

OPWDD IS MAKING CHANGES TO ELIGIBILITY FOR SERVICES:
WHAT ALL STAKEHOLDERS NEED TO KNOW!

On June 7, 2018, the Office for People with Developmental Disabilities (“OPWDD”) enacted emergency regulation 14 NYCRR § 629.1 which impacts eligibility for services. OPWDD is also seeking to make the emergency regulation permanent.

Q. *What does the proposed regulation do?*

The regulation codifies (puts into a legal form) specific eligibility requirements for people seeking the Home and Community Based Services (“HCBS”) Waiver from OPWDD.

Q. *Why is DRNY concerned about the proposed regulation?*

The regulation goes beyond what the law says is allowed in determining eligibility. The New York State Legislature has already specified the eligibility requirements for people seeking OPWDD supports and services. In MHL § 1.03(22), an individual is eligible if:

- 1) There is documentation that an individual has been diagnosed with an intellectual and/or developmental disability;
- 2) The developmental disability occurred prior to the age of 22;
- 3) The developmental disability has continued or can be expected to continue indefinitely; and
- 4) The developmental disability constitutes a substantial handicap to the individual’s ability to function in society.

Mental Hygiene Law further defines a developmental disability as a disability which:

- (a) (1) is attributable to intellectual disability, cerebral palsy, epilepsy, neurological impairment, familial dysautonomia, Prader-Willi syndrome, or autism;
- (2) is attributable to any other condition of a person found to be closely related to intellectual disability because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of intellectually disabled persons or requires treatment and services similar to those required for such person; or
- (3) is attributable to dyslexia resulting from a disability described in subparagraph one or two of this paragraph; . . .

Mental Hygiene Law § 1.03 (22).

OPWDD's proposed regulation would allow OPWDD to rely on "guidelines" that it has developed to determine someone's eligibility for its services. This is a major source of concern for DRNY as it allows OPWDD to limit eligibility. In relying on these guidelines, OPWDD exceeds its authority by re-defining "developmental disability" beyond what the New York State Legislature has stipulated.

Q. *What kind of impact can OPWDD's "guidelines" have in determining eligibility?*

OPWDD's regulation and "guidelines" make obtaining eligibility more difficult for certain individuals.

1) Impact on eligibility for persons who are dually diagnosed:

In 2001, OPWDD issued a guideline entitled: Advisory Guideline Determining Eligibility for Services: Substantial Handicap and Developmental Disability that has made it more difficult for someone to obtain eligibility who has both a developmental disability and mental illness. OPWDD's 2001 Guideline states that for these individuals, eligibility rests on a determination of "whether a pre-existing developmental condition may have been a risk factor for both onset of the psychiatric disability and increased severity of limitation in adaptive behavior." at 20. For example, this Guideline would make it more challenging for someone to obtain eligibility who has a mild intellectual disability and a diagnosis of schizophrenia. This is because this individual would have the burden of showing that functional weaknesses are related to the developmental disability and not schizophrenia.

2) Impact on eligibility for persons applying for services who are over the age of 22:

In addition, OPWDD's 2001 Guideline makes it difficult for older people with developmental disabilities to be eligible for services. While there has always been a requirement to demonstrate that the developmental disability was present before the age of 22, the Guideline further requires that verification of "significant limitations in adaptive behavior prior to age 22."¹

For example, this rule would make it challenging for someone to apply for eligibility if they are over the age of 22, and could not provide OPWDD with an adaptive behavioral assessment conducted during childhood. Disability Right New York has routinely found that individuals aged 40 or older who apply for services for the first time are unable to produce such an assessment. For older individuals with disabilities, school and medical records have been destroyed or are unavailable, or because it was not a standard practice to conduct adaptive behavior assessments during childhood.

¹

3) Impact on eligibility for persons who have a developmental disability not specifically listed in the statute:

In 2002, OPWDD issued another eligibility Guideline entitled: Clarification of Provision of the August 2001 Eligibility Advisory. The emergency regulation allows OPWDD will rely on this Guideline when determining eligibility. Under current law, individuals with other conditions similar to intellectual and developmental disabilities can be eligible if they have substantial functional or intellectual impairments. However, the Guideline limits these “other conditions” to central nervous system disorders.

For example, application of the Guideline would exclude a child with a fetal alcohol spectrum disorder even if the child has substantial adaptive deficits similar to someone with an intellectual disability.

Q. Does the Proposed Regulation Include Any Other Changes?

The regulation formalizes eligibility processes.

- Children can be provided provisional eligibility for OPWDD services up until age 8 who show substantial delays or specific congenital or acquired conditions that result in a high probability of a developmental disability if services from OPWDD are not obtained.
- OPWDD may review or re-review an individual’s eligibility at any time.
- Applicants who are determined ineligible for services may reapply for OPWDD services if they obtain new or different information regarding their eligibility.
- A determination that someone is eligible for services from OPWDD does not mean the person is automatically eligible for all OPWDD services; some services have additional eligibility criteria.
- Eligibility is initiated by applying to the Developmental Disabilities Regional Office (DDRO). The applicant must provide:
 - The name of the applicant and the applicant’s representative;
 - Documentation of the applicant’s developmental disability including assessments and standardized measures of adaptive functioning; and
 - Documentation of the presence of a developmental disability prior to age 22.

Q. If I agree or disagree with the proposed regulation what can I do?

You can comment on the regulation by simply writing a short email or letter by August 27, 2018. Send to:

Office for People with Developmental Disabilities.
Office of Counsel, Bureau of Policy and Regulatory Affairs
44 Holland Avenue
Albany, New York 12229
Fax: (518) 474-7382
E-mail: RAU.unit@opwdd.ny.gov

Q. *If I do make a comment, will it make a difference?*

By law, OPWDD must seek and consider public comment. In the past, OPWDD has made changes to final regulations based on public comments. Your voice matters.

Q. *Are there other people I should let know about this proposed change?*

Anyone who is concerned about services for people with developmental disabilities should be aware of this regulation and how the changes could impact someone's eligibility for its services.

SAMPLE FORMAT FOR PUBLIC COMMENT

Dear OPWDD,

I am writing regarding OPWDD's Emergency/Proposed Regulation on Eligibility for Services. I am *[choose one of the following: a person with a disability, a family member of a person with a disability, a service provider, an advocate]*.

I *[agree/disagree]* with the proposed regulation because *[add reason(s); consider sharing how the proposal would impact you or your family member or client or constituent]*.

Thank you for your consideration.

Sincerely,

[Your Name]