



To: CEOs of Voluntary Provider Agencies for Home and Community Based Services (HCBS), Intermediate Care Facilities (ICF/DD), and Article 16 Clinics, Developmental Disabilities State Operations Offices (DDSOO) Directors, Developmental Disabilities Regional Offices (DDRO) Directors, Provider Associations, Willowbrook Consumer Advisory Board

From: Division of Policy and Program Development

Date: April 19, 2023

Subject: End of COVID-19 Federal Public Health Emergency (PHE) effective May 11, 2023 and Unwinding Guidance

I. Introduction

The purpose of this memorandum is for the Office for People with Developmental Disabilities (OPWDD) to communicate with Provider Agencies regarding the end of the temporary flexibilities associated with the COVID-19 pandemic. With the federal notification that the Department of Health and Human Services (HHS) is planning to end the PHE on May 11, 2023, the flexibilities available during the pandemic will end and agencies should return to operational requirements as described in OPWDD Administrative Memoranda (ADMs), rules, regulations, and other guidance. Information regarding the end of COVID-19 flexibilities related to Care Coordination Organizations (CCOs) can be found in the *Care Management End of Flexibilities* Memorandum <https://opwdd.ny.gov/coronavirus-guidance/covid-19-public-health-emergency-unwinding-guidance> Absent further notification from HHS that the PHE will end on a date other than May 11, 2023, the effective dates provided in this guidance document will remain applicable, and provider agencies should commence planning unwinding activities accordingly. As detailed below, the flexibilities authorized under Appendix K for HCBS Waiver Services will expire on November 11, 2023, or six months after the end of the PHE, with limited exception as noted below. The flexibilities authorized under the Medicaid Disaster Relief State Plan Amendment and the Social Security Act Section 1135 authority will expire on May 11, 2023.

This document (and included Excel file) is designed to assist and support providers with planning for a return to regular operations across their HCBS Waiver services, ICF/IID programs, and Article 16 Clinic services. All ADMs listed in this document can be found at <https://opwdd.ny.gov/regulations-guidance> unless otherwise noted. This memorandum does not address Day Treatment or Crisis Services for Individuals with I/DD (CSIDD).

II. Post-Emergency Guidance Changes

Providers of OPWDD certified, operated, and/or funded programs should resume all pre-pandemic activities in compliance with applicable rules and regulations and guidance. With

the conclusion of the COVID-19 PHE on May 11, 2023, certain flexibilities authorized under the following federal authorities will end as indicated below:

- Appendix K for HCBS Waiver Services – November 11, 2023
- Medicaid Disaster Relief State Plan Amendment (SPA) – May 11, 2023
- 1135 Authority – May 11, 2023

This memo does not address any of the special allowances that ended prior to the date of issuance of this memorandum.

A. Appendix K Authority: Provisions ending on November 11, 2023:

- The ability to temporarily provide Residential Habilitation, Day Habilitation, and Site Based Pre-Vocational services out-of-state will end and no longer be allowed after November 11, 2023. Under certain circumstances, OPWDD HCBS waiver services can be provided out-of-state or outside the country as outlined in ADM 2019-02R *Permissible Out-of-State or Country Home and Community-Based Services (HCBS) Waiver Services Delivery* available at <https://opwdd.ny.gov/system/files/documents/2020/01/oos-ooc-adm-10.10.19.pdf>.
- Day Habilitation services will no longer be allowed to be provided in a certified residential setting. After November 11, 2023, Day Habilitation services must again meet the criteria previously established in ADM 2006-01 *Group Day Habilitation Service Documentation Requirements* available at https://opwdd.ny.gov/system/files/documents/2020/01/group-day-hab-documentation-requirements_memo200601.pdf. Individuals who choose to receive in-residence day services may receive in-residence Community Habilitation-Residential (CH-R). Eligibility requirements for in-residence CH-R are described in 21-ADM-02 *Requirements for Community Habilitation-Residential (CH-R) services delivered in the Individual's Certified Residence for people who are elderly, medically frail or present with complex behavioral needs* available at https://opwdd.ny.gov/system/files/documents/2021/07/21-adm-02-in-residence-community-habilitation-services_final.pdf. Additional guidance is forthcoming regarding the transition to out-of-residence day services.
- Prevocational Services will no longer be allowed to be provided in a certified residential setting. After November 11, 2023, Prevocational Services must meet the criteria previously established in ADM 2020-01R available at <https://opwdd.ny.gov/adm-2020-01r-prevocational-services>. Individuals who choose to receive in-residence day services may receive in-residence Community Habilitation-Residential (CH-R). Eligibility requirements for CH-R is described in 21-ADM-02 *Requirements for Community Habilitation-Residential (CH-R) services delivered in the Individual's Certified Residence for people who are elderly, medically frail or present with complex behavioral needs* available at https://opwdd.ny.gov/system/files/documents/2021/07/21-adm-02-in-residence-community-habilitation-services_final.pdf. Additional guidance is forthcoming regarding the transition to out-of-residence day services.

- Modifications to the Day Habilitation and Site Based Pre-Vocational services program day duration will end, including in-person service time and mealtime modifications. To bill for a full-or half-day of services after November 11, 2023, providers must meet the requirements in ADM 2006-01 *Group Day Habilitation Service Documentation Requirements* available at https://opwdd.ny.gov/system/files/documents/2020/01/group-day-hab-documentation-requirements_memo200601.pdf. Billing requirements for Site-Based Pre-Vocational services are listed in ADM 2020-01R *Prevocational Services* available at https://opwdd.ny.gov/system/files/documents/2020/12/prevoc-adm_2020-01r-final.pdf.
- Modifications to Community Habilitation services, including allowing those who live in a certified residence to receive Community Habilitation services in the residence and services to be temporarily provided out-of-state, will end. After November 11, 2023, OPWDD will permit the delivery of CH-R services for people who are elderly, medically frail, or present with complex behavioral needs and residing in a certified residence in accordance with 21-ADM-02 *Requirements for Community Habilitation-Residential (CH-R) services delivered in the Individual's Certified Residence* available at https://opwdd.ny.gov/system/files/documents/2021/07/21-adm-02-in-residence-community-habilitation-services_final.pdf. Additional information on Community Habilitation is available in ADM 2015-01 *Service Documentation for Community Habilitation Services Provided to Individuals Residing in Certified and Non-Certified Locations* available at https://opwdd.ny.gov/system/files/documents/2020/01/admfinal2015-01_1_0.pdf.
- Modifications to Respite services, including temporarily providing Respite services to people living in a certified residence (Individualized Residential Alternative, Community Residence, or Family Care Home), will end after November 11, 2023. Additional information on Respite services is available in ADM 2017-01R *HCBS Waiver and Non-Waiver Enrolled Respite Services* available at <https://opwdd.ny.gov/system/files/documents/2021/12/adm-2017-01r-respite-adm-update-3-1-21.pdf>. A limited exception is allowed for people who live in a certified residential setting and receive respite at a resource center while enrolled in Crisis Services for Individuals with Intellectual and/or Developmental Disabilities (CSIDD).
- Modifications to Supported Employment (SEMP) and Pathway to Employment Services, including the ability to provide services out-of-state, will end after November 11, 2023. Information on SEMP is in ADM-2016-01 available at https://opwdd.ny.gov/system/files/documents/2020/01/adm-2016-01_supported_employment.pdf. Information on Pathway to Employment is in ADM 2015-07 *Service Documentation for Pathway to Employment Service* available at https://opwdd.ny.gov/system/files/documents/2020/03/adm2015-07_0.pdf.
- Retainer payments made by a Fiscal Intermediary (FI) to retain 'self-hired' staff who are unable to work because the individual receiving services or his/her family

member is ill will end after November 11, 2023. Retainer payments are temporarily available for self-hired staff delivering Community Habilitation services and other services that include personal care as a service component.

- Effective October 15, 2020, retainer payments for Day Habilitation and Site-Based Prevocational services ended and were replaced by time-limited modifications to the program day duration for billing Day Habilitation and Site-Based Prevocational Services in limited circumstances. These provisions are allowed when the site is mandated to close due to COVID-19 or the provider voluntarily closes its program due to the elevated percentage of individuals and staff at a particular site that have tested positive for COVID-19. These provisions end on November 11, 2023, and are described here: <https://opwdd.ny.gov/system/files/documents/2021/04/covid-19-program-flexibilities-master-3.25.21.pdf>.
- Providers of OPWDD certified, operated, and/or funded HCBS programs that have used the flexibility to defer updates to Staff Action Plans must update Staff Action Plans within 6 months from the end of the PHE for COVID-19-related changes (if reflected in the Life Plan or Life Plan Addendum) or 60 days from the end of the PHE for non-COVID-19-related changes, and must return to reviewing Staff Action Plans twice annually. For additional information on Staff Action Plan requirements, please see 18-ADM-09R *Staff Action Plan Program and Billing Requirements* available at https://opwdd.ny.gov/system/files/documents/2020/01/4.12.19-staff-action-plan-adm-final_0.pdf.

B. Appendix K Flexibilities Ending Prior to November 11, 2023.

- The Appendix K included flexibilities allowing providers of OPWDD certified, operated, and/or funded HCBS residential habilitation programs to increase occupancy beyond 14 individuals. This authorization will end on June 6, 2023 when the emergency regulations authorizing such expansions expire.
- The Appendix K included flexibilities allowing providers of OPWDD certified, operated, and/or funded HCBS programs to provide abbreviated trainings and defer annual certifications. Pursuant to recent OPWDD guidance, all providers who used these flexibilities must become compliant with these regulations by June 30, 2023 and create and maintain a plan demonstrating how they will become compliant with OPWDD's training requirements by that date.

C. Medicaid Disaster Relief State Plan Amendment – Provisions end on May 11, 2023.

- The voluntary-operated ICF/IIDs' supplemental payments to fund the provision of ICF/IID active treatment during daytime, weekday service hours in accordance with each individual's authorized levels of day services provided outside of the ICF/IID prior to the pandemic will end on May 11, 2023. These provisions are described here: <https://opwdd.ny.gov/system/files/documents/2021/05/emergency-mgt->

[covid19-icf-iid-supplemental-payment-letter-5-17-21_kmv_protected.pdf](#). A person may receive day services through in-home day services, Day Treatment, or community-based Day Services. The ICF/IID active treatment services will continue to be delivered in accordance with 42 CFR § 440.150 and with the individual's Comprehensive Functional Assessment (CFA) as defined in 42 CFR §483.440(c)(3).

D. Social Security Act Section 1135 Authority – Provisions end on May 11, 2023.

- The Social Security Act Section 1135 Medicaid waiver that allowed Article 16 Clinic services delivered via telehealth to be billed even if neither the individual nor the practitioner were at the clinic site will end on May 11, 2023. After expiration of the 1135 waiver, Article 16 Clinic Rehabilitation services must be delivered in-person at the clinic site unless another allowance is identified in the Article 16 Clinic Crosswalk: <https://opwdd.ny.gov/providers/article-16-clinics> Article 16 Clinic services that are medical in nature should follow the guidance for Article 28 Clinics, available on NYS DOH's APG webpage: http://www.health.ny.gov/health_care/medicaid/rates/apg/. Furthermore, the provision of Article 16 services that are medical in nature via telehealth is governed by the standards announced in the February 2023 NYS DOH Medicaid Update (Volume 39, Number 3) available here: https://www.health.ny.gov/health_care/medicaid/program/update/2023/docs/mu_no3_feb23_speced_pr.pdf. Use of Remote Technologies for OPWDD 's Comprehensive HCBS 1915(c) Waiver services are discussed in Section III, below.
- The allowance that Fair Hearings and Appeals must be requested within 120 days will end on May 11, 2023. These requests will return to the pre-PHE timeframe of 90 days to submit such a request.
- The Suspension of Preadmission Screening and Resident Review (PASRR) assessments for up to 30 days will end on May 11, 2023.

III. Ongoing OPWDD Guidance

OPWDD will continue to allow the use of Remote Technologies, where appropriate, to remotely deliver the following services authorized under OPWDD's Comprehensive HCBS 1915(c) Waiver: Day Habilitation, Community Habilitation, Prevocational Services, Supported Employment, Pathway to Employment, Support Broker, and Respite Services. Remote technology cannot be an exclusive, long-term service delivery option. Additional requirements and information for the delivery of remote services is available in 21-ADM-03 *Ability to use Technology to Remotely Deliver Home and Community-Based Services* available at https://opwdd.ny.gov/system/files/documents/2021/07/21-adm-03-hcbs-remote-technology_final.pdf.

OPWDD guidance regarding the isolation of, and additional precautions to be taken, for people residing in OPWDD certified facilities who are exposed to COVID-19 will remain in place post-PHE. Information on when individuals should be placed in isolation and/or

additional precautions in OPWDD certified facilities taken, including when a mask must be worn, can be found in the Revised Protocols for the Implementation of Isolation and Precautions for individuals Exposed to Covid-19 Residing in OPWDD Certified Facilities available at <https://opwdd.ny.gov/coronavirus-guidance>

OPWDD will be providing additional guidance regarding the transition to out-of-residence day services.

For questions regarding Article 16 clinics, please contact clinic.services.information@opwdd.ny.gov. For all other questions regarding this memorandum, please contact peoplefirstwaiver@opwdd.ny.gov.