

HEALTH AND SENIOR SERVICES

SENIOR SERVICES AND HEALTH SYSTEMS BRANCH

HEALTH FACILITIES EVALUATION AND LICENSING DIVISION

OFFICE OF CERTIFICATE OF NEED AND HEALTHCARE FACILITY

LICENSURE

Certificate of Need: Policy Manual for Long Term Care Services

Proposed Readoption: N.J.A.C. 8:33H

Authorized By: _____

Heather Howard, Commissioner, Department of Health and Senior
Services (with the approval of the Health Care Administration
Board).

Authority: N.J.S.A. 26:2H-1 et seq.

Calendar Reference: See Summary below for explanation of exception to
calendar requirement.

Proposal Number: PRN 2009-

Submit written comments by _____, 2009 to:

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The agency proposal follows:

The official version of any departmental rulemaking activity (notices of proposal or adoption) are published in the *New Jersey Register* or *New Jersey Administrative Code*. Should there be any discrepancies between this document and the official version of the proposal or adoption, the official version will govern.

Summary

N.J.A.C. 8:33H, Certificate of Need: Policy Manual for Long Term Care Facilities and Services, establishes Certificate of Need and related planning requirements for long-term care services.

There have been dramatic changes in the health care delivery system in recent years, especially in relation to long-term care services. These changes indicate the need for a comprehensive analysis of the current and projected long-term care environment to accurately and appropriately structure regulations to address these changes.

The Department proposes to readopt N.J.A.C. 8:33H without change to provide the Department time to complete a comprehensive analysis of the full range of long-term care services. In the interim, the existing rules proposed for readoption, and the existing Certificate of Need: Application and Review process rules at N.J.A.C. 8:33, would continue to establish standards for the review of certificate of need applications for general, pediatric and specialized long-term care beds, should the Commissioner issue a call for such beds. The rules proposed for readoption in concert with N.J.A.C. 8:33 would continue to establish standards for review of certificate of need applications for general, pediatric and specialized long-term care beds permitted under the expedited review process.

Pursuant to N.J.S.A. 52:14B-5.1 and Executive Order No. 66 (1978), N.J.A.C. 8:33H was scheduled to expire on August 25, 2009. In accordance with N.J.S.A. 52:14B-5.1c, the filing of this notice of proposal with the Office of Administrative Law prior to August 25, 2009, operates to extend the expiration date of N.J.A.C. 8:33H to February 21, 2010.

The Department has reviewed N.J.A.C. 8:33H and has determined that the existing rules continue to be necessary, adequate, reasonable, efficient, understandable, and responsive to the purposes for which they were originally promulgated. Therefore, the Department has determined to readopt the chapter. The rules proposed for readoption would continue to provide the regulatory framework to fulfill the Department's obligation to assure access to long-term care services of the highest quality, while taking into consideration the significant changes in the economics of the health care system since the inception of the certificate of need program.

During the past three decades, the chapter has provided standards and criteria to assess the Statewide need for the full spectrum of long-term care services (that is, assisted living residences and programs, comprehensive personal care homes, statewide restricted admissions facilities, pediatric long-term care, general and specialized long-term care). The Department has emphasized the development of less restrictive forms of long-term care in recent years, such as assisted living residences and programs, and comprehensive personal care homes. As

part of this effort, in 2004, the Department repealed N.J.A.C. 8:33H-1.3, 1.4, and 1.12, which addressed the need methodologies for general long-term care units and residential health care facilities because these types of facilities were no longer subject to certificate of need review. 36 N.J.R. 1641(a) (April 5, 2004), 36 N.J.R. 4306(a) (September 20, 2004). The Department intends to convene stakeholders to develop a new need methodology that reflects the potential need for general long-term care services in the context of a health care environment that now has well-established long-term care alternatives.

Following is a summary of the regulatory history of the chapter:

N.J.A.C. 8:33H, Certificate of Need: Reviews of Long Term Care Facilities and Services, first became effective September 18, 1980, upon its adoption by the Department, with the approval of the Health Care Administration Board (HCAB). 12 N.J.R. 393(a) (July 10, 1980) and 579(b) (September 18, 1980). Pursuant to Executive Order No. 66 (1978), the Department, with the approval of the HCAB, readopted N.J.A.C. 8:33H effective July 19, 1985. 17 N.J.R. 1216(a) (May 20, 1985) and 2034(a) (July 19, 1985).

Pursuant to Executive Order No. 66 (1978), the Department, with the approval of the HCAB, readopted Chapter 33H effective May 16, 1990. 22 N.J.R. 897(a) (March 19, 1990) and 1938(a) (May 16, 1990). The Department, with the approval of the HCAB, repealed Chapter 8:33H,

Certificate of Need: Reviews of Long Term Care Facilities and Services, and adopted Chapter 33H: Certificate of Need: Policy Manual for Long Term Care Services, as new rules effective September 8, 1992. 24 N.J.R. 2014(a) (June 1, 1992) and 3144(a) (September 8, 1992). Pursuant to Executive Order No. 66 (1978), Chapter 33H expired on September 8, 1997. The Department, with the approval of the HCAB, adopted Chapter 33H: Certificate of Need: Policy Manual for Long Term Care Services, as new rules effective March 16, 1998. 29 N.J.R. 3794(a) (September 2, 1997) and 30 N.J.R. 1085(a) (March 16, 1998).

Pursuant to Executive Order No. 66 (1978), the Department, with the approval of the HCAB, readopted Chapter 33H Certificate of Need: Policy Manual for Long Term Care Services, effective March 1, 2001. 32 N.J.R. 4071(a) (November 20, 2000) and 33 N.J.R. 1101(a) (April 2, 2001). The Department, with the approval of the HCAB, readopted Chapter 33H Certificate of Need: Policy Manual for Long Term Care Services, effective August 25, 2004. 36 N.J.R. 1641(a) (April 5, 2004) and 4306(a) (September 20, 2004).

Due to the ongoing growth of assisted living facilities, changes to the Medicare and Medicaid reimbursement system, and the recent implementation of the global options for long-term care program, the Department does not anticipate that it will be necessary to issue a call for certificate of need applications for general long-term care beds in the near

future. The global options for long-term care program became effective on January 1, 2009 when the Department received approval from the U.S. Centers for Medicare and Medicaid to consolidate Medicaid-supported home and community-based services to improve access to a wider range of in-home long-term supportive services for a greater number of seniors. The global options for long-term care program is an initiative that was introduced in 2004 and 2005 through Gubernatorial Executive Orders and enacted in 2006 through the Independence, Dignity, and Choice in Long-Term Care Act (P.L. 2006, c. 23). This consolidation of Medicaid services affords greater flexibility for caretakers to meet an individual's care plan needs and preferences, often allowing the individual to remain at home. Furthermore, nursing facility occupancy has remained relatively stable in recent years, with Medicaid occupancy at 65 percent and total occupancy at 90 percent for 2007, the latest year for which data is available. The Department will continue to monitor the use of long-term care services to determine whether it would be necessary to issue calls for certificate of need applications for new or expanded long-term care services. The Department proposes to readopt N.J.A.C. 8:33H without change because the rules proposed for readoption would continue to establish standards applicable to the full range of long-term care services including standards to obtain access to these services.

The rules proposed for re-adoption would continue to include a purpose and scope section (N.J.A.C. 8:33H-1.1) that would articulate the Department's commitment to planning for long-term care services and to the ongoing promotion of the goals of quality, access, affordability, and community participation in long-term care services planning (N.J.A.C. 8:33H-1.1(a) and(b)); the facility types the chapter addresses (N.J.A.C. 8:33H-1.1(c)); the importance of home health and comprehensive rehabilitation services in the continuum of care with additional language noting that these require separate certificate of need review subject to a call (N.J.A.C. 8:33H-1.1(d) and (e)); the applicability of the chapter to all covered facilities regardless of type of ownership (N.J.A.C. 8:33H-1.1(f)); and the requirement that approved certificate of need applicants are to use approved beds for residents who require the services of that category of care and the prohibition of advertising indicating other than approved levels of service (N.J.A.C. 8:33H-1.1(g)).

N.J.A.C. 8:33H-1.2 would continue to contain definitions of terms used in the rules.

N.J.A.C. 8:33H-1.3 and 1.4 are reserved.

N.J.A.C. 8:33H-1.5 would continue to contain the methodology for projecting pediatric long-term care bed need. The methodology is based on age-specific use rates and population growth and, thus, can reasonably be used to project need until stakeholders and the Department complete a

study of long-term care need assessment . In addition, the periodic basis for the surveying of pediatric patients who are medically ready for transfer to a pediatric long-term care facility is five years, reflecting the fact that historic demand for these services is relatively stable and pediatric long-term care beds and services have been available at existing providers in the past.

N.J.A.C. 8:33H-1.6 addresses specialized long-term care, would continue to establish standards for ventilator care for adults and care of patients with severe behavior management problems (N.J.A.C. 8:33H-1.6(a)); to require specific certificate of need approval prior to establishing these types of beds (N.J.A.C. 8:33H-1.6(b)); to identify a region as a “planning region” (N.J.A.C.8:33H-1.6(c)); and to describe a need methodology for adult ventilator beds (N.J.A.C. 8:33H-1.6(d)). This latter methodology is based on existing use rates and adult population growth and therefore can reasonably be used to project need until stakeholders and the Department complete a further study.

N.J.A.C. 8:33H-1.6(e) would continue to describe criteria for approving applications for beds to serve patients with severe behavior management problems and to indicate that the Commissioner would give consideration to approve one model program for this service in each “planning region.”

N.J.A.C. 8:33H-1.6(e)1 would continue to limit the number of beds that can be approved for this service to 32 and requires applicants to demonstrate need by submitting patient-specific data (while protecting an individual's identity), showing that there is a sufficient number of individuals in the planning region who meet the unit's proposed admission criteria that would fill 85 percent of the requested beds.

N.J.A.C. 8:33H-1.6(e)2 would continue to require the facility to develop and maintain a collaborative affiliation with at least one school of nursing which grants baccalaureate and/or master's degrees in nursing, one school of social work, and one medical school.

N.J.A.C. 8:33H-1.6(e)3 would continue to require the model program to have a formal research and program evaluation component. It also would require the applicant to describe how patient care outcomes are to be evaluated by an independent party or organization and to submit evaluation reports to the Department within three years of licensure. Finally, it would continue to require an identification of funding sources for this research since Medicaid does not reimburse for such expenses.

N.J.A.C. 8:33H-1.6(e)4 would continue to require an application for this service to include admission and discharge criteria that assure that the most difficult to manage patients will receive priority admission.

N.J.A.C. 8:33H-1.6(e)5 would continue to require the application to include a plan to assure continuity of care for patients discharged from the

program. It would also require the facility in which the specialized care program is offered to at all times have beds available in other nursing units within the facility to permit the transfer of residents who no longer require specialized care. Finally, it would require the applicant to specify how other nursing homes in the region will be involved in continuity of care.

N.J.A.C. 8:33H-1.6(e)6 would continue to require the approved facility to develop and maintain an ongoing program whereby designated staff are available to offer training, seminars and technical assistance in the care of residents with severe behavior problems to other facilities in the planning area.

N.J.A.C. 8:33H-1.6(e)7 would continue to require the approved facility to conduct multidisciplinary team meetings in order to establish and review each resident's plan of care. This team must include staff members involved in direct resident care and the team must promote innovative approaches to caring for residents with severe behavior management problems.

N.J.A.C. 8:33H-1.6(e)8 would continue to require the facility to have a medical director with expertise in the care of those with behavior management problems.

N.J.A.C. 8:33H-1.6(f) would continue to require a facility approved to provide specialized long-term care beds to have a distinct and separate unit for such beds.

N.J.A.C. 8:33H-1.6(g) would continue to require applicants for certificates of need for specialized long-term care beds to provide: a detailed description of services and programs of care to be offered, specific admission and discharge criteria for the unit, a plan for in-service training and orientation of staff, a description of physical plant considerations and special architectural features of the specialized unit, a signed transfer agreement with at least one 200-bed hospital within 30 minutes of the specialized long-term care unit, and a specific plan for continuity of care for discharged specialized long-term care residents.

N.J.A.C. 8:33H-1.6(h) would require that specialized long-term care units treating ventilator-dependent residents maintain the 24-hour-per-day presence of at least one registered nurse on the unit and the 24-hour-per-day on-call availability of at least one respiratory therapist.

N.J.A.C. 8:33H-1.6(i) would continue to state that the minimum desired occupancy rate for specialized long-term care units is 85 percent.

N.J.A.C. 8:33H-1.6(j) would continue to indicate that in cases of competing applications for certificates of need for specialized long-term care beds, the Department would use the prioritization criteria at N.J.A.C. 8:33H-1.19(e) in determining which applications to approve or deny.

N.J.A.C. 8:33H-1.7 would continue to contain criteria regarding assisted living residences and assisted living programs.

N.J.A.C. 8:33H-1.7(a) would continue to indicate that assisted living residences fall under expedited certificate of need review and, upon approval, must comply with applicable licensing standards in N.J.A.C. 8:36.

N.J.A.C. 8:33H-1.7(b) would continue to indicate that an assisted living program is also subject to expedited certificate of need review; that each office site of a program may provide services in an area that covers no more than two contiguous counties; that an applicant may establish and license sufficient sites to provide services in multiple counties, up to and including a Statewide service area; and that an approved program must comply with applicable licensing standards at N.J.A.C. 8:36.

N.J.A.C. 8:33H-1.7(c) would continue to require applicants for assisted living residences or programs to undergo a track record review in accordance with N.J.A.C. 8:33H-1.14.

N.J.A.C. 8:33H-1.7(d) would continue to require that applications submitted subsequent to the general availability of Medicaid reimbursement for assisted living residences beyond the limited number of slots authorized under the Department's Medicaid waiver are to include a statement of commitment to provide access and continuity of care for Medicaid-eligible residents, including former psychiatric patients, who need nursing home level care.

N.J.A.C. 8:33H-1.7(e) would continue to require an assisted living residence licensed on or after August 31, 2001 (the effective date of the amendment of N.J.S.A. 26:2H-12.16 by P.L. 2001, c. 234) to reserve 10 percent of its total bed complement for Medicaid-eligible persons.

N.J.A.C. 8:33H-1.7(e)1, in conformance with N.J.S.A. 26:2H-12.16, would continue to indicate that the 10 percent requirement may be met by either or both of the following types of residents: residents who originally enter a facility paying from private funds who subsequently become Medicaid-eligible (commonly referred to as the process of "Medicaid conversion"), and/or residents who enter a facility already Medicaid-eligible. N.J.A.C. 8:33H-1.7(e)2 would continue to require that a facility achieve this 10 percent level of use by Medicaid-eligible persons within three years of licensure and that it maintain this level thereafter.

Also in conformance with the amendment of N.J.S.A. 26:2H-12.16, N.J.A.C. 8:33H-1.7(f) would continue to require existing assisted living facilities adding beds to maintain 10 percent of the additional licensed beds for use by Medicaid-eligible persons. A facility would continue to be able to achieve this percentage of use by counting residents who undergo Medicaid conversion and/or residents who are Medicaid-eligible upon admission.

N.J.A.C. 8:33H-1.7 (f)1 would continue to require at least one of the additional beds to be reserved for a Medicaid-eligible person whenever the total number of additional beds is less than 10.

N.J.A.C. 8:33H-1.7(f)2 would continue to require a facility to achieve this 10 percent Medicaid level of use within three years of licensure of additional beds, and that it maintain this level thereafter.

N.J.A.C. 8:33H-1.7(f)3 would continue to define “Medicaid-eligible person” as one admitted to a facility paying from private funds who subsequently becomes eligible for Medicaid, and persons who were Medicaid-eligible upon admission to a facility.

N.J.A.C. 8:33H-1.7(f)4 would continue to authorize the Department to waive or reduce the Medicaid usage percentage if it were to determine that there were no need to continue to maintain it, and would continue to require the Department to waive the requirement if there were a limitation on funding to pay for services.

Paragraph (f)5 would continue to make required Medicaid use levels inapplicable to beds operated by continuing care retirement communities.

N.J.A.C. 8:33H-1.8 is reserved.

N.J.A.C. 8:33H-1.9 would continue to address size and occupancy of nursing homes and nursing units.

N.J.A.C. 8:33H-1.9(a) would continue to establish the target annual occupancy rate for nursing homes at 90 percent.

N.J.A.C. 8:33H-1.9(a)1 would continue to prohibit the Department from approving applications for certificates of need for the addition of long-term care beds with an annual occupancy rate of less than 90 percent.

N.J.A.C. 8:33H-1.9(b) would continue to require the design and sizing of nursing homes to promote a homelike environment, efficient facility operation, and a high quality of life and care.

N.J.A.C. 8:33H-1.9(c) would continue to require applications for long-term care beds to state the number of beds proposed for each nursing unit and to limit the size of each nursing unit to a maximum of 64 beds.

N.J.A.C. 8:33H-1.9(d) would continue to require each applicant to demonstrate that each proposed nursing unit with long-term care beds, regardless of size, would be staffed with at least one licensed nurse (a registered nurse or a licensed practical nurse) for each shift and at least two nursing personnel assigned to each nursing unit for each shift. It also would continue to require facilities to meet staffing requirements at N.J.A.C. 8:39 and to demonstrate that facility operation thus staffed would be financially feasible. N.J.A.C. 8:33H-1.9(d)1 would require, as a condition of certificate of need approval, applicants to agree to comply with the staffing standards in subsection (d) even if this would result in an

exceedance of the minimum staffing standards at N.J.A.C. 8:39, Standards for Licensure of Long Term Care Facilities.

N.J.A.C. 8:33H-1.9(e) would continue to establish the maximum size of facilities receiving certificate of need approval for general and specialized long-term care beds to be 240 beds. N.J.A.C. 8:33H-1.9(e)1 would continue to permit the Department to waive the 240-bed maximum if an existing facility already licensed for more than 240 beds were to propose to reduce its licensed beds by at least 15 percent, provided other applicable requirements of this chapter were to be met. N.J.A.C. 8:33H-1.9(e)2 would continue to permit an exception to the 240-bed maximum for a Statewide restricted-admission facility if the facility would otherwise meet the requirements for such facilities at N.J.A.C. 8:33H-1.11 and all other applicable provisions of N.J.A.C. 8:33H.

N.J.A.C. 8:33H-1.9(f) would continue to authorize the Department to issue a certificate of need for additional long-term care beds to a facility already licensed for 240 or more long-term care beds provided the applicant were to design the project to result in two or more separately licensed and staffed facilities, each in compliance with the 240-bed maximum size.

N.J.A.C. 8:33H-1.9(g) would continue to limit specialized long-term care bed units to a maximum size of 32.

N.J.A.C. 8:33H-1.10 would continue to establish standards for comprehensive personal care homes.

N.J.A.C. 8:33H-1.10(a) would continue to authorize Residential Health Care Facilities and Class C Boarding Homes to apply for certificates of need to convert to comprehensive personal care homes, thereby providing the opportunity to age in place to residents of these facility types.

N.J.A.C. 8:33H-1.10(b) would continue to provide that the Department would review applications to convert to comprehensive personal care homes under the expedited review process.

N.J.A.C. 8:33H-1.10(c) would continue to articulate the eligibility criteria for construction of new comprehensive personal care homes.

N.J.A.C. 8:33H-1.10(c)1 would authorize existing comprehensive personal care homes and existing facilities proposing to convert to comprehensive personal care homes to add a maximum of 20 new beds within any five-year period. N.J.A.C. 8:33H-1.10(c)2 would authorize hospice programs certified by Medicare for at least 12 consecutive months to add up to 20 new beds provided all would be occupied exclusively by residents eligible for hospice services.

N.J.A.C. 8:33H-1.10(d) would continue to establish that applicants for certificates of need for comprehensive personal care home beds would be subject to track record review pursuant to N.J.A.C. 8:33H-1.14.

N.J.A.C. 8:33H-1.10(e) would continue to require applications submitted subsequent to the general availability of Medicaid reimbursement for comprehensive personal care homes beyond the limited number of slots authorized under the Department's Medicaid waiver to include a statement of commitment to provide access and continuity of care for Medicaid-eligible residents, including former psychiatric patients, who need nursing home level care.

N.J.A.C. 8:33H-1.10(f) would continue to require residential health care facilities and Class C boarding homes converting to comprehensive personal care homes to maintain existing residents who are Supplemental Security Income (SSI) -eligible recipients and former psychiatric patients; to require, on an ongoing, annual basis, at least five percent of the facility's residents to be SSI-eligible recipients, and at least half of these residents to be former psychiatric patients, calculated based on the number of resident days per calendar year, and to be reported for the previous calendar year to the Department by April 15 of each year. Paragraph (f)1 would continue to require, if a facility's SSI-eligible residents were to develop a need for nursing home level of care, the facility to maintain these residents in accordance with N.J.A.C. 8:36, subject to discharge criteria at N.J.A.C. 8:36-4.1(d), provided that Medicaid reimbursement were to remain available. If Medicaid reimbursement were to be unavailable, the facility would continue to be

obliged to make all necessary arrangements to transfer the person to a nursing home. Paragraph (f)2 would continue to establish that if the SSI payment rate for Comprehensive Personal Care Homes is set at a level below the SSI payment rate for Residential Health Care Facilities, the five-percent occupancy requirement for SSI-eligible residents in subsection (f) would not apply, but Comprehensive Personal Care Homes would continue to be obliged to maintain existing SSI-eligible residents.

N.J.A.C. 8:33H-1.10(g) would continue to require a comprehensive personal care home licensed on or after August 31, 2001 (the effective date of the amendment to N.J.S.A. 26:2H-12.16) to reserve 10 percent of its total bed complement for Medicaid-eligible persons. N.J.A.C. 8:33H-1.10(g)1, in conformance with that statute, would continue to indicate that a facility could meet the 10 percent requirement by counting residents who underwent the process of Medicaid conversion, and/or persons who were Medicaid-eligible upon admission to a facility. N.J.A.C. 8:33H-1.10(g)2 would require facilities to achieve this percentage within three years of licensure and to maintain this level thereafter.

Also in conformance with N.J.S.A. 26:2H-12.16, N.J.A.C. 8:33H-1.10(h) would continue to require existing comprehensive personal care homes adding beds to maintain 10 percent of the additional licensed beds for use by Medicaid-eligible persons, and to authorize these facilities to meet this level of use by counting residents undergoing the Medicaid

conversion process and/or residents who were Medicaid-eligible upon admission.

N.J.A.C. 8:33H-1.10(h)1 would continue to require at least one of the additional beds to be reserved for a Medicaid-eligible person whenever the total number of additional beds is fewer than 10.

N.J.A.C. 8:33H-1.10(h)2 would continue to require facilities to achieve the percentage of Medicaid-eligible use within three years of licensure of the additional beds and to maintain it thereafter.

N.J.A.C. 8:33H-1.10(h)3 would continue to provide a definition of a Medicaid-eligible person.

N.J.A.C. 8:33H-1.10(h)4 would continue to authorize the Department to waive the minimum Medicaid-eligible level of use if it determines that there is no need to require it, and to require the Department to waive the minimum Medicaid-eligible level of use if there were to be a limitation on funding to pay for services.

N.J.A.C. 8:33H-1.10(h)5 would continue make the minimum Medicaid-eligible level of use inapplicable to beds operated by continuing care retirement communities.

N.J.A.C. 8:33H-1.11 would continue to establish standards for Statewide restricted-admission facilities.

N.J.A.C. 8:33H-1.11(a) would continue to require an applicant proposing a new or expanded nursing home the meets the definition of a

restricted-admission facility at N.J.A.C. 8:33H-1.2 to state this fact in the application and to provide the documentation required in N.J.A.C. 8:33H-1.11(a)1 and 2. N.J.A.C. 8:33H-1.11(a)1 would continue to require a facility's bylaws to state explicitly that only members of the specified religious or fraternal organization and their immediate family members are to be admitted to 100 percent of the long-term care beds; and N.J.A.C. 8:33H-1.11(a)2 would continue to require at least 50 percent of the facility's residents to come from outside the planning region in which the facility is located.

N.J.A.C. 8:33H-1.11(b) would continue to permit applicants for certificates of need for restricted-admission facilities to apply subject to expedited review.

N.J.A.C. 8:33H-1.11(c) would continue to require applications to contain a detailed resident origin breakdown of the facility's then-current population, identifying the county (or state, for out-of-State residents) of prior residence for each resident, and of anyone on the facility's waiting list.

N.J.A.C. 8:33H-1.11(d) would continue to require facilities to agree to meet applicable utilization criteria for Medicaid, SSI, and discharged psychiatric patients, as N.J.A.C. 8:33H-1.15 requires. It also would continue to require facilities that do not participate in the Medicaid

Program to document how they subsidize the care of residents who are Medicaid-eligible.

N.J.A.C. 8:33H-1.12, is reserved.

N.J.A.C. 8:33H-1.13 establishes standards for conversion or elimination of licensed or certificate of need-approved beds or services.

N.J.A.C. 8:33H-1.13(a) would continue to require applicants proposing to convert licensed beds to submit schematic plans with a floor layout of the facility to illustrate how the proposed conversion would be accomplished, would continue to recommend that applicants consult with the Health Care Plan Review Program at the Department of Community Affairs to confirm that the proposed conversion would meet applicable building codes, and to would continue provide that a proposed conversion to a use subject to the review schedule at N.J.A.C. 8:33-4.1(a) would need to meet applicable requirements of N.J.A.C. 8:33-4.1.

N.J.A.C. 8:33H-1.13(b) would continue to require applicants for the conversion of residential health care beds to long-term care beds to commit in writing to allowing existing residents of residential health care facility beds subject to the proposed conversion to continue to occupy their assigned beds unless and until these residents were to request a permanent relocation placement. The subsection also would continue to require the proposed conversion to adhere to applicable requirements of N.J.A.C. 8:33-4.1(a). Paragraph (b)1 would continue to authorize

applicants to mix residential health care and long-term care beds within one or more units as part of the applicant's implementation of a certificate of need to convert or eliminate beds as necessary to avoid relocating or discharging residents who do not want to relocate.

N.J.A.C. 8:33H-1.13(c) would continue to require applicants for a certification of need to eliminate licensed residential health care beds and/or to convert licensed residential health care beds to long-term care beds to provide compelling evidence that the public would obtain a greater benefit from the proposed elimination and/or conversion of beds than it would if the Department were to deny the application, if either the issuance of the certificate of need would require the facility to discharge or permanently relocate residents upon receiving certificate of need approval, or the applicant has discharged or relocated more than 25 percent of the residents of the beds that are the subject of the application during the 12 months preceding the applicant's submission of the application. Examples of materials that would support the Department's finding of a public benefit would continue to include, but not be limited to, letters from residents of the beds that are the subject of the application, their family members, their significant others, and/or their health care providers supporting the proposed conversion and resulting discharge or relocation of residents, (paragraph (c)1); evidence that residents' quality of life and/or care would deteriorate if these residents were to remain in the

facility and/or would improve if these residents were to relocate to another facility (paragraph (c)2); evidence that the quality of life and/or care of those residents who would remain as residents of the facility would deteriorate if the Department were to deny the certificate of need and/or would substantially improve if the Department were to issue the certificate of need (paragraph (c)3); and evidence that the relocation would provide residents' families convenient access for visitation purposes (paragraph (c)4).

N.J.S.A. 8:33H-1.13(d) would continue to provide an exception to the documentation requirement at N.J.A.C. 8:33H-1.13(c) if an application for a certificate of need were for the permanent closure of the facility.

N.J.A.C. 8:33H-1.13(e) would continue to provide that applications for a certificate of need for the conversion of residential health care beds to long-term care beds are subject to N.J.A.C. 8:33-4.1(a). Paragraph (e)1 would continue to require, if the issuance of a certificate of need for conversion would require the relocation of residents, applicants to submit a transfer agreement with at least one other residential health care facility in the area that has admission policies, offers amenities, and charges fees similar to those of the residential health care facility that is the subject of the application and that is willing and has bed capacity to accommodate those residents potentially subject to the relocation, including Supplemental Security Income recipients and discharged psychiatric

patients. Paragraph (e)2 would continue to require, if the issuance of the certificate of need would result in there being residents at the facility who were to require or desire relocation, the applicant to agree to provide all necessary social service assistance to implement the relocation in a way that maximizes consumer choice of placement alternatives, and to bear the cost of relocation. Paragraph (e)3 would continue to require the applicant to comply with applicable requirements of the chapter.

N.J.A.C. 8:33H-1.13(f) would continue to require the Department to consider applications for the issuance of certificates of need for the conversion of specialized long-term care beds to general use or to another category of specialized care if certain conditions the applicant were to provide evidence of the following: that the applicant has made good faith efforts to implement the existing specialized unit for a period of 18 months prior to the conversion application, such as records of efforts to establish appropriate referral sources and transfer agreements; records of efforts to negotiate reimbursement rates with third-party payers, including Medicaid; records identifying residents referred for admission over the 12-month period prior to application submission, and whether the person was admitted to the special care unit, and if not, why not and the name of the facility where the person was ultimately placed; and records of efforts to recruit and train staff for the unit.

N.J.A.C. 8:33H-1.13(f)2 would continue to provide that a certificate of need authorizing the conversion of specialized long-term care beds to general long-term care beds or to another type of specialized care is subject to N.J.A.C. 8:33-4.1(a).

N.J.A.C. 8:33H-1.13(g) would continue to identify the following factors the Department would take into consideration in reviewing an application for the issuance of a certificate of need for the conversion of acute care hospital beds to general or specialized long-term care beds: that the planning region, and not just the county in which the facility that is the subject of the application is located, has a documented bed need; that the proposed conversion of beds would be permanent; that the converted facility would maintain a home-like environment and/or have admission policies that would limit the admission of persons whose stays would be likely to be fewer than 100 days; that the capital cost of converting the acute care beds would be less than new nursing home construction; and that the application would comply with other applicable requirements of the chapter and N.J.A.C. 8:33-4.1(a).

N.J.A.C. 8:33H-1.14 establishes quality of care and licensure track record requirements and would continue require the Department to evaluate the licensure track record of an applicant in accordance with N.J.A.C. 8:33.

N.J.A.C. 8:33H-1.15 establishes utilization requirements for Medicaid-eligible persons, Supplemental Security Income (SSI) recipients, and former psychiatric patients. N.J.A.C. 8:33H-1.15(a) would continue to provide the following utilization requirements for certificate of need applicants proposing new or additional long-term care beds: that within one year of licensure, directly admitted Medicaid-eligible residents would occupy at least 36 percent of the total general long-term care bed complement and specialized long-term care beds, and that the facility maintain at least this percentage of usage annually thereafter; that Medicaid-eligible residents who have either spent down to the level of Medicaid eligibility during their nursing home stay or whom the facility would directly admit as Medicaid-eligible would occupy at least 45 percent of the total general long-term care bed complement and of specialized long-term care beds and that the facility achieve at least this percentage of usage by the end of the first year of licensure and maintain it continually thereafter; that seven percent of the total number of long-term care beds would be available for occupancy by present or former patients of State or county psychiatric hospitals or community hospital psychiatric units who need nursing home care; that beds occupied by former psychiatric patients could count toward the seven percent Medicaid-eligible resident utilization if the former psychiatric patients were Medicaid-eligible; and that, to comply with the seven percent requirement, upon issuance of a

certificate of need for a new or converted long-term care bed, the applicant would enter into and thereafter maintain a written transfer agreement with the Division of Mental Health Services of the Department of Human Services, at least one county psychiatric hospital, or a facility with a community inpatient psychiatric unit.

N.J.A.C. 8:33H-1.15(b) would continue to require an applicant to whom the Department issues a certificate of need for a change in scope to meet the higher of either the Medicaid utilization established in the original certificate of need or at N.J.A.C. 8:33H.

N.J.A.C. 8:33H-1.15(c) would continue to establish a procedure by which an applicant for a certificate of need could request the Department to conduct a feasibility review of the utilization requirements applicable to the facility that is the subject of the application based on the financial hardship associated with compliance therewith, and to request a modification thereof in accordance with the result of the financial feasibility review.

N.J.A.C. 8:33H-1.16 would continue to address cost-efficiency and financial flexibility.

N.J.A.C. 8:33H-1.16(a) would continue to require applicants to demonstrate the financial feasibility of their projects, based upon the projection of reasonable private pay and Medicaid charges, expenses of

operation and staffing patterns in relation to other facilities in the planning region.

N.J.A.C. 8:33H-1.16(b) would continue to require the Department to take into consideration total project cost, construction cost per square foot and cost per bed be taken in reviewing applications.

N.J.A.C. 8:33H-1.16(c) would continue to require applicants, upon the Department's request, to provide an explanation if the Department were to find that projected construction and operating costs of a project to be considerably higher or lower than the average for the planning region, indicating the factors that are causing variation.

N.J.A.C. 8:33H-1.16(d) would continue to require applicants to describe their previous track record of implementing other long-term care projects and to indicate whether the applicant had requested that the Department authorize a change in cost, and would provide that, other factors being equal, the Department would accord preference to applicants with a history of realistic cost projections.

N.J.A.C. 8:33H-1.16(e) would continue to require applicants to provide evidence in their financial projections that income generated from operations would be sufficient to provide care to the greater of the percentage of Medicaid-eligible or indigent residents that either the application or N.J.A.C. 8:33H-1.15 specifies.

N.J.A.C. 8:33H-1.16(f) would continue to require applicants to verify at least 10 percent of the total project cost in the form of equity.

N.J.A.C. 8:33H-1.16(g) would continue to require applicants to try to obtain the lowest-cost financing available. N.J.A.C. 8:33H-1.16(h) would continue to require applicants proposing to add long-term care beds to an existing or replacement facility to provide evidence that the addition of beds would improve the efficient operation of the facility, and would reduce unit costs of care per resident.

N.J.A.C. 8:33H-1.17 would establish environmental and physical plant considerations. N.J.A.C. 8:33H-1.17(a) would continue to require the design and construction of facilities in a manner that eliminates architectural barriers to care. N.J.A.C. 8:33H-1.17(b) would continue to require applicants to consult with the Department of Community Affairs' Health Care Plan Review Program regarding the design and construction of their projects, and to would establish the following additional requirements: that specialized care units for ventilator care have piped-in oxygen, suction equipment, emergency electrical outlets and additional square footage for ventilator equipment and supplies; that pediatric nursing units have a play or recreation room and suitable space for educational use; that specialized care units for those with severe behavior management problems provide easy access to a protected outdoor area.

N.J.A.C. 8:33H-1.18 addresses location of facilities. N.J.A.C. 8:33H-1.18(a) would continue to require applicants to describe the site of a project, its existing zoning status, and the proposed timetable for securing required zoning and land use approvals, and would continue to prohibit the Department from approving the construction of new or replacement facilities on sites currently zoned for heavy industrial use. N.J.A.C. 8:33H-1.18(a)1 would continue to recommend that applicants not enter into costly land use or zoning approval procedures prior to receiving certificate of need approval.

N.J.A.C. 8:33H-1.18(b) would continue to require applicants to identify the proposed facility's access to public transportation and would require, where possible, facilities to be located where they would have access to low-cost public transportation. N.J.A.C. 8:33H-1.18(c) would continue to require applicants for new facilities to describe the availability of utilities to the proposed site and, if utilities were not already available, to provide a timetable and describe costs for obtaining utilities. N.J.A.C. 8:33H-1.18(d) would continue to require applicants to identify the proximity of proposed facilities to potential sources of adverse environmental conditions and to locate facilities in a way that prevents exposure of residents to adverse environmental conditions.

N.J.A.C. 8:33H-1.19 addresses prioritization criteria and recommended features for the approval of nursing home projects.

N.J.A.C. 8:33H-1.19(a) would continue to require the Department to prioritize competing applications to meet a limited bed need in accordance with that section. N.J.A.C. 8:33H-1.19(b) would continue to identify the following applicable prioritization criteria, proof requirements, and respective point values: the applicant's commitment to occupy 55 percent or more of the facility's total long-term care bed complement with Medicaid-eligible residents within one year of licensure, including at least 45 percent occupancy of the total bed complement by directly admitted Medicaid-eligible residents and at least 10 percent occupancy by residents who undergo Medicaid conversion; an applicant's commitment to admit and maintain Medicaid-eligible residents requiring "heavy care" or with acuties to at least 20 percent of the proposed new beds, in accordance with the definitions and proof requirements contained in that paragraph; that the applicant maintains a track record of consistently high quality of care as demonstrated by a satisfactory record of compliance with licensure standards during the three-year period prior to the applicant's submission of the application; that an applicant has operated at least one facility licensed for both long-term care and residential health care beds and maintained at least an 85 percent occupancy in the residential health care beds during the most recent calendar year; that the proposed facility would maintain a separate and distinct unit for young adult residents; that within one year of licensing, the proposed facility would be staffed with

one or more full-time equivalent physicians or clinical nurse specialists who held master's degrees in geriatric nursing or a related clinical field from a program accredited by the National League for Nursing; that the proposed facility would provide tuition reimbursement and/or a career ladder program for staff; that the proposed project would result in the elimination of life safety code waivers at an existing facility; that the proposed project would convert excess hospital beds to long-term care beds; that the applicant had a track record of timely implementation of long-term care construction projects; that the applicant had no more than one other Certificate of Need approved but unlicensed long-term care facility in New Jersey upon the Department's acceptance for processing of the new application; that the applicant had a track record of high-quality resident care in the applicant's other New Jersey facilities; and that the facility would promote a high quality of life for residents upon consideration of factors described in that paragraph.

N.J.A.C. 8:33H-1.19(c) would continue to specify that if the Department were to prioritize an application and issue a certificate of need based on the prioritization criteria at N.J.A.C. 8:33H-1.19(b), the Department would identify these criteria in the certificate of need as conditions of approval and that failure to comply could result in actions against the facility license.

N.J.A.C. 8:33H-1.19(d) would continue to require applicants who commit to achieving prioritization criteria to factor the costs of archiving these criteria into the financial flexibility analysis of the application.

N.J.A.C. 8:33H-1.19(e) would continue to specify the following criteria that the Department would consider in prioritizing applications for specialized long-term care beds: that a facility would be centrally located and convenient to public and private transportation by residents from all parts of the planning region; that a facility could readily accommodate additional specialized care beds were there to be a future need; that the facility would commit to having Medicaid-eligible residents occupy at least 55 percent or more of the specialized care bed complement within one year of licensure, including at least 45 percent occupancy by directly admitted Medicaid-eligible residents and at least 10 percent occupancy by residents who undergo a Medicaid conversion process.

N.J.A.C. 8:33H-1.20 addresses the relationship between licensure and certificate of need requirements and would continue to state that applicants to whom the Department issues certificates of need for long-term care, assisted living residence, and/or comprehensive personal care home beds, or for assisted living programs, are to comply with applicable licensing requirements for these types of beds and services.

As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirement, pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The rules proposed for readoption have maintained and would continue to maintain the expedited review status of assisted living residences (ALRs), assisted living programs (ALPs) and comprehensive personal care homes (CPCH), thereby continuing the Department's effort to facilitate the development of a more diverse array of high-quality long-term care options, greater consumer choice and an improved quality of life for those who need long-term care.

As assisted living facilities and services have come into common use, they have proven to be desirable and effective alternatives to traditional long-term care services. The rules proposed for readoption would continue to require full certificate of need review of the more traditional long-term care option of nursing homes. As the Department and the regulated community continue to assess the impact of ALRs, ALPs, and CPCHs, it is likely that nursing home bed needs would require adjustment, and the Department will move to address this issue. In the interim, failure to maintain the rules proposed for readoption would have a pronounced negative effect on those individuals with developing long-term care needs.

The rules proposed for readoption would continue to require full review of specialized and pediatric long-term care services. While alternative care options identified above are unlikely to have the same

effect on the demand for these services as they would on nursing homes, however, the Department will continue to monitor and, as appropriate, re-evaluate the need methodologies for these services. The readoption of the rules proposed for readoption during the development of appropriate need methodologies is necessary to assure continuing access to high-quality care to patients in need of these specialized services.

The rules proposed for readoption would continue to provide a continuum of long-term care options to consumers while assuring the quality and availability of more traditional services until more appropriate and up-to-date options become available.

Economic Impact

The rules proposed for readoption have had, and would continue to have, no economic impact on consumers, providers or the Department, for the various types of assisted living and specialized long-term care facilities. The success of the assisted living option makes the need for a call for applications for certificates of need for general long-term care beds unlikely prior to the Department's reevaluation of the long-term care methodology. However, were a need for additional general long-term care beds to arise prior to the completion of the Department's reevaluation, the Department could issue a call and review applications reviewed pursuant to the need criteria at N.J.S.A. 26:2H-8, and pursuant to the criteria and

requirements of the rules proposed for readoption. The statutory need criteria are less complex than those in the rules proposed for readoption. Therefore, applicants for such a call would have a lesser burden in developing applications.

The costs of compliance with the rules proposed for readoption if the Department were to call for applications for certificates of need would include the application fee, which is \$7,500 plus 0.25 percent of the total project cost. Applicants could incur costs for professionals such as architects, planners, and attorneys associated with the development and processing of applications for certificates of need. These costs typically represent a relatively small fraction of typical project costs. Potential long-term care providers would incur these costs only if the Department were to issue a call for conventional or specialized long-term care beds and services.

One could view the potential costs to industry providers as negligible in contrast to the system cost savings and benefits that would accrue from the emphasis, in the rules proposed for readoption, on the creation of lower-cost alternatives to conventional nursing homes (that is, assisted living facilities, comprehensive personal care homes) that provide consumers with more affordable options. The rules proposed for readoption have assured and would continue to assure quality of care by imposing limits on eligibility for certificates of need to potential providers

that demonstrate a record of strict compliance with stringent New Jersey and applicable out-of state licensure standards.

Failure to readopt the rules proposed for readoption could result in a proliferation of nursing facilities, resulting in unnecessarily increased costs to Medicaid, the primary payer of these services.

Federal Standards Statement

The rules proposed for readoption would meet but would not exceed standards applicable to health care providers at 42 U.S.C. §§1395 et seq. There are no Federal standards applicable to alternative services or for expansion of capacity in nursing facilities.

Except as described above, the rules proposed for readoption are not subject to any Federal requirements or standards or to a State statute that incorporates or refers to Federal law, standards, or requirements. Therefore, a Federal standards analysis is not required.

Jobs Impact

The rules proposed for readoption have had no impact on the generation or loss of jobs in New Jersey. The Department does not anticipate that the rules proposed for readoption would have an impact on the generation or loss of jobs in New Jersey.

Agriculture Industry Impact

The rules proposed for readoption have had no impact, and would have no impact, on the agriculture industry in New Jersey.

Regulatory Flexibility Analysis

The rules proposed for readoption govern the certificate of need process for long-term care facilities including nursing homes, pediatric and specialized long-term care services, continuing care retirement communities, Statewide restricted admission facilities, assisted living residences and programs and comprehensive personal care homes, and would impose requirements on applicants for and holders of certificates of need for these kinds of long-term care facilities.

While many holders of and applicants for certificates of need represent facilities that employ over 100 persons full-time and, therefore, are not “small businesses” within the meaning of the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., many represent facilities that have fewer than 100 employees and, therefore, are “small businesses” within the meaning of the Regulatory Flexibility Act.

The compliance requirements and the costs of compliance that the rules proposed for readoption would impose on entities subject to the chapter that are small businesses are the same as the requirements and costs that the rules would impose on entities subject to the chapter

generally. The Summary, above, describes these requirements, and the Economic Impact, above, describes these costs.

The rules proposed for readoption establish the certificate of need application process and planning procedures and, accordingly, contain planning formulae. They are necessary to assure appropriate patient and/or resident placement while maintaining maximum utilization to realize the full extent of attendant economies of scale. Accordingly, the rules proposed for readoption would establish no distinction or accommodation based on business size, other than the provisions for waiver or modification based on financial feasibility and other factors that are available to all entities subject to the chapter. The Summary, above, describes these waiver and modification provisions.

Applicants for and holders of certificates of need would incur administrative and professional services costs, which the Economic Impact, above, describes.

Due to the changing availability of existing long-term care alternatives and the ongoing development of new alternatives, the Department anticipates that some businesses that employ fewer than 100 individuals full-time would eventually hire more employees and thus would no longer be “small businesses” within the meaning of the Regulatory Flexibility Act.

Smart Growth Impact

The rules proposed for readoption have had, and would have, no impact on the achievement of smart growth or the implementation of the State Development and Redevelopment Plan.

Housing Affordability Impact

The rules proposed for readoption have had, and would continue to have, an insignificant impact on affordable housing in New Jersey and there is an extreme unlikelihood that the rules proposed for readoption would evoke a change in the average costs associated with housing because the rules proposed for readoption establish standards for the issuance and maintenance of certificates of need for long-term care health facilities and services.

Smart Growth Development Impact

The rules proposed for readoption have had and would continue to have an insignificant impact on smart growth and there is an extreme unlikelihood that the rules proposed for readoption would evoke a change in housing production in Planning areas 1 or 2 or within designated centers under the State Development and Redevelopment Plan in New Jersey because the rules proposed for readoption establish standards for

the issuance and maintenance of certificates of need for long-term care health facilities and services.

Full text of the proposed readoption may be found in the New Jersey Administrative Code at N.J.A.C. 8:33H.

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