



TO: The Professional Practice Committee

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: September 13, 2018

AUTHORIZATION(S):
 

SUMMARY

Issue for Decision

Should the Board of Regents adopt 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 Professional Practice Committee for recommendation and the Full Board for adoption as a permanent rule at the September 2018 meeting of the Board of Regents. A copy of the proposed amendment is attached. Supporting materials are available upon request from the Secretary to the Board of Regents.

Procedural History

The proposed amendment was adopted 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 for a 60-day public comment period. A second emergency action was taken at the July

2018 meeting, in order to ensure that the emergency rule remained continuously in effect until it could be permanently adopted at the September 17-18, 2018 Regents meeting.

Following the 60-day public comment period required under the State Administrative Procedure Act, the Department received multiple comments from seven separate commenters. An Assessment of Public Comment is attached, however, no change in the proposed amendment is recommended at this time.

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 was 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: Proposed Addition](http://www.regents.nysed.gov/common/regents/files/618ppca2.pdf) 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>)

[July 2018: Proposed Addition](http://www.regents.nysed.gov/common/regents/files/718brca8.pdf) 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/718brca8.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 October 3, 2018.

Timetable for Implementation

If adopted at the September 17-18, 2018 Regents meeting, the proposed rule will take effect on October 3, 2018.

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.

Attachment B

8 NYCRR §64.9

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on June 27, 2018, the State Education Department received the following comments:

1. COMMENT:

Three commenters, a non-for-profit home and community-based health care organization, a membership and advocacy organization for not-for-profit and publicly-sponsored long-term care organizations located in New York State (NYS), and a national not-for-profit that works to transform eldercare and disability services by promoting quality direct care jobs as the foundation of quality care, recommended that the regulations be revised to shorten the duration of Advanced Home Health Aide (AHHA) training programs and suggested that this could reduce the cost or burden of offering AHHA training programs. Two other commenters, a senior living provider

association and an association of licensed adult care facility/assisted living residence/assisted living program providers, requested an explanation for the duration of the AHHA training programs.

DEPARTMENT RESPONSE:

Section 64.9(f)(3) of the proposed rule requires that AHHA training programs include least eighty hours of didactic classroom and skills laboratory training and at least forty-five hours of supervised practical training. The Department developed the AHHA training program curricular standards in consultation with the New York State Department of Health (DOH) and, after a thorough evaluation of education and practice standards for New York certified home health aides, as well as the skills and knowledge needed by AHHAs to competently perform advanced tasks. The Department believes that the AHHA training program curricular requirements are necessary to ensure that AHHA training program graduates have the requisite knowledge and skill to competently perform the advanced tasks under the direct supervision of a registered professional nurse (RN) in home settings. The Department intends to provide additional information regarding AHHA training program curriculum standards in future guidance documents. Thus, no changes to the proposed rule are necessary.

2. COMMENT:

Two commenters, a non-for-profit home and community-based health care organization and a membership and advocacy organization for not-for-profit and publicly-sponsored long-term care organizations located in NYS, objected to the regulatory requirement that AHHAs who perform advanced tasks and the RNs who supervise them be employed by the same organization.

DEPARTMENT RESPONSE:

Pursuant to Education Law §§6908 (2)(a) and 6909(8), AHHAs and the RNs who supervise them must work for the same home care services agency licensed or certified pursuant to Public Health Law Article 36, or hospice certified pursuant to Public Health Law Article 40, or enhanced assisted living residence licensed pursuant to Social Services Law Article 7 and certified pursuant to Public Health Law Article 46-B. The proposed rule is both consistent with the statute and necessary to conform the Commissioners' regulations to the changes to the Education Law made by Chapter 471 of the Laws of 2016 (Chapter 471) and also necessary in order to provide "direct supervision" as the proposed amendment requires. Thus, no changes to the proposed rule are necessary.

3. COMMENT:

One commenter, a senior living provider association, expressed concern about a reference to the term "medically stable."

DEPARTMENT RESPONSE:

The proposed rule does not contain the term "medically stable." Thus, no changes to the proposed rule are necessary.

4. COMMENT:

Three commenters, a non-for-profit home and community-based health care organization, an association of licensed adult care facility/assisted living residence/assisted living program providers, and a membership and advocacy organization for not-for-profit and publicly-sponsored long-term care organizations located in NYS, urged the Department to further clarify the definition of the term "stable

health” in the regulations. Another commenter, a senior living provider association, suggested that hospice patients could not be considered to have “stable health.”

DEPARTMENT RESPONSE:

Section 64.9(a)(5) of the proposed rule defines “stable health” to mean “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.” The Department believes this definition is reasonably clear and that chronically or terminally ill patients, for periods to time, meet this definition of “stable health.” However, the Department will consider providing additional information relevant to this definition when developing any future guidance documents. Thus, no changes to the proposed rule are necessary.

5. COMMENT:

Four commenters, a senior living provider association, a membership and advocacy organization for not-for-profit and publicly-sponsored long-term care organizations located in NYS, a national not-for-profit that works to transform eldercare and disability services by promoting quality direct care jobs as the foundation of quality care, and a non-for-profit home and community-based health care organization, recommended that the regulations be revised to eliminate the requirement that students admitted to AHHA training programs must have a high school diploma or high school equivalency diploma.

DEPARTMENT RESPONSE:

Section 64.9(f)(3) of the proposed rule requires students admitted to an AHHA training program to have a high school diploma or a high school equivalency diploma. The Department believes that this requirement is necessary to ensure that these students have the requisite educational preparation necessary to successfully complete the program. AHHAs must be able to read client specific written instructions for performing advanced tasks and criteria for identifying, reporting and responding to problems or complications. They must also accurately document the health care they provide. Therefore, they must be able to read and understand medical terminology relating to advanced tasks, including, but not limited to, complex medication names. In addition, AHHAs must understand math concepts, such as units of measurement, to perform certain advanced tasks. Moreover, AHHA training program graduates must have a high school diploma or a high school equivalency diploma to qualify to take the Department approved written medication administration examination.

Finally, an important goal of the enabling statute is to create a career pathway for home health aides to become AHHAs and then licensed practical nurses. Having a high school diploma or equivalent education credential is an admission requirement for all licensed practiced nurse education programs in New York State. Thus, based on the foregoing, the Department declines to revise the proposed rule at this time.

6. COMMENT:

Three commenters, an association of licensed adult care facility/assisted living residence/assisted living program providers, a membership and advocacy organization for not-for-profit and publicly-sponsored long-term care organizations located in NYS, and a national not-for-profit that works to transform eldercare and disability services by promoting quality direct care jobs as the foundation of quality care, urged the

Department to consider future expansion and clarification of advanced tasks that an AHHA would be permitted to perform pursuant to section 64.9(a)(6) of the proposed rule.

DEPARTMENT RESPONSE:

The Department believes that the scope of tasks permitted to be performed by AHHAs as set forth in section 64.9(a)(6) of the proposed rule is appropriate and is consistent with the intent of Chapter 471. However, the Department will take these commenters' requests under consideration and it may issue guidance regarding the scope of AHHA tasks if it determines that such clarification is necessary in the future. No changes to the proposed rule are necessary at this time.

7. COMMENT:

Three commenters, a membership and advocacy organization for not-for-profit and publicly-sponsored long-term care organizations located in NYS, a national not-for-profit that works to transform eldercare and disability services by promoting quality direct care jobs as the foundation of quality care, and a statewide association that represents all levels of home care services, stated that the informed consent requirements for clients who receive services provided by AHHAs in sections 64.9(d)(2) and (3) of the proposed rule are the same as informed consent requirements for clients who receive services from home health aides. The statewide association that represents all levels of home care services also questioned whether the Department intended the proposed rule's informed consent requirements for services performed by AHHAs to be different from the informed consent requirements for services performed by home health aides.

DEPARTMENT RESPONSE:

The Department does not regulate informed consent requirements for services from home health aides who are not AHHAs. The informed consent requirements for clients who receive services provided by AHHAs in sections 64.9(d)(2) and (3) of the proposed rule are consistent with the statute and necessary for implementation. Thus, no changes to the proposed rule are necessary.

8. COMMENT:

One commenter, a membership and advocacy organization for not-for-profit and publicly-sponsored long-term care organizations located in NYS, recommended changes to 10 NYCRR §§766.1(a)(10) and (11), which were adopted by DOH.

DEPARTMENT RESPONSE:

This comment is outside the scope of the Department's proposed AHHA rule. The Department does not have statutory authority to revise regulations adopted by DOH.

9. COMMENT:

One commenter, a statewide association that represents all levels of home care services, urged the Department to distinguish between regulatory standards that apply to AHHAs and standards that apply to home health aides and urged the Department to ensure that regulatory requirements for AHHAs are as consistent as possible with standards for home health aides.

DEPARTMENT RESPONSE:

The Department, in consultation with DOH, drafted the proposed rule and took into consideration DOH's regulations governing home health aides. However, the

Department is obligated to implement the Education Law, including statutory provisions that may be different from federal and New York State standards that apply to home health aides. The proposed rule is consistent with Chapter 471 and necessary for its implementation. Thus, no changes to the proposed rule are necessary.

10. COMMENT:

One commenter, a statewide association that represents all levels of home care services, asked whether the regulations, which exclude tasks involving a mechanical ventilator from the definition of advanced tasks, permit an AHHA to perform suctioning. See, 8 NYCRR §64.9(a)(6)(v).

DEPARTMENT RESPONSE:

The proposed rule does not include explicit references to suctioning. The Department notes that “suctioning” could refer to a variety of tasks (i.e., oral suctioning, tracheal suctioning) that may be performed on patients who may or may not use a mechanical ventilator. Further clarification may be issued in future guidance. No changes to the regulation are necessary.

11. COMMENT:

One commenter, a statewide association that represents all levels of home care services, urged the Department to ensure that the regulations, which require a supervising RN, while on duty, to be continuously available to communicate with an AHHA, are interpreted in a reasonable and practical manner. See, 8 NYCRR § 64.9 (a) (7).

DEPARTMENT RESPONSE:

Section 64.9 (a)(7) of the proposed rule’s requirement that a supervising RN, while on duty, to be continuously available to communicate with an AHHA is consistent

with Chapter 471. However, the Department will take this commenter's request under consideration and it may issue future guidance regarding RN supervision should it determine that such clarification is necessary in the future. No changes to the proposed rule are necessary.

12. COMMENT:

Two commenters, a statewide association that represents all levels of home care services and a national not-for-profit that works to transform eldercare and disability services by promoting quality direct care jobs as the foundation of quality care, sought clarification of section 64.9(b)(3) of the proposed rule, which allows "multiple authorized RNs to 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 to perform each advanced task to be assigned".

DEPARTMENT RESPONSE:

Section 64.9(b)(3) of the proposed rule allows "multiple authorized RNs to jointly agree to assign one or more advanced tasks" to an AHHA. In such cases, only one of the RNs is required to determine that the AHHA is competent to perform each advanced task to be assigned. The Department will consider whether further clarification regarding the assignment of advanced tasks to an AHHA is necessary when developing any future guidance documents. No changes to the proposed rule are necessary.

13. COMMENT:

Four commenters, a statewide association that represents all levels of home care services, a national not-for-profit that works to transform eldercare and disability services by promoting quality direct care jobs as the foundation of quality care, an association that represents not-for-profit and public providers of long-term and post-

acute care and senior care throughout NYS, and an association of licensed adult care facility/assisted living residence/assisted living program providers, sought clarification of sections 64.9(e)(2) and (f)(2)'s experience requirements for qualifying for AHHA certification. Two of these commenters, an association that represents not-for-profit and public providers of long-term and post-acute care and senior care throughout NYS and an association of licensed adult care facility/assisted living residence/assisted living program providers, also asked for clarification regarding the references to "home health services entity" in sections 64.9(e)(2) and (f)(2) of the proposed rule.

DEPARTMENT RESPONSE:

Under sections 64.9(e)(2) and (f)(2) of the proposed rule, to meet the experience requirements for AHHA certification, a person must 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". The proposed rule offers two ways to meet this experience requirement: (1) a person who is certified in New York or any other state as a home health aide can meet the requirement with at least one year of experience providing either home health or personal care services, or a combination of the same while working as a certified home health aide the state in which the person is certified; and, (2) a person can meet the requirement by providing at least a year of either home health or personal care services, or a combination of the same, while employed by a home care services agency licensed or certified pursuant to Public Health Law Article 36, a hospice pursuant to Public Health Law Article 40 or an enhanced assisted living residence licensed pursuant Social Services Law Article 7 and Public Health Law Article 46-B. The proposed rule's

experience requirements for AHHA certification are consistent with Chapter 471 and necessary to implement it.

With respect to two of the commenters' request for clarification regarding the references to "home health services entity" in sections 64.9(e)(2) and (f)(2) of the proposed rule, the Department will take this request under consideration and it may issue guidance regarding these references should it determine that such clarification is necessary in the future. No changes to the proposed rule are necessary at this time.

14. COMMENT:

One commenter, a statewide association that represents all levels of home care services, asked whether the regulations allow an organization to offer AHHA training programs prior to receiving approval from the Department or DOH to do so.

DEPARTMENT RESPONSE:

Pursuant to section 64.9(f)(1) of the proposed rule, an organization cannot offer AHHA training programs without approval by either the Department or DOH.

15. COMMENT:

One commenter, a statewide association that represents all levels of home care services, asked whether the regulations permit AHHA training program students to perform advanced tasks on "volunteer patients" in a lab as part of a competency evaluation.

DEPARTMENT RESPONSE:

Section 64.9(f)(4) of the proposed rule requires a qualified RN to perform a competency evaluation, as determined by the RN, by personally observing the AHHA training program student performing advanced tasks. The proposed rule does not

necessarily require the RN to observe the student perform advanced tasks on an actual patient as part of the competency evaluation.

16. COMMENT:

One commenter, an association of licensed adult care facility/assisted living residence/assisted living program providers, urged the Department to revise the regulations to limit a nurse practitioner's authority to order medical care for residents of assisted living facilities who may receive services from AHHAs.

DEPARTMENT RESPONSE:

This commenter's request is outside the scope of this proposed rule. Chapter 471 does not give the Department the statutory authority to restrict the scope of practice of nurse practitioners. Thus, no changes to the proposed rule are necessary.

17. COMMENT:

One commenter, an association of licensed adult care facility/assisted living residence/assisted living program providers, asked whether an AHHA can perform glucose testing.

DEPARTMENT RESPONSE:

The proposed rule does not include explicit references to glucose testing. The Department notes that "glucose testing" could refer to a variety of different laboratory or point-of-care tests used for different clinical purposes. The Department will take this comment under consideration when developing any future guidance documents. No changes to the regulations are necessary.

18. COMMENT:

One commenter, an association of licensed adult care facility/assisted living residence/assisted living program providers, noted that the regulations require RNs to

perform skilled nursing assessments, including assessment of a patient's need for pain medication. The commenter urged the Department to clarify whether an RN may perform assessments based solely on input from the AHHA.

DEPARTMENT RESPONSE:

The Department agrees with the commenter that section 64.9(a)(6)(vii) of the proposed rule requires RNs to perform skilled nursing assessments, including an assessment of a patient's need for pain medication. The proposed rule further excludes tasks involving professional nursing judgment, observation, monitoring or assessment of a client from the permitted AHHA tasks. However, the Department will take this request under consideration when developing any future guidance documents. No changes to the regulations are necessary.

19: COMMENT:

One commenter, an association of licensed adult care facility/assisted living residence/assisted living program providers, noted that the section 64.9(a)(7)(i) of the proposed rule regulations allow, in limited circumstances, a supervising RN to arrange for another qualified health professional, such as another RN to visit a client at home. The commenter suggested that this provision is inconsistent with regulations adopted by DOH.

DEPARTMENT RESPONSE:

The regulations adopted by DOH appear to be consistent with section 64.9(a)(7)(i) of the proposed rule. Although section 64.9(a)(7)(i) allows the supervising RN to arrange for another qualified health professional to visit the client, it does not affect the supervising RN's ongoing responsibility to provide direct supervision to the AHHA while the health professional visits the client. The Department notes that DOH's

regulations do not explicitly prohibit a supervising RN from arranging for another qualified health professional to visit a patient so long as the supervising RN remains responsible for providing direct supervision to the AHHA. Thus, no changes to the proposed rule are necessary.

20. COMMENT:

One commenter, an association of licensed adult care facility/assisted living residence/assisted living program providers, urged the Department to acknowledge that the regulations allow assisted living program providers, in conjunction with licensed home care agencies, to use AHHAs.

DEPARTMENT RESPONSE:

If a business entity (such as a limited liability company or not-for-profit corporation) is licensed by DOH to operate an assisted living program and a licensed home care services agency (LHCSA), the business entity may employ an AHHA to provide advanced tasks only to the business entity's LHCSA clients in accordance with Public Health Law Article 36. However, if a business entity is licensed by DOH to operate an assisted living program only and is not licensed to operate a LHCSA, the business entity is not allowed to employ an AHHA to perform advanced tasks.

21. COMMENT:

One commenter, an association of licensed adult care facility/assisted living residence/assisted living program providers, noted that the regulations do not specify whether a health care provider or a home health aide or some combination of both is responsible for paying costs associated with AHHA certification. The commenter urged the Department to address requirements for paying for AHHA certification.

DEPARTMENT RESPONSE:

The proposed rule neither prohibits AHHA Training Programs from charging fees nor does it address other payment requirements or issues relating to AHHA certification. The Department does not have a policy governing who is responsible for paying any of the costs associated with AHHA certification. However, the Department notes that DOH has separate authority to approve home care services agencies to offer AHHA Training Programs and it may also have relevant fee policies that affect these licensed home care services agencies and/or applicants for AHHA certification. Thus, no changes to the proposed rule are necessary.

22. COMMENT:

One commenter, a national not-for-profit that works to transform eldercare and disability services by promoting quality direct care jobs as the foundation of quality care, urged the Department to include in the definition of “routine medications” certain medications that are given by injection.

DEPARTMENT RESPONSE:

Sections 64.9(a)(6)(ii) and (iii) of the proposed rule already identify the administration of certain injections, a subcutaneous or intramuscular injection of low molecular weight heparin or medication prescribed to treat diabetes; and the use of a prefilled auto-injector of naloxone or epinephrine in an emergency, as advanced tasks that AHHAs can perform. Thus, no changes to the proposed rule are necessary.

23. COMMENT:

One commenter, a national not-for-profit that works to transform eldercare and disability services by promoting quality direct care jobs as the foundation of quality care, urged the Department to consider the full range of options for implementing the regulatory requirement that a supervising RN must visit the patient receiving services no

less than every two weeks to observe the AHHA perform assigned advanced tasks for clients.

DEPARTMENT RESPONSE:

The Department will take the commenter's suggestions, regarding the options for implementing section 64.9(a)(7)(iii) of the proposed rule's requirement that a supervising RN must visit the patient receiving services no less than every two weeks to observe the AHHA perform assigned advanced tasks for clients, under consideration and it may issue guidance regarding the implementation of this requirement if it determines that such clarification is necessary in the future.

24. COMMENT:

One commenter, a national not-for-profit that works to transform eldercare and disability services by promoting quality direct care jobs as the foundation of quality care, urged the Department to consult with DOH when developing guidance for AHHA training programs.

DEPARTMENT RESPONSE:

The Department has and will continue to work with DOH to implement Chapter 471, which includes working with DOH in developing any guidance regarding the AHHA Training Programs.

25. COMMENT:

Two commenters, a national not-for-profit that works to transform eldercare and disability services by promoting quality direct care jobs as the foundation of quality care and an association of licensed adult care facility/assisted living residence/assisted living

program providers, urged the Department to provide details regarding the duration of AHHA certification, as well as renewing AHHA certification.

DEPARTMENT RESPONSE:

DOH, not the Department, has the statutory authority to determine the both the duration of AHHA certification and standards for renewing it. Thus, this comment is outside the scope of the Department's proposed rule.

26. COMMENT:

One commenter, a national not-for-profit that works to transform eldercare and disability services by promoting quality direct care jobs as the foundation of quality care, urged the Department to revise the regulations to establish a stakeholder work group.

DEPARTMENT RESPONSE:

Chapter 471 provided the Department with the authority to establish implementing regulations consistent with the parameters established by the statute. Such parameters did not require the Department to establish such a workgroup. However, the Department may consider feedback from the field when issuing any future guidance on this issue. Thus, no changes to the proposed rule are necessary at this time.

27. COMMENT:

One commenter, a national not-for-profit that works to transform eldercare and disability services by promoting quality direct care jobs as the foundation of quality care,

urged the Department to provide guidance on what constitutes a “systemic approach to address drug diversion” as described in section 64.9(a)(9) of the proposed rule.

DEPARTMENT RESPONSE:

The Department will take this request under consideration when developing any future guidance documents. No changes to the proposed rule are necessary.

28. COMMENT:

One commenter, an association of licensed adult care facility/assisted living residence/assisted living program providers, urged the Department to clarify the reference in section 64.9 (b)(2)(iii) of the proposed rule, to a client who “lacks capacity to consent” to his/her care being provided by an AHHA.

DEPARTMENT RESPONSE:

The Department will take this request under consideration when developing any future guidance documents. No changes to the rule are necessary.