



**Summary of OPWDD's HCBS Waiver  
Emergency Preparedness and Response  
Appendix K  
Amended 4/20/20**

## **Introduction**

In the wake of disaster or emergency, certain laws that govern Medicaid allow for the federal government to allow States the flexible use of its Medicaid waivers. On March 7th, Governor Andrew Cuomo declared a state of emergency in New York State to contain the spread of the Coronavirus (COVID-19). Shortly thereafter, New York submitted a request to the Federal Centers for Medicare and Medicaid Services (CMS) to amend the NYS Office for People With Developmental Disabilities' (OPWDD) Home and Community-Based Services (HCBS) waiver through what's called Emergency Preparedness and Response Appendix K strategy.

New York received approval of its OPWDD HCBS Waiver Emergency Preparedness and Response Appendix K waiver amendment on April 7th.

## **What is Appendix K?**

States are allowed to use the Appendix K option to amend existing 1915(c) HCBS waivers in emergency situations. The use of approved K waiver authority is temporary and provides States with flexibility by waiving certain rules that govern the respective waiver in areas such as payment, eligibility, rules, claims, privacy.

## **OPWDD HCBS Appendix K Waiver Amendment – General**

CMS approved the term of New York's OPWDD HCBS Appendix K waiver amendment from March 7, 2020 through September 7, 2020 but will only cover the period in which there is a declared State of Emergency in New York.

The waiver amendment is statewide, meaning it covers the entirety of New York state and applies in all locations served by the waiver for anyone impacted by COVID-19.

The waiver amendment covers approximately 90,000 people in the OPWDD system.

People enrolled in the OPWDD HCBS waiver, providers including Care Coordination Organizations and families are affected. It's important to reiterate that the waiver amendment is only applicable to people and providers impacted by COVID-19.

## **New York State Appendix K Provisions:**

### **Policy Amendments:**

#### Remote Services:

For the period of the emergency, the State will allow the remote delivery of the following services through the telephone or other technology in accordance with HIPAA requirements:

- Day Habilitation
- Community Habilitation
- Prevocational Services
- Supported Employment (SEMP)
- Pathway to Employment
- Support Broker

Please note that subsequent Executive Order's by Governor Cuomo have allowed delivery of services that extend beyond traditional HIPAA requirements. In those cases, an Executive Order overrules Appendix K guidelines and dictates the standard that is allowed. Additionally, The Office of Civil Rights (OCR) of the Department of Health and Human Services (HHS) which is responsible for HIPAA enforcement has indicated it will exercise "enforcement discretion" and not impose penalties for noncompliance with the regulatory requirements of HIPAA during the COVID-19 nationwide public health emergency.

#### Expand Setting Where Services Are Delivered:

Day Habilitation and Prevocational Services may be delivered temporarily in the participant's residential setting, which is defined as:

- The participant's private home,
- A provider owned or controlled certified residential setting, or
- Other residential emergency setting, such as a hotel.

Residential Habilitation services may be delivered temporarily in another certified location or non-certified location.

### Out-of-State Services:

If the only temporary, safe, and accessible setting for a person to reside is outside of New York State, the person may receive any waiver service in another adjacent state.

### Training and Background Checks:

Direct Support Professionals may deliver services, even if not all training may have been completed. Within 60 days of the end of the state of emergency, any lapsed or missing training must be completed.

Provider agencies will have an exemption from requirements in the Criminal Background Check (CBC) screening, Staff Exclusion List (SEL) check, and State Central Register (SCR) check. In no event, will an employee be permitted to work unsupervised with individuals until the SEL check is completed and the CBC submitted. If upon the receipt of background check information, it is found that the employee is unqualified, the staff person will not be allowed to continue to render services.

### Level of Care (LOC) Evaluations:

During the period of the state of emergency, the annual LOC recertification may be delayed up to six (6) months from the original due date.

### Person-Centered Service Plan Development Process:

A temporary waiver of face-to-face requirements for Health Home and Basic HCBS Plan Support providers has been instituted by New York State. In lieu of face-to-face contact, Care Managers may utilize telephonic or telehealth capabilities in accordance with HIPAA requirements.

The requirement that at least one face-to-face Life Plan meeting is conducted each year is waived during the period of the state of emergency.

Adjustments to the Life Plan may be approved with a retroactive approval date for service needs identified to mitigate harm or risk directly related to COVID-19 impacts.

The use of e-signatures that meets privacy and security requirements will be added as a method for the participant or legal guardian signing the Life Plan to indicate approval of the plan.

### Medication Administration:

In an emergency situation, medication administration may be provided by a Direct Support Professional who is not current with medication administration training, if no other staff is available and said service is essential for the person's health and safety.

### Consolidated Fiscal Report (CFR):

CFR submission deadlines for OPWDD HCBS Waiver providers and NYS will be extended throughout the duration of this state of emergency without financial penalties and penalties for late submissions will be waived.

Outside of this Waiver, the State has extended the CFR filing date for calendar year filers to August 1.

### **Fiscal and Payment-Related Provisions:**

#### Rate Enhancements:

The State is amending Residential Habilitation rates for Supervised residences to compensate providers for additional hours of staffing needed when day services are suspended, or the resident is unable to attend for health and safety reasons. The current rate methodology will be adjusted upward to reflect the enhanced staffing needs in the residence for increased day time staffing hours.

Supervised Residential Habilitation providers will not be eligible for this enhanced rate if the provider is also billing a retainer day for the person's day services, or Respite services. However, providers have the latitude to adjust Life Plan goals in order to best suit the needs of the person during the State of Emergency. This could mean that Life Plan's could be adjusted to focus on personal hygiene (hand washing) and other contact mitigation strategies (keeping hand away from face) that are billable and relevant to health and safety whereas some of the existing Life Plan goals may not be currently billable and not directly related to the health and safety of the individual or the community.

Specific provider impacts of the enhanced rate are forthcoming and will be made available to providers in draft form prior to final approval for planning purposes.

#### Retainer Payments:

Retainer payments are intended to provide agencies with financial latitude to retain staff with the understanding that agencies may not be able to bill for, and

receive revenue during the state of emergency, in the amount that would justify them retaining their staff levels prior to the state of emergency.

Retainer payments will be made in two phases.

**Phase 1 - 3/18 through 4/15:**

- This phase allows providers to bill for day habilitation and prevocational services that were ordered closed as of 3/18.
- Providers may bill retainer days for individuals who:
  - Are authorized by OPWDD to receive Day Habilitation, Prevocational and/or Day Treatment services from your agency; and
  - Were actively receiving Day Habilitation, Prevocational and/or Day Treatment services from your agency at the time of the mandated temporary suspension of services.
- Retainer day payments may be billed to Medicaid in accordance with the individual's existing schedule for participating in your agency's Day Habilitation, Prevocational and/or Day Treatment services.
  - For example, if your agency normally provided a full unit of Day Habilitation on Monday, Wednesday and Friday each week, your agency may bill no more than three (3) full units of retainer Day Habilitation payments.
- Retainer day payments are billed as follow:
  - Use existing Provider ID for Day Habilitation, Prevocational and/or Day Treatment services;
  - Use existing rate codes for half and/or full units of Day Habilitation, Supplemental Day Habilitation, site-based Prevocational and/or Day Treatment services; and the existing rate code for 15-minute units of community-based Prevocational Services;
  - Use existing locator code, and
  - Use revenue code: "0180 - Leave of Absence."

**Phase 2 – 4/16 until State of Emergency is Declared Over:**

Services eligible for retainer days in phase 2 include day habilitation, community habilitation, and prevocational services.

Day Service Retainer Program will be available to providers in circumstances:

- in which facility closures are necessary due to COVID-19 containment efforts
- in which attendance and utilization for the service drops to below 80% of the monthly average for the period of July 2019 through December 2019.

*\*\*Please note that community habilitation will be eligible to be billed retroactively to March 18th under the Phase 2 construct while day habilitation*

and prevocational services are governed under the Phase 1 construct from 3/18 through 4/15.\*\*

Each provider participating in this program will be required to sign onto an agreement with OPWDD which requires agencies to:

- Retain staff at the levels in effect prior to the Governor's March 7, 2020 declaration of emergency
- Continue to provide services to individuals and families currently served by their agency
- Have a signed agreement to either provide/use staff for an OPWDD residential provider or emergency "step-down" intensive respite facilities
- Completed the OPWDD Day Program Template

Retainer payments are based on the average monthly paid claims, per provider, per individual for the period of July 2019 to December 2019 for Day Habilitation, Prevocational Services and Community Habilitation Services

The calculation of the retainer payment will be 80% of the average monthly paid claims for Day Habilitation, Prevocational Services and Community Habilitation Services.

Any billing that exceeds 100% of revenue ceiling, will be identified through a post audit review reconciliation process.

Important guidance for providers as it relates to phase 2 billing:

- Agencies will now only need to make a "good faith effort" to retain employees that they have lost prior to March 7th. It is likely that providers will simply need to attest that they made an effort to bring back any furloughed, laid off, or staff who left because they would rather just take the unemployment.
- Administrative staff are not going to be considered for the retention requirement, just the 100,200,300 level code staff on the CFR.
- Retainer payments will be adjusted for 1/1/20 and 4/1/20 rate impacts which most providers passed along to staff already but have not been paid for because the rates have not been finalized by OPWDD.
- The flexibility in the Life Plan goals mentioned earlier in this document will likely be the best mechanism for providers to earn the 20% that is not paid through the retainer payment, and OPWDD will be flexible with that approach.
- The Appendix K Waiver allows agencies to amend the Life Plan and get requisite signatures and approvals after the fact.
  - For example, an agency could make personal hygiene a Life Plan goal. You can tailor the Life Plan goals to things that your agency believes will get reimbursed for, and you have the latitude to do 2 hours in the morning, break for lunch and do 2 hours in the afternoon because you are not required to bill in 4 hour consecutive increments.
- *During the period of New York State's COVID-related mandatory school closure, Community Habilitation may temporarily be delivered during*

weekday, daytime hours to students who are authorized to receive Community Habilitation. This allows the provision of Community Habilitation, during what would regularly be considered part of the school day, up to the amount previously authorized for that individual.

- You are not allowed to get the enhanced rate and day vocational services for the same individuals but one or the other should allow providers the flexibility they need to get closer to 100% billing.
- As part of the retainer payment agreement, providers will be required to enter into a shared staffing arrangement with one other agency but have the option to enter into agreement with more than one. This shared staffing arrangement will need to be submitted to OPWDD by June 15th.
- Claims may be submitted for Phase 2 beginning 5/1/2020.
- Two rate codes being developed to bill for Phase 2:
  - 4775 – COVID Retainer – 1st Half Month
  - 4776 – COVID Retainer – 2nd Half Month

#### Delivering services while maintaining social distancing:

Agencies may temporarily provide and bill Medicaid for services that support the person and his/her family while maintaining social distancing. For example, Day Habilitation Prevocational Services and Community Habilitation staff may deliver groceries. For these types of services, the time that staff spend traveling to the person's home, running the errand, and returning to the worker's home may be billed as service time.

#### Flow of Funds:

- The State will deliver the retainer payment in two monthly installments, the first spanning the first half of the month and the second spanning the second half.
- The State will notify each provider of the number of units they are allowed to bill for the 80% payment.
- The provider will then bill EMedNY for the 80 percent units that are allowable and any subsequent units in order to achieve the additional 20%. Units in excess of the 100% cap will be subject to reconciliation.