

## Office of Mental Health

### EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### COVID-19 Masking Program

**I.D. No.** OMH-40-21-00007-EP

**Filing No.** 1005

**Filing Date:** 2021-09-16

**Effective Date:** 2021-09-16

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

**Proposed Action:** Addition of Part 556 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.07, 7.09 and 31.04

**Finding of necessity for emergency rule:** Preservation of public health and general welfare.

**Specific reasons underlying the finding of necessity:** The immediate adoption of this amendment is necessary for the preservation of health, safety, and welfare.

The 2019 Coronavirus (COVID-19) is a disease that causes mild to severe respiratory symptoms, including fever, cough, and difficulty breathing. People infected with COVID-19 have had symptoms ranging from those that are mild (like a common cold) to severe pneumonia that requires medical care in a general hospital and can be fatal. According to Johns Hopkins' Coronavirus Resource Center, as of July 14, 2021, there have been over 188 million cases and over 4 million deaths worldwide, with a disproportionate risk of severe illness for older adults and/or those who have serious underlying medical health conditions. Given the disproportionate adverse health impacts of COVID-19 for older adults and those with comorbidities, many of whom reside in New York's facilities, it is imperative that these facilities facilitate the appropriate masking of their staff. Based on the foregoing, the Office has made the determination that this emergency regulation is necessary to best protect the residents of New York's facilities

For all of the reasons outlined above, this rule is being adopted on an Emergency basis until such time as it has been formally adopted through the SAPA rule promulgation process.

**Subject:** COVID-19 Masking Program.

**Purpose:** To implement a COVID-19 mask program.

**Text of emergency/proposed rule:** A new Part 556 titled COVID-19 Mask Requirement, is added to read as follows:

#### 556.1 Background and intent.

(a) COVID-19 is an unpredictable disease that can cause serious illnesses and death. In response to this increased public health threat, New York must take active steps to prevent and control transmission of COVID-19. The seriousness of the continuing threat and the failure to achieve acceptable vaccination rates through voluntary programs necessitate further action.

#### 556.2 Legal Base.

(a) Section 7.07 of the Mental Hygiene Law charges the Office of Mental Health with the responsibility for seeing that persons with mental illness are provided with care and treatment, and that such care, treatment and rehabilitation is of high quality and effectiveness.

(b) Section 7.09 of the Mental Hygiene Law gives the Commissioner of the Office of Mental Health the power and responsibility to adopt regulations that are necessary and proper to implement matters under the Commissioner's jurisdiction.

(c) Section 31.04 of the Mental Hygiene Law grants the Commissioner of Mental Health the power and responsibility to adopt regulations to effectuate the provisions and purposes of Article 31 of the Mental Hygiene Law, including procedures for the issuance and amendment of operating certificates, and for setting standards of quality and adequacy of facilities.

#### 556.3 Applicability.

(a) This Part applies to:

(1) any provider of services which operates or proposes to operate a facility, or a residential program licensed, certified, designated or funded by the Office of Mental Health.

(2) hospitals, facilities, corrections-based programs, and residential programs operated by the Office of Mental Health.

#### 556.4 Definitions pertaining to this Part.

(a) Facility shall mean:

(1) a Hospital as defined hereinafter,

(2) a provider of services which operates or proposes to operate a congregate residential program licensed, certified, or funded by the Office of Mental Health, or

(3) an out-patient program licensed, certified, designated or funded by the Office of Mental Health.

(b) Hospital shall mean a hospital named in Mental Hygiene Law section 7.17(b), or operated pursuant to Parts 580, 582, or 590 of this Title, and any provider of services co-located within such hospital campus.

(c) Staff shall mean all persons employed or affiliated with a Facility, whether paid or unpaid, including but not limited to employees, corrections-based staff, members of the medical, nursing, and other treatment staff, contract staff, students, and volunteers, who engage in activities such that if they were infected with COVID-19 they could potentially expose patients to the disease.

#### 556.5 Requirements for All Facilities.

(a) Effective immediately, all Programs shall have policies and procedures in place to ensure all staff, visitors and individuals receiving services regardless of vaccination status wear appropriate masks, consistent with any infection control guidance issued by this Office.

(b) As determined by the Commissioner based on COVID-19 incidence and prevalence, as well as any other public health and/or clinical risk factors related to COVID-19 disease spread, all Hospital and Facility staff, contractors, vendors, visitors, patients, residents, clients, and all other individuals who enter the indoor premises of such Hospital or Facility, must wear masks at all times regardless of vaccination status, except when alone in an office or room, or actively eating or drinking.

(c) For purposes of this section face-coverings shall include, but are not limited to, cloth masks, surgical masks, and N-95 respirators that are worn to completely cover a person's nose and mouth.

(d) Face coverings are not required to be worn by:

(1) Children under two years of age,

(2) A person with a disability who cannot wear a mask, or cannot safely wear a mask, for reasons related to the disability, or

(3) A person for whom wearing a mask would create a risk to workplace health, safety, or job duty as determined by an Occupational Health and Safety Administration workplace risk assessment.

#### 556.6 Enforcement.

(a) The Office will enforce the provisions of this Part pursuant to its oversight authority in Mental Hygiene Law Articles 7 and 31.

**This notice is intended:** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire December 14, 2021.

**Text of rule and any required statements and analyses may be obtained from:** Sara Paupini, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: sara.paupini@omh.ny.gov

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 60 days after publication of this notice.

#### Regulatory Impact Statement

1. Statutory Authority:

(a) Section 7.07 of the Mental Hygiene Law (MHL) charges the Office of Mental Health (OMH) with the responsibility for seeing that persons with mental illness are provided with care and treatment, and that such care, treatment and rehabilitation is of high quality and effectiveness.

(b) Section 7.09 of the Mental Hygiene Law gives the Commissioner of the Office of Mental Health the power and responsibility to adopt regulations that are necessary and proper to implement matters under their jurisdiction.

(c) Section 31.04 of the Mental Hygiene Law grants the Commissioner of Mental Health the power and responsibility to adopt regulations to effectuate the provisions and purposes of article 31 of such law, including procedures for the issuance and amendment of operating certificates, and for setting standards of quality and adequacy of facilities.

2. Legislative Objectives:

To implement a COVID-19 mask program through MHL §§ 7.07, 7.09 and 31.04 which provide the Commissioner of Mental Health with the authority to protect the health and life of the people of the State of New York including by controlling the spread of communicable diseases. COVID-19 is an unpredictable disease that can cause serious illnesses and death. In response to this increased public health threat, New York must take active steps to prevent and control transmission of COVID-19. The seriousness of the continuing threat and the failure to achieve acceptable vaccination rates through voluntary programs necessitate further action. Collectively, the legislative purpose of these statutes is to protect the residents of New York's mental health facilities by providing safe, effective, and adequate care.

3. Needs and Benefits:

These regulations are necessary to prevent the spread of COVID-19 in facilities licensed, certified, funded and operated by the Office of Mental Health and to help ensure the health and life of residents of these facilities. This requirement will help reduce the spread of COVID-19 and ensure residents are less likely to suffer a COVID-related death or severe illness.

COVID-19 is a disease that causes mild to severe respiratory symptoms, including fever, cough, and difficulty breathing. People infected with COVID-19 have had symptoms ranging from those that are mild (like a common cold) to severe pneumonia that requires medical care in a general hospital and can be fatal. Given the disproportionate adverse health impacts of COVID-19 for adults and those with comorbidities, many of whom receive treatment in New York's facilities, it is imperative that all steps are taken, including wearing masks, to prevent the spread of the disease.

Based on the foregoing, the Office has made the determination that this emergency regulation is necessary to best protect the residents of the Office of Mental Health's licensed and operated facilities.

4. Costs:

(a) Costs to Regulated Parties:

The purpose of this regulation is to require licensed and operated OMH facilities to promptly coordinate the COVID-19 masking of their residents and personnel. Costs are expected to be minimal.

(b) Costs to Local and State Governments:

This regulation will not have a significant impact on local or State governments unless they operate an OMH licensed facility or hospital in which case costs will be the same as costs for private entities. There may be limited additional agency costs for administrative oversight.

5. Local Government Mandates:

Hospitals and residences operated by local governments will be affected and will be subject to the same requirements as any other hospital licensed under Article 31.

6. Paperwork:

This regulation imposes no additional paperwork.

7. Duplication:

These regulatory amendments do not duplicate existing State or Federal requirements.

8. Alternatives:

The Office believes that the promulgation of this regulation is the most effective means to ensure that OMH licensed, certified, funded and operated facilities and hospitals adequately ensure appropriate masking is occurring to prevent the spread of COVID-19. Accordingly, the alternative of not issuing these regulations was rejected, as the potential for serious illness and possible death of both staff and residents as a result of a COVID-19 outbreak outweighed the risk of rejecting such a mandate.

9. Federal Standards:

The regulatory amendments do not exceed any minimum standards of the Federal Government for the same or similar subject areas.

10. Compliance Schedule:

This rulemaking will be effective upon filing a Notice of Emergency Adoption and Notice of Proposed Rulemaking in the State Register.

**Regulatory Flexibility Analysis**

Effect of Rule:

There are approximately 35 county operated mental health clinics. Including all OMH funded ambulatory and residential providers, there are over 100 such providers. This regulation will not impact local governments or small businesses unless they operate a facility licensed by this Office.

Compliance Requirements:

This regulation primarily requires facilities and hospitals to promptly coordinate the masking of all individuals and personnel entering such facilities or hospitals.

Professional Services:

No professional services are required by this regulation.

Compliance Costs:

This regulation requires OMH licensed and operated facilities and hospitals to promptly coordinate the masking of their residents and personnel. Costs are expected to be minimal given the current prevalence of masking.

Economic and Technological Feasibility:

There are no economic or technological impediments to the rule changes.

Minimizing Adverse Impact:

This regulation is consistent with the existing responsibilities facilities and hospitals have to maintain the health and safety of residents, ensure sufficient staffing levels, and ensure staff are free from communicable diseases. Therefore, any adverse impacts are expected to be minimal and are outweighed by the regulation's health and safety benefits to residents and staff.

Small Business and Local Government Participation:

Given the seriousness of COVID-19 if contracted, particularly by older

adults or persons with comorbidities, small business and local governments were not directly consulted. However, the Office will notify such entities of the existence of these regulations and the opportunity to submit comments or questions to the Department.

**Rural Area Flexibility Analysis**

Types and Estimated Numbers of Rural Areas:

Although this rule applies uniformly throughout the state, including rural areas, for the purposes of this Rural Area Flexibility Analysis (RAFA), "rural area" means areas of the state defined by Exec. Law § 481(7) (SAPA § 102(10)). Per Exec. Law § 481(7), rural areas are defined as "counties within the state having less than two hundred thousand population, and the municipalities, individuals, institutions, communities, and programs and such other entities or resources found therein.

Reporting, recordkeeping, and other compliance requirements; and professional services:

This regulation imposes no additional paperwork. Although the regulation may require recordkeeping by facilities, including documentation in personnel files, these records must already be maintained by facilities. Additionally, no additional professional services are required by this regulation.

Compliance Costs:

Costs are expected to be minimal given the prevalence of masking in health facilities.

Economic and Technological Feasibility:

There are no economic or technological impediments to the rule changes.

Minimizing Adverse Impact:

This regulation is consistent with the existing responsibilities facilities have to maintain the health and safety of residents, ensure sufficient staffing levels, and ensure staff are free from communicable diseases. Therefore, any adverse impacts are expected to be minimal and are outweighed by the regulation's health and safety benefits to residents and staff.

Rural Area Participation:

Given the seriousness of the COVID-19 virus particularly in congregate care settings and the need for services to be provided in person where appropriate, facilities located in rural areas were not directly consulted. However, the Office will notify covered entities located in rural areas of the existence of these regulations and the opportunity to submit comments or questions to the Office.

**Job Impact Statement**

A Job Impact Statement for this regulation is not being submitted because it is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and/or employment opportunities.

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## Office for People with Developmental Disabilities

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### EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

**Mandatory Face Coverings in OPWDD Certified Services**

**I.D. No.** PDD-40-21-00002-EP

**Filing No.** 1000

**Filing Date:** 2021-09-16

**Effective Date:** 2021-09-16

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

**Proposed Action:** Addition of section 633.26 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.07, 13.09(b) and 16.00

**Finding of necessity for emergency rule:** Preservation of public health, public safety and general welfare.

**Specific reasons underlying the finding of necessity:** The emergency adoption of a new section, 14 NYCRR 633.26, that requires face coverings for all staff, volunteers, contractors, vendors, visitors and individuals receiving services when in facilities or providing services that are certified or operated by OPWDD, is necessary to protect the health, safety, and