

(“agent trade”); continuing education (“CE”) course providers; the executive director of a university’s risk management and decision processes center (“executive director”); and insurance producers. The executive director expressed support for the amendment, explaining that the amendment would improve flood risk communication and help ensure that consumers receive the insurance that best fits their needs at an appropriate price.

Other comments included: suggestions that DFS change the effective date; a question about whether the definition of “Insurance Law instruction” includes instruction on 23 NYCRR 500; a question about whether DFS would approve a CE course on general insurance agency operations that includes topics on diversity, inclusion, and elimination of bias, ethics and professionalism, and the Insurance Law; a request that DFS either remove the enhanced flood CE requirement or reduce it to one hour; that the amendment now would require insurance brokers with designations to take 39 CE hours every two years; a request that DFS consolidate the flood insurance instruction requirements from three hours to two hours or rotate the requirements for these areas of instruction; that it is “ridiculous” that the amendment requires insurance producers to devote almost one half of the 15 mandatory CE hours to instruction “involving nothing to do with insurance”; that it is unfair that prior courses allegedly would not count toward license renewal; a request that DFS waive the amendment requirements for insurance producers who already completed their CE for their 2022 license renewal; a question about whether the amendment applies to all insurance producer licensing lines; a question about whether DFS will allow an insurance producer to repeat flood courses to satisfy the CE requirements; a question about whether bridge courses will still be available after DFS adopts this amendment; a question about whether the amendment applies to non-resident insurance agents and non-resident independent adjusters; and a question about an insurance agent with an inactive agent’s license.

DFS did not make any changes in response to these comments. The full assessment of public comments is available on the DFS website.

Department of Health

EMERGENCY RULE MAKING

Telehealth Services

I.D. No. HLT-41-21-00002-E

Filing No. 1047

Filing Date: 2021-09-23

Effective Date: 2021-09-23

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Addition of Part 538 to Title 18 NYCRR.

Statutory authority: Public Health Law, sections 2999-cc(2)(y), (4) and 2999-ee

Finding of necessity for emergency rule: Preservation of public health.

Specific reasons underlying the finding of necessity: These regulations must be promulgated on an emergency basis to continue certain telehealth flexibilities that were authorized during the State public health emergency and to avoid a disruption in certain health care services provided to Medicaid enrollees once the public health emergency ends. During the public health emergency, pursuant to Executive Orders which waived certain New York State laws and regulatory requirements related to telehealth, all eligible Medicaid providers were authorized to utilize telehealth, including audio-only telephone or other audio-only technology. This regulation is required to authorize Medicaid providers to continue to provide services pursuant to the same flexibilities afforded during the public health emergency until permanent regulations are able to be promulgated.

Subject: Telehealth Services.

Purpose: To ensure continuity of care of telehealth services provided to Medicaid enrollees.

Text of emergency rule: Pursuant to the authority vested in the Commissioner of Health by sections 2999-cc(2)(y) and (4) and 2999-ee of the Public Health Law, Article 4 of Subchapter E of Chapter II of Title 18 (Social Services) of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended, to be effective on filing with the Secretary of State, by adding Part 538 to read as follows:

PART 538 State Reimbursement for Telehealth Services

Section 538.1 Authorized providers. For purposes of medical assistance reimbursement during the federally declared public health emergency related to the COVID-19 pandemic, all Medicaid providers authorized to provide in-person services are authorized to provide such services via telehealth, as long as such telehealth services are appropriate to meet a patient’s health care needs and are within a provider’s scope of practice.

Section 538.2 Acceptable telehealth modalities. In addition to the telehealth modalities set forth in section 2999-cc of the public health law, reimbursement shall be made for telehealth services provided by use of telephone and other audio-only technologies.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 21, 2021.

Text of rule and any required statements and analyses may be obtained from: Katherine Ceroalo, DOH, Bureau of Program Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqa@health.ny.gov

Regulatory Impact Statement

Statutory Authority:

Public Health Law section 2999-cc(2)(y) provides the Commissioner of Health with the authority to determine, in consultation with the Commissioners of the Office of Mental Health, the Office of Addiction Services and Supports, or the Office for People with Developmental Disabilities, other categories of providers authorized to provide telehealth services.

Public Health Law section 2999-cc(4) requires promulgation of regulations to cover the modality of audio-only telephone communication as telehealth in the medical assistance and child health insurance programs.

Public Health Law section 2999-ee provides the Commissioner of Health with the authority to specify in regulation additional acceptable modalities for the delivery of health care services via telehealth, including audio-only telephone communications, in consultation with the Commissioners of the Office of Children and Family Services, the Office of Mental Health, the Office of Addiction Services and Supports, or the Office for People with Developmental Disabilities.

Legislative Objectives:

The legislative objective is to provide the Commissioner of Health with authority to determine the appropriate providers and modalities of telehealth necessary to increase access to health care services for Medicaid enrollees, especially for behavioral health, oral health, maternity care, care management, services provided in emergency departments and services provided to certain high-need populations.

Needs and Benefits:

These regulatory amendments are needed to ensure continuity of care provided to Medicaid enrollees during the transition from telehealth services provided during the public health emergency and after the public health emergency ends. During the public health emergency, pursuant to Executive Orders that waived certain New York State laws and regulatory requirements related to telehealth, all Medicaid providers were authorized to utilize telehealth, including audio-only telephone or other audio-only technology. Since these Executive Orders expired on June 24, 2021, this regulation is required to authorize Medicaid providers to continuously provide services pursuant to these flexibilities to ensure continuity of care.

During the course of the public health emergency, Medicaid providers have adopted widespread use of telehealth, including through audio-only telephonic modalities and other audio-only technologies, as a means of delivering services to Medicaid beneficiaries. Providers have reported that this expansion of telehealth has improved access to care, improved patient experience, and improved provider satisfaction. Telehealth also has the potential to improve patient outcomes, although measurement of these outcomes requires further research. Furthermore, expanded use of telehealth during the pandemic has resulted in Medicaid program savings related to avoidance of emergency room and urgent care visits, and decreased utilization of Medicaid-covered non-emergency medical transportation services.

As many of these flexibilities are intended to be made permanent after the public health emergency through enactment of regulations by the Department, and given that Centers for Medicare and Medicaid Services has authorized continued use of telehealth through modalities that align with Article 29-G of the Public Health Law, the Department is issuing these emergency regulations in order to ensure ongoing and continuous access to telehealth services for Medicaid members. This continuous access is particularly important for members of the Medicaid population who are unable to access services in person, or who continue to be at risk for COVID-19, because they are ineligible for the vaccine, including children under age 12 and individuals for whom the vaccine is currently medically contraindicated.

Costs:

Costs to Regulated Parties:

There are no costs imposed on regulated parties by these regulations because the amendments provide reimbursement for health care services provided via telehealth.

Costs to the Administering Agencies, the State, and Local Governments:

Costs to administering agencies and the State associated with these amendments will be covered by existing State budget appropriations and anticipated federal financial participation. There are no costs imposed on local governments by these regulations because the amendments provide reimbursement for health care services provided via telehealth.

Local Government Mandates:

The proposed regulations do not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

The proposed regulations impose minimal paperwork requirements on regulated parties to claim Medicaid reimbursement for telehealth services provided to Medicaid enrollees.

Duplication:

There are no other State or Federal requirements that duplicate, overlap, or conflict with the statute and the proposed regulations.

Alternatives:

The Department considered the option of not promulgating these emergency regulations, which would create an abrupt halt to certain telehealth flexibilities authorized during the public health emergency and which have proven vital to Medicaid members. In consultation with the Office of Mental Health and Office of Addiction Services and Supports, the Department determined that providing continuity of care to Medicaid enrollees during the transition is a public health priority and as such, decided to move forward with these emergency regulations.

Federal Standards:

There are no minimum Federal standards regarding this subject.

Compliance Schedule:

These amendments shall be effective on filing with the Secretary of State.

Regulatory Flexibility Analysis

No regulatory flexibility analysis is required pursuant to section 202-b(3)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse economic impact on small businesses or local governments, and it does not impose any new reporting, record keeping or other compliance requirements on small businesses or local governments.

Cure Period:

Chapter 524 of the Laws of 2011 requires agencies to include a "cure period" or other opportunity for ameliorative action to prevent the imposition of penalties on the party or parties subject to enforcement when developing a regulation or explain in the Regulatory Flexibility Analysis why one was not included. This regulation creates no new penalty or sanction. Hence, a cure period is not necessary.

Rural Area Flexibility Analysis

No rural area flexibility analysis is required pursuant to section 202-bb(4)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse impact on rural areas, and it does not impose any new reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

No job impact statement is required pursuant to section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have an adverse impact on jobs and employment opportunities.

NOTICE OF ADOPTION**Limits on Executive Compensation**

I.D. No. HLT-36-19-00006-A

Filing No. 1046

Filing Date: 2021-09-22

Effective Date: 2021-10-13

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of section 1002.3 of Title 10 NYCRR.

Statutory authority: Social Services Law, section 363-a(2); Public Health Law, sections 201(1)(o), (p), 206(3) and (6)

Subject: Limits on Executive Compensation.

Purpose: Removes "Soft Cap" prohibition on covered executive salaries.

Text or summary was published in the September 4, 2019 issue of the Register, I.D. No. HLT-36-19-00006-P.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Katherine Ceroalo, DOH, Bureau of Program Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqa@health.ny.gov

Initial Review of Rule

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2026, which is no later than the 5th year after the year in which this rule is being adopted.

Assessment of Public Comment

The New York State Department of Health (Department) received comments from Agencies for Children's Therapy Services (ACTS) and The Continuing Care Leadership Coalition (CCLC). The comments and the Department's responses are summarized below.

Comment: A comment was received stating that the \$199,000 executive compensation threshold is antiquated and should be updated to reflect new duties executives have been required to take on as well as inflation. The commenter suggested that the executive compensation cap be at a minimum constituent with the Bureau of Labor Statistics data on inflation.

Response: The regulations establish a \$199,000 maximum for the use of State funds or State-authorized payments for executive compensation given directly or indirectly to a covered executive. However, this amount does not limit the amount of compensation paid to such executives from other sources of income outside of State funds or State-authorized payments. In addition, the regulations provide for an annual review to be conducted by the Department to determine whether adjustment is necessary based on appropriate factors and subject to the approval of the Director of the Division of Budget. As such, no changes were made to the proposed regulation as a result of this comment.

Comment: A comment was received asking that the Department recognize that not-for-profit entities engage in a similar process as set forth in the proposed regulation to comply with Internal Revenue Service requirements related to executive compensation. The commenter suggested that the Department consider further aligning State reporting and Federal reporting for such entities, to reduce the paperwork burden for not-for-profit entities.

Response: The proposed regulation is necessary to comply with the Court of Appeal's decision in *LeadingAge, et al. v. Shah, et al.*, 32 N.Y.3d 249 (2018), which invalidated section 1002.3(b) of the existing regulation. The proposed rulemaking only seeks to remove this provision of the regulation and no additional amendments are being made at this time. The Department will take this comment under consideration for any future rulemaking. No changes were made to the proposed regulation as a result of this comment.

Comment: A comment was received suggesting that the Department update the materials on the State's EO #38 website, as the existing materials appeared to be dated and confusing to understand.

Response: The Department will take this comment under consideration; however, no changes are necessary to the regulation as a result of this comment.

Comment: A comment was received in support of the regulatory amendments.

Response: No changes to the proposed regulation are necessary as a result of this comment.

NOTICE OF EXPIRATION

The following notices have expired and cannot be reconsidered unless the Department of Health publishes a new notice of proposed rule making in the *NYS Register*.

Hospital Medical Staff - Limited Permit Holders

| I.D. No. | Proposed | Expiration Date |
|-------------------|-------------------|--------------------|
| HLT-47-19-00008-P | November 20, 2019 | September 22, 2021 |

Women, Infants and Children (WIC) Program

| I.D. No. | Proposed | Expiration Date |
|-------------------|-------------------|--------------------|
| HLT-51-19-00001-P | December 18, 2019 | September 22, 2021 |

Medicaid Managed Care State Fair Hearings and External Appeals Processes and Standards

| I.D. No. | Proposed | Expiration Date |
|-------------------|--------------|--------------------|
| HLT-27-20-00006-P | July 8, 2020 | September 22, 2021 |