



**TO:** The Honorable the Members of the Board of Regents

**FROM:** Douglas E. Lentivech

**SUBJECT:** Proposed Addition of Section 64.9 to the Regulations of the Commissioner of Education Relating to Regulation of Advanced Home Health Aides

**DATE:** July 3, 2018

**AUTHORIZATION(S):**

### SUMMARY

#### **Issue for Decision (Consent Agenda)**

Should the Board of Regents adopt, as a second emergency action, the proposed addition of §64.9 to the Regulations of the Commissioner of Education relating to the regulation of advanced home health aides?

#### **Reason for Consideration**

Required by statute (Chapter 471 of the Laws of 2016).

#### **Proposed Handling**

The proposed amendment will be presented to the Full Board for adoption as an emergency rule at the July 2018 meeting of the Board of Regents. A copy of the proposed rule and a statement of facts and circumstances justifying the emergency action are attached.

#### **Procedural History**

The proposed amendment was presented to the Professional Practice Committee and to the Full Board for adoption as an emergency action at the June 2018 meeting of the Board of Regents, effective June 12, 2018. A Notice of Emergency Action and Proposed Rulemaking was published in the State Register on June 27, 2018. Because the June emergency rule will expire on September 9, 2018, a second

emergency action is necessary to ensure that the emergency rule remains continuously in effect until it can be adopted at the September 17-18, 2018 Regents meeting and take effect as a permanent rule. A Notice of Emergency Adoption will be published in the State Register on August 1, 2018. Supporting materials for the proposed rule are available upon request from the Secretary of the Board of Regents.

### **Background Information**

Chapter 471 of the Laws of 2016 (Chapter 471) amended the Education Law and the Public Health Law, effective May 28, 2018, to authorize registered professional nurses (RNs) to assign advanced home health aides (AHHAs) to provide nursing care (known as “advanced tasks”) to certain hospice and home care patients. Chapter 471 also established training requirements for AHHAs and requires them to perform advanced tasks under the direct supervision of an RN. In addition, Chapter 471 requires the AHHA and RN to work for the same hospice, home care services agency, or enhanced assisted living residence licensed by the New York State Department of Health (DOH).

Additionally, Chapter 471 requires the Commissioner of Education to develop regulations, in consultation with the Commissioner of DOH, to implement its amendments to the Education Law provisions. Chapter 471 requires DOH to maintain a "registry" of AHHAs and adopt regulations relating to the limitations of AHHAs' authorization to perform certain advanced tasks. Chapter 471 further requires DOH to perform criminal history background checks of certain hospice employees who provide home care. Chapter 471 also requires DOH to notify the Department if an RN engages in "improper behavior" while supervising AHHAs.

Chapter 471 was enacted to expand access to home care to enable more people to live in home and community-based settings in order to assist in ensuring that care is provided to New Yorkers in the most integrated settings possible, as required by law (see, Olmstead v. L.C., 527 U.S. 581 [1999]; Executive Order No. 84 [available at <https://www.governor.ny.gov/news/no-84-establishing-olmstead-plan-development-and-implementation-cabinet>]).

The Department has worked collaboratively with DOH to implement Chapter 471 by, among other things, developing the proposed amendment, in consultation with DOH, as well as the requirements to become an AHHA and the standards for AHHA training programs. In addition, the Department and DOH have agreed on a written AHHA competency examination, the Medication Aide Certification Examination, which was created by the National Council for the State Boards for Nursing.

The proposed addition of §64.9 to the Regulations of the Commissioner of Education establishes the requirements for becoming an AHHA, the assignment of advanced task to AHHAs, the direct supervision of AHHAs by RNs, the performance of advanced tasks by AHHAs, AHHA training and competency, and AHHA training programs.

Subdivision (a) of the proposed addition of §64.9 of the Regulations of the Commissioner of Education defines, among other things, such terms as “advanced

home health aide”, “advanced task”, “direct supervision”, “client”, and “home health services entity”.

Subdivision (b) of the proposed addition of §64.9 of the Regulations of the Commissioner of Education establishes the criteria that RNs must comply with when assigning an AHHA to perform one or more advanced tasks for a health care or hospice patient.

Subdivision (c) of the proposed addition of §64.9 of the Regulations of the Commissioner of Education establishes the criteria that RNs must comply with when supervising AHHAs who perform advanced tasks.

Subdivision (d) of the proposed addition of §64.9 of the Regulations of the Commissioner of Education establishes the criteria that AHHAs must comply with when performing advanced tasks for a home care or hospice patient.

Subdivision (e) of the proposed addition of §64.9 of the Regulations of the Commissioner of Education establishes the criteria that a home health aide must meet to qualify for certification as an AHHA.

Subdivision (f) of the proposed addition of §64.9 of the Regulations of the Commissioner of Education establishes criteria for AHHA Training Programs.

A draft copy of the proposed amendment has been shared with stakeholders, including, but limited to DOH, the New York State Association of Health Care Providers, the New York State Chapter of the American Nurses Association, the New York Organization of Nurse Executives and Leaders, the New York State Nurses Association, the New York State Home Care Association, and 1199 SIEU (United Healthcare Workers East).

### **Related Regents Items**

[June 2018](http://www.regents.nysed.gov/common/regents/files/618ppca2.pdf): Proposed Addition of §64.9 to the Regulations of the Commissioner of Education Relating to Regulation of Advanced Home Health Aides: (<http://www.regents.nysed.gov/common/regents/files/618ppca2.pdf>)

### **Recommendation**

It is recommended that the Board of Regents take the following action:

VOTED: That §64.9 of the Regulations of the Commissioner of Education be added, as submitted, effective September 10, 2018, as an emergency action upon a finding by the Board of Regents that such action is necessary for the preservation of the public health and general welfare in order to timely implement the requirements of Chapter 471 of the Laws of 2016, which established the requirements for becoming an advanced home health aide, the assignment of advanced tasks to advanced home health aides, the direct supervision of advanced home health aides by registered professional nurses, the performance of advanced tasks by advanced home health

aides, advanced home health aide training and competency, and advanced home health aide training programs.

### **Timetable for Implementation**

If adopted at the July 2018 Regents meeting, the emergency rule will take effect on September 10, 2018.

It is anticipated that the proposed rule will be presented to the Board of Regents for permanent adoption at the September 17-18, 2018 Regents meeting, after publication of the proposed amendment in the State Register and expiration of the 60-day public comment period required under the State Administrative Procedure Act.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 207, 212, 6504, 6507, 6906, 6908 and 6909 of the Education Law and Chapter 471 of the Laws 2016

1. Section 64.9 of the Regulations of the Commissioner of Education is added, as follows:

§64.9 Advanced Home Health Aides

(a) Definitions. As used in this section:

(1) Health services entity means a home care services agency licensed or certified pursuant to article thirty-six of the public health law, a hospice program certified pursuant to article forty of the public health law or an enhanced assisted living residence licensed pursuant to article seven of the social services law and certified pursuant to article forty-six B of the public health law.

(2) RN means a registered professional nurse who is licensed and registered to practice nursing pursuant to article one hundred thirty-nine of the education law and is employed by a health services entity to provide nursing services, including the direct supervision of advanced home health aides or AHHAs, for clients of the health services entity.

(3) Home care services worker registry means the New York State home care services worker registry that is maintained by the department of health pursuant to subdivision (9) of section thirty-six hundred thirteen of the public health law.

(4) Advanced home health aide or AHHA means a certified home health aide who has met all requirements to perform advanced tasks as set forth in subdivision (2) of section sixty-nine hundred eight of the education law and this section and is currently listed in the home care services worker registry, as defined in paragraph (3) of this

subdivision, as having satisfied all applicable requirements for performing advanced tasks as an advanced home health aide.

(5) Routine medications means medications that are: (i) prefilled or otherwise packaged in a manner that promotes relative ease of administration; (ii) routinely administered to a client with stable health; and, (iii) administered by the following routes only: (a) oral; (b) sublingual; (c) buccal; (d) ophthalmic; (e) otic; (f) nasal; (g) rectal; (h) vaginal; (i) topical; or, (j) inhaled through the nose or mouth. Stable health means that a client's physiologic status is not in flux and changes in health status that require emergency or immediate medical intervention are not expected or foreseeable.

(6) Advanced tasks mean health care tasks delineated in subdivision (2) of section sixty-nine hundred eight of the education law and this section. Provided that if a health services entity has established a systematic approach to address drug diversion, advanced tasks shall include the following medication administration tasks: (i) the administration of routine medications as defined in paragraph (5) of this subdivision; (ii) a subcutaneous or intramuscular injection of low molecular weight heparin or medication prescribed to treat diabetes; and, (iii) the use of a prefilled auto-injector of naloxone or epinephrine in an emergency. Advanced tasks shall not include: (i) converting or calculating the dose of any medication or determining a client's need for medications; (ii) medication administration through enteral feeding tubes, including, but not limited to, gastrostomy or nasogastric tubes; (iii) medication administration parenterally, except for certain routine medications and injections as expressly provided for in this paragraph; (iv) tasks involving the use of intravenous or subcutaneous infusion devices on a client; (v) tasks involving the use of a mechanical ventilator on a client; (vi) tasks involving sterile or aseptic technique, except for the administration of injections as expressly provided for in this paragraph; (vii) tasks involving professional

nursing judgment, observation, monitoring or assessment of a client; and, (viii) tasks that are outside the scope of practice of a licensed practical nurse.

(7) Direct supervision means the provision by an RN of training, guidance, direction and oversight relating to the performance of advanced tasks by an AHHA, including periodic assessment of the AHHA's performance of advanced tasks. Such direct supervision shall be determined by the RN responsible for supervising such advanced tasks, based upon the complexity of such advanced tasks, the skill and experience of the AHHA assigned to perform the advanced tasks, and the health status of the client for whom the advanced tasks are being performed, provided that, at a minimum: (i) the RN, while on duty, shall be continuously available to speak with the AHHA by telephone and by other means as appropriate and shall personally visit a client or arrange for another qualified licensed health professional, such as another RN, to visit the client whenever necessary to protect the health and safety of the client; (ii) the RN performs an initial and thereafter regular and ongoing assessment of the client's needs; (iii) the supervising RN or another supervising RN shall visit the client no less than once every two weeks for the purpose of supervising the services provided by the AHHA by, among other things, personally observing, evaluating, and overseeing the provision of such services.

(8) Client means a patient, resident or other individual who receives nursing and possibly other health services from a health services entity in accordance with articles thirty-six, forty or forty-six-B of the public health law.

(9) Established systematic approach to address drug diversion means that a health services entity has written policies and procedures in place to prevent drug diversion and address suspected incidents of drug diversion, which are periodically reviewed as part of the entity's quality assurance program.

(10) Case mix complexity and geographic considerations means the clinical complexity of the clients who are being served and the geographic distance(s) RNs travel to supervise the AHHAs providing services that should be considered when assigning AHHAs to care for clients and for RN supervision.

(b) Assignment of Advanced Tasks.

An RN, while employed by a health services entity, may assign an AHHA to perform one or more advanced tasks for a client of the health services entity in accordance with subdivision eight of section sixty-nine hundred nine of the education law and this section.

(1) Prior to assigning an AHHA to perform an advanced task for a client, the RN shall: (i) complete a nursing assessment to ascertain the client's current health status and care needs; (ii) provide case specific training to the AHHA and verify that the AHHA can safely and competently perform the advanced task for the client; and (ii) provide to the AHHA written, client specific instructions for performing the advanced task and criteria for identifying, reporting and responding to problems, errors or complications. In addition to the foregoing, prior to assigning an AHHA to administer medications to a client, the RN shall evaluate the client's current medication use and prescribed drug regimen to identify and resolve any discrepancies.

(2) The RN shall not assign an advanced task to an AHHA unless: (i) the client's health status is stable; (ii) the advanced task to be assigned is consistent with a physician's, nurse practitioner's or prescriber's ordered or prescribed care; (iii) the client (or when the client lacks capacity to consent, a person authorized by law to consent for the client) has consented to the assignment of advanced tasks to the AHHA; (iv) the health services entity has written policies and procedures in effect covering the assignment and performance of advanced tasks in accordance with applicable law; (v)

the AHHA has demonstrated to the satisfaction of the supervising RN that he or she can competently perform the advanced task to be assigned; (vi) the AHHA has agreed to perform the advanced task, including, but not limited to, documenting the performance of the task; and, (vii) the AHHA is able to communicate effectively with the client and understands the client's needs.

(3) Multiple authorized RNs employed by a health services entity may jointly agree to assign one or more advanced tasks to an AHHA, provided that only one RN shall be required to determine if the AHHA has demonstrated competency in each advanced task(s) to be performed in accordance with subsection (b) of this section. An AHHA is not authorized to modify an assignment or assign or reassign advanced task(s) to any other individual.

(4) Only a supervising RN shall be authorized to revoke or modify an assigned advanced task(s) to be performed by an AHHA.

(5) The RN shall document the assignment advanced task(s) to each AHHA and any modification or termination of an assignment in the client's individualized service or care plan or health record.

(c) Direct Supervision of AHHAs.

An RN, while employed by a health services entity, may provide direct supervision of an AHHA who performs assigned advanced tasks for a client of the health services entity. The RN who provides such direct supervision shall, at a minimum: (1) be aware of the client's current health status, health care needs and the client's individualized plan of care; (2) be authorized to assign, revoke or modify assigned advanced tasks to an AHHA in accordance with this section; and, (3) consider client care needs, case mix complexity and geographic considerations to ensure that

the number of clients serviced by the RN is reasonable and prudent. An RN may provide direct supervision to more than one AHHA at a time.

(d) Performance of Advanced Tasks.

(1) An AHHA, while employed by a health services entity, may perform one or more advanced tasks for a client of the health services entity under the direct supervision of an RN, provided that: (1) an RN assigned the performance of the advanced task(s) in writing to the AHHA in accordance with subsection (b) of this section; and, (2) the AHHA shall comply with written instructions from an assigning or supervising RN pertaining to the performance of the advanced task(s) assigned to him or her.

(2) An AHHA shall not perform an advanced task if the client refuses the care from the AHHA, or when the client lacks capacity to consent, a person authorized by law to consent for the client, refuses the care.

(3) If an AHHA determines that he or she is unable to perform an advanced task, the AHHA shall promptly notify the supervising RN.

(4) An AHHA shall document the performance or nonperformance of each assigned advanced task in the client's individualized service or care plan or health record.

(5) An AHHA shall not or hold him or herself out or accept employment as a person licensed to practice nursing pursuant to article thirty-nine of the education law.

(e) AHHA Training and Competency Requirements.

To qualify for certification as an AHHA, an individual shall: (1) be currently listed in the home care worker registry as having satisfied all applicable requirements for certification as a home health aide; (2) have at least one year of experience providing either home health or personal care services, or a combination of the same, as a

certified home health aide or while working for a home health services entity; (3) successfully complete an approved advanced home health aide training program; (4) pass one or more department approved competency examinations; and, (5) meet other requirements as determined by the department of health.

(f) Advanced Home Health Aide Training Programs.

(1) No advanced home health aide training program shall be offered unless approved by the department pursuant to this paragraph or by the department of health. To be considered for approval, the program sponsor shall be currently authorized by the department or the department of health to offer a certified home health aide training program. The department may approve a program sponsor to offer an advanced home health aide training program for terms of up to three years, to be co-terminus with the approval of the program sponsor's certified home health aide training program. Program sponsors seeking initial approval or to renew approval to offer an advanced home health aide training program shall submit a completed application and information as required by the department, as well as any applicable fee.

(2) Before being offered admission into an advanced home health aide training program, the program sponsor shall, at a minimum, verify that each candidate: (i) has earned a high school diploma or a high school equivalency diploma; (ii) is currently listed in the home care worker registry as having satisfied all applicable requirements for certification as a home health aide; and, (iii) has completed at least one year of experience providing home health or personal care services, or a combination of the same, as a certified home health aide or while working for a health services entity.

(3) The advanced home health aide training program curriculum shall include at least eighty hours of didactic classroom and skills laboratory training and at least forty-five hours of supervised practical training, which shall not be offered until at least three

hours of didactic classroom training have been provided. The advanced home health aide training program curriculum shall address at least the following topics: (i) the assignment of advanced tasks; (ii) working with supervising RNs; (iii) infection control, injections and injection safety; (iv) documentation relating to advanced tasks; (v) medication administration; (vi) client communication; and, (vii) preparation for taking a department approved competency examination. Supervised practical training shall be provided in a home care setting in which the student performs advanced tasks for a client while under the personal supervision of a registered professional nurse with a minimum of two years of nursing experience, at least one year of which must be in home health care.

(4) As a requirement for successful completion an advanced home health aide training program, the program sponsor shall ensure that each student has successfully completed a competency evaluation, as determined by a registered professional nurse, after he or she has personally observed the student perform the tasks described in subparagraphs (i) through (vi) of paragraph (3) of this subdivision. The other topics may be evaluated through written examination, oral examination, or observation of an AHHA performing tasks. The program sponsor shall notify the home care services worker registry when a student has successfully completed the program sponsor's advanced home health aide training program.

(5) The program sponsor shall, upon notification by the department of health that a student has completed all requirements for certification as an AHHA, including passing a competency test required by the department, issue a certificate to the student.

(6) The program sponsor shall maintain, for at least six years, records relating to the operation of the advanced home health aide training program, including but not

limited to, approved curricula and curricular changes, faculty, and records that demonstrate that each student has met all criteria for enrolling in the advanced home health aide training program and whether the student has completed the program. The program sponsor shall make such records available to the department upon request.

**8 NYCRR §64.9**

STATEMENT OF FACTS AND CIRCUMSTANCES  
WHICH NECESSITATE EMERGENCY ACTION

The proposed amendment is necessary to implement Chapter 471 of the Laws of 2016 (Chapter 471), which amended the Education Law and the Public Health Law to authorize registered professional nurses (RNs) to assign advanced home health aides (AHHAs) to provide nursing care (known as "advanced tasks") to certain hospice and home care patients, effective May 28, 2018. Chapter 471 also established training requirements for AHHAs and requires them to perform advanced tasks under the direct supervision of an RN. In addition, it requires the AHHA and RN to work for the same hospice, home care services agency, or enhanced assisted living residence licensed by the New York State Department of Health (DOH).

Chapter 471 also establishes the requirements for becoming an AHHA, the assignment of advanced task to AHHAs, the direct supervision of AHHAs by RNs, the performance of advanced tasks by AHHAs, AHHA training and competency, and AHHA training programs.

Chapter 471 was enacted to expand access to home care to enable more people to live in home and community-based settings to assist in ensuring that care is provided to New Yorkers in the most integrated settings possible, as required by law (see, Olmstead v. L.C., 527 U.S. 581 [1999]; Executive Order No. 84).

The proposed amendment was presented to the Professional Practice Committee for recommendation and to the Full Board for adoption as an emergency action at the June 2018 meeting of the Board of Regents, effective June 12, 2018.

Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be presented for adoption, after expiration of the required 60-day public comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5), would be the September 17-18, 2018 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the September meeting, would be October 3, 2018, the date the Notice of Adoption would be published in the State Register. However, the June emergency rule will expire on September 10, 2018. If the rule were to lapse, it would impede, inter alia, the ability of RNs to assign AHHAs to provide nursing care (known as "advanced tasks") to certain hospice and home care patients.

Therefore, emergency action is necessary at the July 2018 Regents meeting for the preservation of the public health and general welfare in order enable the State Education Department to continue to implement Chapter 471, which is already in effect, to improve access to home care services for New Yorkers who need home care services in order to live in home and community-settings can receive such services in the most integrated settings, as required by law (see, *Olmstead v. L.C.*, 527 U.S. 581 [1999]; Executive Order No. 84)).

It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the September 17-18, 2018 Regents meeting, which is the first scheduled meeting after the 60-day public comment period prescribed in the State Administrative Procedure Act for State agency rule makings.