassification will require day program and residential vehicles to obtain a change in vehicle registration to livery and will require many drivers to obtain a change in driver's license
- New service documentation requirements will add significant additional time in many routes and additional driver costs associated with reporting. Many of these service documentation requirements will necessitate new software systems for some transporters.
- Those transporters that are not currently Medicaid transporters and who exceed the \$500,000 payment threshold will be required to create corporate compliance systems for the first time and add compliance staff to perform this function
- DOT operating authority and vehicle standards could result if the function of transportation for day and residential providers who currently provide their own service is determined to have changed.

The December 18th letter identifies two regulations as the sole legal basis for imposing this new transportation policy: a federal Medicaid regulation, 42 CFR §447.10(d) and a state Medicaid regulation 18 NYCRR §504.1(b)(1). Neither regulation individually, nor both taken together, can reasonably and rationally be considered as supporting this new policy. The federal regulation, 42 CFR §447.10, contains the prohibition against the reassignment of provider claims. Section (d) restricts to whom payment of Medicaid reimbursement may be made, and Sections (e), (f) and (g) address reassignments to a government agency or as ordered by a court; payments to business agents and payment to individual practitioners. There is nothing in §447.10(d) that addresses transportation itself, the fact that payment for transportation is included in Medicaid rates or OPWDD programs or services specifically or in general.

The state regulation, 18 NYCRR §504.1(b)(1), similarly is a Medicaid regulation of general applicability requiring that a person that provides services to a Medicaid recipient for which payment is made under the Medicaid program must be enrolled in the Medicaid program. Again, there is nothing in §504.1(b)(1) that addresses transportation, reimbursement for transportation in Medicaid rates or OPWDD programs or services. The two regulations whether read individually or together contain nothing whatsoever to support the substantial burdens imposed by new policy. Nor can the new policy be justified as a reasonable interpretation of

existing regulations. While regulatory agencies have significant latitude in interpreting their own regulations, such interpretation must be rational and reasonable. There is nothing – not a word or phrase - in either regulation to support this unprecedented leap in interpretation. It should be noted that the cited state regulation has been in effect for over two decades and has never been interpreted in the manner now asserted by DOH.

Moreover, transportation services in OPWDD residential and day programs (where reimbursement includes costs of program-related transportation) are specifically identified and required programmatic components of such OPWDD programs or services. See, 14 NYCRR 635-10.4(b)(1)(x) for residential habilitation; 14 NYCRR 635-10.4(j)(1)(ix) for day habilitation; 14 NYCRR 635-10.4(j)(1)(ix) for supported employment; 14 NYCRR 635-10.4(l)(2)(vi) for community prevocational services; 14 NYCRR 681.14(c)(3)(viii) for intermediate care facilities; and 14 NYCRR 690.3(a)(3)(iii) for day treatment. Providers of these OPWDD residential and day programs and services comply with all OPWDD program-related transportation policies and requirements. In conclusion, nothing in the cited federal or state regulations supports the imposition of the new policy.

It is clear these new requirements will bring significant new costs to existing transportation services, which will require significant additional investments by New York State. These day and residential programs (including their transportation services) are already certified and highly regulated by OPWDD. Adding an entirely new additional system of Medicaid transportation regulations on top of the existing OPWDD regulations is excessive and, in itself, disruptive. Instead, we propose that DOH should agree with the long-held position that regulations governing residential and day services (and the transportation supports which are integral parts of those services) to individuals with intellectual and developmental disabilities habilitation remain the sole purview of OPWDD.

cc: Jason Helgerson, DOH Medicaid Director
Kerry Delaney, OPWDD Acting Commissioner
Roger Bearden, OPWDD General Counsel

Very truly yours,

Phil Catchpole
Multicultural and Emerging Agency Provider Council

Susan Constantino, President / CEO
Cerebral Palsy Associations of NYS, Inc.

Rhonda Frederick, President
Developmental Disabilities Alliance of Western NY (DDAWNY)

Ann Hardiman, Executive Director
NYS Assoc. of Community & Residential Agencies (NYSACRA)

Steven Kroll, Executive Director
NYSARC, Inc.

Michael Lawler, Director of Catholic Charities
NYS Catholic Conference

Ron Little
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Edie Mesick, State Government Relations Executive
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New York Association of Emerging & Multi-Cultural Providers, Inc. (NYAEMP)