

**ENVIRONMENTAL PROTECTION**

**(a)**

**DIVISION OF FISH AND WILDLIFE**

**Notice of Administrative Changes**

**Marine Fisheries**

**Modification of Black Sea Bass Recreational Season and Summer Flounder Recreational Size, Season, and Possession Limits**

**N.J.A.C. 7:25-18.1**

Take notice that, pursuant to N.J.A.C. 7:25-18.1(p), the Commissioner of the Department of Environmental Protection, with the approval of the New Jersey Marine Fisheries Council (Council) at its March 1, 2012 meeting, has modified the recreational season for black sea bass and the recreational season for summer flounder. These actions have been taken to comply with the Atlantic States Marine Fisheries Commission (ASMFC) management plan for black sea bass and summer flounder.

At its February 8, 2012 meeting, the ASMFC's Summer Flounder, Scup and Black Sea Bass Management Board (the Board) approved Addendum XXII to the Summer Flounder, Scup and Black Sea Bass Fishery Management Plan. The Addendum establishes a regional management approach which allows the states from Massachusetts to New Jersey, as a region, to liberalize recreational measures for black sea bass up to 57 percent relative to the 2011 recreational harvest estimate. In light of this action, the Council approved changing the recreational black sea bass season from May 28 through September 11, and November 1 through December 31 to May 19 through October 14, and November 1 through December 31. The changes made will be reviewed by ASMFC to assure that they do not exceed the allowed liberalization. Should further measures be determined to be necessary by ASMFC, those changes will be the subject of a future notice.

In December 2011, the ASMFC's Summer Flounder, Scup and Black Sea Bass Management Board met to discuss summer flounder recreational management measures. The Board approved that for 2012 summer flounder be managed under state-by-state conservation equivalency which allows for states to set their own regulations to reach their state allocated harvest target. New Jersey's recreational summer flounder harvest target for 2012 is 1,090,407 fish. In order to achieve this target, the Council approved changing the 2012 recreational summer flounder regulations from an open season of May 7 through September 25 with a size limit of 18 inches and a possession limit of eight fish to an open season of May 5 through September 28, with a size limit of 17.5 inches and a possession limit of five fish. The ASMFC Board approved New Jersey's recreational summer flounder management changes as compliant with the management plan for summer flounder on February 8, 2012.

These changes will be reflected in the Division of Fish and Wildlife rules at N.J.A.C. 7:25-18.1(c) as indicated below. As required in N.J.A.C. 7:25-18.1(p), changes to N.J.A.C. 7:25-18.1(c) will be published in the New Jersey Register, the New Jersey Fish and Wildlife Digest and via a news release submitted to individuals on the Division of Fish and Wildlife's outdoor writers mailing list.

Full text of the changed rule follows (additions indicated in boldface thus; deletions indicated in brackets [thus]):

7:25-18.1 Size, season and possession

(a)-(b) (No change.)

(c) A person angling with a hand line or with a rod and line or using a bait net or spearfishing shall not have in his or her possession any species listed below less than the minimum length, nor shall such person take in any one day or possess more than the possession limits as provided below, nor shall such person possess any species listed below during the closed season for that species. Exceptions to this section as may be provided elsewhere in this subchapter shall be subject to the specific provisions of any such section. Fish length shall measure from the tip of the snout to the tip of the tail (total length), except as noted below:

Species	Minimum Size In Inches	Open Season	Possession Limit
...			
Black Sea Bass	12.5	[May 28 – Sept. 11]  May 19—Oct. 14 Nov. 1 – Dec. 31	25
...			
Summer Flounder (Fluke)	[18] 17.5	[May 7 – Sept. 25]  May 5 – Sept. 28	[8] 5
...			
1.-3. (No change.)			
(d)-(r) (No change.)			

**HUMAN SERVICES**

**(b)**

**DIVISION OF DISABILITY SERVICES**

**Personal Assistance Services Program**

**Adopted Amendments: N.J.A.C. 10:140-1, 2, 3.1 through 3.9, 3.11, 4.2, 4.3, 4.4, 4.5, 5.1, 6.1, 6.3, 6.4, 7.1, 7.2, and 7.3**

**Adopted Repeal: N.J.A.C. 10:140-6.2**

**Adopted Repeal and New Rule: N.J.A.C. 10:140-4.1**

Proposed: October 3, 2011 at 43 N.J.R. 2551(a).

Adopted: March 2, 2012 by Jennifer Velez, Esq., Commissioner, Department of Human Services.

Filed: March 21, 2012 as R.2012 d.079, with substantial and technical changes not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 30:4G-21.

Effective Date: April 16, 2012.

Expiration Date: January 20, 2016.

**Summary of Public Comments and Agency Responses:**

The Division received 55 public comments regarding its notice of proposal to amend the rules regulating the operation of the Personal Assistance Services Program (PASP). Similar comments are grouped together for ease of response. Unique comments are cited to the individual making the comment and are responded to individually.

The individuals and groups making comments are as follows:

1. Tamie Amoroso
2. Terri Battisti
3. Ellen Berfond
4. Wesley Burden
5. Gail Camuso
6. Roy Carbone
7. Tara Celetano
8. Robert Colicchio
9. Pat Davis
10. Katherine (Tinka) Dawson
11. Fred Doerr
12. Daniel Downing
13. Rose Marie Downing
14. Lisa Enz
15. John Ferdinand
16. Regina Ferris

17. John Fig
18. Susan Flad
19. Ertgul Gomec
20. Dave Grennon, Cumberland County Office for the Disabled
21. Gail Hoppenstedt
22. Carol Jaskula
23. Jamie Hilton
24. Christine Homayounifar
25. Elizabeth Johnson
26. Rosemarie Kasper
27. John Lewris
28. Ron Louk
29. Rocco Maggio
30. Mary E. Marmo
31. Dorothy McGowan
32. Middlesex County PASP Advisory Council
33. Colleen O'Dell-Multer
34. Charles Newman, Union County Office for the Disabled
35. Sandra Oncay
36. Joseph Pagan
37. Gwen Bartlett Palmer
38. Arlene Palmieri
39. Terry Penrod
40. Matt Petrusko
41. Roxanne Reff
42. Fredda Rosenstein
43. Janice Sangle
44. Charlotte Schwartz
45. Thomas Spadaro
46. Statewide Consumer Advisory Council
47. Jennifer Sterner
48. Carolyn Torre
49. Kathy Vaczi
50. Diane Walters
51. Betsy Walton
52. Carol Willis
53. Sanon Yanick
54. Joanne Zinski
55. Joe Zinski

1. COMMENT: The Division of Disability Services received 18 comments concerning proposed N.J.A.C. 10:140-2.1(a)5, which states in the notice of proposal Summary that a relative or other informal caregiver is not available to provide the services that the consumer needs. The commenters inquired as to whether it appears to be in contradiction with N.J.A.C. 10:140-3.5(d), which allows program consumers to hire their relatives as their employees in a cash model program.

RESPONSE: The Division has reviewed the program's enabling legislation N.J.S.A. 30:4G-21 et seq., and it clearly stipulates that a family member or informal caregiver must not be available to act as a personal assistant; therefore, the Division may not remove the text from the rule or create a rule that is contrary to the statute. It is the Division's intention to allow for the hire of family members as personal assistants as the program transitions to a cash model, as it believes that the use of the word "informal" means an unpaid or voluntary caregiver, and is reflected in the aforementioned statute and rule relating to eligibility thereunder, and not to program operations. Further, the Division believes there will be no conflict or contradiction in hiring a relative given that once a family member is hired, that individual assumes both the role and function of a paid employee, governed by a job description and recognized as a "domestic employee" as defined by the Internal Revenue Service under Title 26 and, in turn, ceases being an informal caregiver. The Division will proceed with the amendment as proposed, as the hiring of family members has never posed a programmatic burden in the two counties where cash models have been successfully piloted.

2. COMMENT: The Division received 13 comments objecting to proposed amendments to N.J.A.C. 10:140-2.1 indicating that a consumer cannot receive more than 40 hours per week of personal assistance services from PASP or in combination with any other program. The concerns were two-fold: commenters were concerned about individuals with profound disabilities (that is, spinal cord injuries) who may require

more than 40 hours per week of service; and, secondly, questioning why the authority to grant these exceptions is vested with the Division Director.

RESPONSE: At N.J.A.C. 10:140-2.1(a)8, the rule, as proposed for amendment, grants this authority to the Division Director as this is who is ultimately held responsible for the utilization and efficient operation of the program. The Division acknowledges the concerns of the commenters and for that reason, proposed a mechanism by which exceptions may be granted by the Division Director to individuals who can demonstrate the need for additional hours and demonstrate that the absence or loss of services would constitute a clear risk to health and safety of the care recipient. This action is consistent with all other Division programs. The Division is moving forward with the proposed cap of 40 hours per week of service as originally proposed since it believes that the exception mechanism as proposed will provide a remedy for those who need additional hours for the purposes of protecting health and safety, while allowing the Division to monitor the utilization of hours to avoid over-usage.

3. COMMENT: The Division received 11 comments in regard to N.J.A.C. 10:140-2.1(a)2, which states that physical domicile in New Jersey is a prerequisite to eligibility for services. Commenters are concerned about consumers who are attending college out-of-State, while still maintaining permanent residence in New Jersey. It was suggested that there should be a "grandfathering" provision for current students who are attending school out-of-State to enable them to finish their studies.

RESPONSE: The Division does not wish to disadvantage students who are presently receiving services while attending college out-of-State, however, the Division is unable to add a grandfathering provision upon adoption, as such a change would violate N.J.A.C. 1:30-6.3. Therefore, the Division will propose to amend the rule in a future rulemaking to address this circumstance, but will limit the scope of the change to students enrolled in out-of-State colleges as of the effective date of the proposed amendment. As PASP eligibility is determined annually for all program consumers per the dictates of N.J.A.C. 10:140-2.1(a)2, the Division will adopt the amendment as proposed.

4. COMMENT: The Division received 10 comments regarding eligibility for more than one age waiver beyond age 70. The commenter's concerns were related to how persons who are still performing program activity could still get the personal care services that they need.

RESPONSE: The Division reminds the commenters that the upper age limit of 70 is taken directly from the amended legislation, N.J.S.A. 30:4G-16.4b. The legislation also makes no mention of waivers, but allows an individual to remain under service for the duration of their 70th year. The Division believes that to extend eligibility further would make the legislatively-defined age limit meaningless. Moreover, the program must operate within its limited budget appropriation, and is, therefore, dependent on individuals aging-out to create opportunities to be able to provide services to new consumers. The Division is, therefore, prepared to move forward with the amendment as proposed.

5. COMMENT: Eight individuals made comments related to the proposed definition of parenting at N.J.A.C. 10:140-1.4. Commenters suggested that the definition should be amended to extend to children to the age of 18 and to include consideration for program recipients who may have adult children with disabilities.

RESPONSE: The Division acknowledges the comment, but believes its position is prudent and in the best interest of the program and, hence, the recipients of its services. The Division does not wish to disadvantage any PASP consumer who ceases other qualifying program activity for the purpose of raising a family; but once a child reaches age five, the Division believes that parental responsibility naturally decreases as the child goes to school, and, therefore, the parent can resume other qualifying program activity as defined in N.J.A.C. 10:140-1.5(a). While the responsibilities of parenting a child can be considered in the calculation of awarded service hours, parenting itself cannot be considered as the qualifying program activity once the child is older than five as proposed in N.J.A.C. 10:140-4.1. In circumstances where a program recipient has an adult child with a disability, the Division believes that the adult child will qualify for assistance and services and, therefore, will not consider the child's disability in the calculation of the

parent's service hours under PASP. The Division will proceed as proposed.

6. COMMENT: The Division received eight public comments regarding N.J.A.C. 10:140-1.5, which mandates that a consumer must volunteer for a minimum of 20 hours a month and provide supporting documentation upon request to qualify for program services. The proposed rule also states that this requirement must be met within 30 days of the effective date of the rule for existing consumers to maintain eligibility. Furthermore, it is proposed that the Division will impose a 90-day look back period to verify both the longevity and sustainability of the volunteer activity. The commenters believe that the 20-hour requirement is arbitrary and excessive; and that the 90-day look back period is unfair.

RESPONSE: The Division acknowledges the comments. However, it believes that the proposed rule is both fair and equitable and creates a reasonable standard for the program. An individual may meet the responsibility within any time frame, (that is, 20 hours per week, 10 hours per week for two weeks, five hours per week for four weeks, etc.). The Division believes that this is reasonable and attainable for all individuals. The purpose of the look back is to assure that an individual does not attain a volunteer position only for the purposes of satisfying the initial eligibility determination. The Division believes that its action will preserve program integrity and the efficient use of public funds, and therefore will proceed as proposed.

7. COMMENT: The Division received eight comments not favoring the transition of the PASP over to a cash model service delivery system.

RESPONSE: The Division appreciates the concern over the cash model transition, but will proceed in accordance with the amended legislation at N.J.S.A. 30:4G-21 that was signed by former Governor Corzine, mandating the transition over to cash model.

8. COMMENT: The Division received eight comments objecting to proposed N.J.A.C. 10:140-4.3, concerning the consumer cost share obligation fee and requirements. Consumers are concerned that it will negatively impact middle and upper middle income consumers and, therefore, suggest that the proposed Consumer Cost Share Obligation Table should be re-examined to determine if 350 percent of the Federal Poverty Level is reasonable and fair to all PASP consumers.

RESPONSE: The Division's proposed Consumer Cost Share Obligation Table is based on the standard set forth in the programmatic statute, N.J.S.A. 30:4G-19, which allows the program to generate the required revenue from cost share to supplement the program's appropriation and to maintain both program service levels and budget neutrality. The Division has also proposed language at N.J.A.C. 10:140-4.4(a)1 through 7, to clarify circumstances in which individuals can seek a reduction of their cost share obligation to address non-routine and emergent circumstances. By way of example, a consumer whose annual gross income is \$50,000 and is receiving 40 hours of personal care services per week, will only pay \$2.70 an hour for service, according to the proposed sliding fee scale. The Division believes that \$2.70 per hour in cost share is fair given that the same hour private pay would cost up to \$25.00.

9. COMMENT: The Division received five comments favoring the transition of the PASP over to a cash model service delivery program.

RESPONSE: The Division believes that its direction is appropriate based on the success of the two piloted PASP counties; along with the recommendation of the PASP Statewide Consumer Advisory Council and the on-going success of the Medicaid funded Personal Preference Program. A cash model program offers program recipients the greatest possible degree of self-control and self-direction.

10. COMMENT: The Division has clarified the expenses allowed for consideration in a cost share reduction in proposed N.J.A.C. 10:140-4.4(a). Allowable expenses must be related to a consumer's disability, non-routine, and due to unforeseen and emergent circumstances. Four commenters are requesting that the regulatory language be further clarified to definitively allow for these expenses when considering a request for reduction in cost share.

RESPONSE: The Division acknowledges the comment, but believes that its method of determining cost share reduction and proposed criteria are fair and equitable because it gives latitude and discretion to evaluate individual circumstances and does not allow for a subjective review and

implementation. The Division will proceed with the amendment as proposed.

11. COMMENT: Two commenters expressed dissatisfaction with proposed N.J.A.C. 10:140-4.2(b), which adjusts the hourly reimbursement rate of \$13.26 weekday and \$15.30 on weekends/holidays to a flat rate of \$15.00 per hour. Commenters doubted that consumers will be able to maintain their current level of service within an inclusive \$15.00 per hour flat rate and wish to maintain a rate differential for weekdays verses weekends/holidays.

RESPONSE: Under the cash model program, the reimbursement rate is the amount by which awards are calculated. However, individuals may adjust the rate of pay to workers to accommodate special circumstances by which they wish to pay their workers more (that is, working on a holiday). The Division is confident that this will not prove burdensome to consumers based on its experience in operating the two cash model pilot counties. The Division will proceed as proposed.

12. COMMENT: Two commenters thought the paperwork required to be completed by the consumer under the cash model program was excessive.

RESPONSE: The Division believes the amount of paperwork to be completed by the individual is minimal given that the county staff will be assisting with this process. The paperwork required is the minimum amount to safeguard public funds and to assure program accountability.

13. COMMENT: Members of the Middlesex County PASP Local Advisory Council commented that N.J.A.C. 10:140-4.2 is unclear and confusing and requested clarification that, "Any additional costs that exceed that flat fee, shall be the financial responsibility of the county designated agency and not the Division." The commenters remarked that the county designated agency will only be receiving administrative funds and will not have funding available to cover any additional costs.

RESPONSE: The Division contracts with county designated agencies to administer the program, and, therefore, it is expected that they will budget within the contract ceiling amount authorized. The intent of the proposed language was to clarify that the county designated agencies cannot expect financial relief from the Division should they exceed their annual allocation. The Division acknowledges the comment, but will proceed with the amendment as proposed.

#### **Charles Newman, Union County Office for the Disabled**

14. COMMENT: As proposed in N.J.A.C. 10:140-1.4 the definition of an "assessor" has been amended to mean a person who is employed by the program to conduct eligibility assessments and has a master's degree or; a bachelor's degree and three years of experience in rehabilitation services or is a registered nurse with a bachelor of science degree in nursing; or three years experience in home care. Mr. Newman suggested that the semi-colon after "nursing" should be omitted to prevent the possible impression that any individual with three years' experience in home care can be an assessor for the program.

RESPONSE: The Division thanks the commenter for their input and, upon review of the rule, has decided to remove the home care experience as an option to be an assessor. The Division believes that only using this experience may lend itself to abuse and inefficiencies by allowing someone with only three years of home care experience to function as an assessor.

#### **Ellen Berfond, Ocean County Board of Social Services**

15. COMMENT: Ms. Berfond suggested a review of the language at N.J.A.C. 10:140-2.1(e) as it limits the scope of the definition of "personal assistance service" defined at N.J.A.C. 10:140-1.4.

RESPONSE: The Division elects to use this definition to be consistent with other programs that provide similar services and will proceed with the definition as proposed and believes the terms can be used interchangeably based on the context in that personal assistance services can encompass personal care services, and, therefore, would not be limiting in scope.

#### **John Fig**

16. COMMENT: Mr. Fig suggested that the definition of the word "household" be added to the rule. He believes it is an important element to accurately determine cost share and family size.

RESPONSE: The Division will add a definition of “household” upon adoption and thanks Mr. Fig for his comment. The Division has defined “household” to include an individual consumer and any dependents as defined by the Internal Revenue Service under Title 26 of the United States Tax Code. The Division has chosen this definition because the tax code is concise, is used for other New Jersey programs, and allows for varying dependent situations that will lead to equity in the implementation of the cost share obligations.

#### Carolyn Torre, New Jersey State Nurses Association

17. COMMENT: Ms. Torre suggested a modification in the language at N.J.A.C. 10:140-2.1(a)7, to include “advanced practice nurse” in the eligibility and determination of an applicant’s diagnoses of a permanent physical disability. Advanced Practice Nurses (APNs) have been authorized statutorily since 1992 (N.J.S.A. 45:11-4. et seq.) and through the Board of Nursing rules passed in 1993 (N.J.A.C. 13:37-7) to provide primary and specialty care to New Jersey residents, including the diagnosis and management of chronic illness. In 2004, APNs were granted statutory authority to affirm a disability by virtue of an amendment to the law.

RESPONSE: While the Division acknowledges the suggestion to modify the language, it is limited by the language contained in the statute at N.J.S.A. 30:4G-16h., which indicates that the “attending physician” is responsible for certification of the eligibility standards. The Division will proceed as proposed.

#### Sandra L. Oncay

18. COMMENT: Ms. Oncay indicated that there is no provision for consumers who do not have computer experience or access to a computer and/or internet service in order to adhere to program requirements. The commenter suggested that implementation of a cash model should not take place until all county coordinators are fully trained and given ample time to assist consumers with the transition (that is, a trial period).

RESPONSE: The Division believes that the commenter may be confused since there is no reference in the rule requiring a consumer to have a computer or be computer literate in order to participate in the PASP. It appears that the commenter maybe referencing the availability of computer-based cash model training at N.J.A.C. 10:140-6.1(a). The Division has taken steps to mandate that the training vendor provides training both in person and on-line, and thereby, not disadvantage anyone without a computer or computer skills. The Division also intends to phase in a cash model, county by county, and will not begin to operate in a county until its coordinator has been fully trained. The Division will proceed with the rule as proposed.

#### Jennifer J. Sterner

19. COMMENT: Ms. Sterner disagreed with proposed “N.J.A.C. 10:140-3.5 9 (c)” (sic) suggesting that personal care services should not be provided under the PASP during a period of hospitalization. The commenter suggests that the Division should allow a minimal amount of service hours during this period.

RESPONSE: The Division believes the commenter is referring to N.J.A.C. 10:140-3.6(d)2, which the Division did not propose for amendment. Therefore, the comment is outside the scope of the notice of proposal and the Division will make no change to the rule.

#### Dave Grennon, Cumberland County Office for the Disabled

20. COMMENT: Current program policy permits personal assistants to drive a consumer’s vehicle while performing their job responsibilities. Proposed N.J.A.C. 10:140-3.5 deletes all references to the personal assistant providing transportation using the consumer’s vehicle or otherwise. Mr. Grennon wanted to know how this accommodation will be provided under a cash model service delivery system.

RESPONSE: The Division believes that this policy will no longer be necessary since, under the cash model program, consumers can make their own private arrangements for job duties of a personal assistant, including transportation. The Division will proceed as proposed.

21. COMMENT: Currently, the “Self-Care Certification” exists for all consumers who need their personal assistant to perform skilled professional medical services during PASP hours. Homecare service providers under contract with the county designated agencies allow

assistants to perform these skilled professional medical services as a condition of the contract. Mr. Grennon indicated that if this process no longer exists as a result of the proposed change to a cash model, consumers may no longer be able to receive the skilled professional medical services they need if they wish to remain with their current service provider who is no longer under contract. How will this provision be handled under the cash model program?

RESPONSE: The Division believes that this policy will no longer be necessary since the performance of self-care tasks will be a private arrangement between the consumer and their employee under the cash model program.

#### Federal Standards Statement

A Federal standards analysis is not required because the adopted amendments, repeals, and new rule are not subject to any Federal requirements or standards. However, both the rules and program operations are in compliance with the Americans with Disabilities Act of 1990.

**Full text** of the adopted amendments and new rule follows (additions to proposal indicated in boldface with asterisks **\*thus\***; deletions from proposal indicated in brackets with asterisks **\*[thus]\***):

#### SUBCHAPTER 1. GENERAL PROVISIONS

##### 10:140-1.1 Purpose

(a) Pursuant to the provisions of N.J.S.A. 30:4G-13 et seq., the Department of Human Services provides support to individuals with permanent physical disabilities in meeting their daily needs for personal care and assistance with activities of daily living in order to live independently within their community. The Personal Assistance Services Program, administered by county designated agencies in each of New Jersey’s 21 counties and within the limits of funds appropriated or otherwise made available to it, shall assist self-directed adults with permanent physical disabilities to:

1.-2. (No change.)

3. Actively participate in community-based independent living (that is, volunteering).

##### 10:140-1.2 Scope

The rules of this chapter apply to all activities and persons participating in the Personal Assistance Services Program, including, but not limited to, the designated State contracting agency, applicants, consumers, their employees, county agencies administering the program and vendors providing services.

##### 10:140-1.3 Personal Assistance Consumer Bill of Rights

(a) Each consumer, and, as appropriate, each applicant:

1. (No change.)

2. Shall be served by personal assistants and/or vendors who are properly trained and competent to perform their duties;

3.-7. (No change.)

8. Shall be free to fully exercise one’s civil and due process rights and to be assisted by a personal assistant and/or vendor as appropriate and necessary;

9.-14. (No change.)

##### 10:140-1.4 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context indicates otherwise:

...  
 “Assessor” means a person who is employed by the program to conduct eligibility assessments and has a master’s of social work degree; a bachelor’s degree and three years of experience in rehabilitation services; **\*or\*** is a registered nurse with a bachelor of science degree in nursing\***[; or three years experience in home care]**\*.  
 ...

“Cash management plan” or “CMP” means to the document used by the Personal Assistance Services Program, which indicates the monthly cash allowance and details the services and supports required by the consumer in order to meet their personal care needs.

“Community-based independent living” means self-directed living whereby a consumer is actively participating in community-based

activities aside from employment or education, including, but not limited to, assistance with parenting tasks, searching for employment, volunteer or community service, participation on governing boards and/or serving on committees.

“Consumer” means an individual who is currently receiving services and who meets the eligibility standards of N.J.A.C. 10:140-2.1, has received an exception under N.J.A.C. 10:140-2.2 or the criteria has been set aside by the Commissioner based on an emergent circumstance, as determined on a case-by-case basis.

“Consumer directed services” means a model of service delivery that affords the opportunity for individuals to control and manage all aspects of the services that they receive including, but not limited to, from whom the services are received, what types of services are received and when, where and how they are received.

“County designated agency” means a county office for the disabled or other agency designated by the county government to administer in that county the Personal Assistance Services Program established pursuant to N.J.S.A. 30:4G-13 et seq. and this chapter.

“Division” or “DDS” means the Division of Disability Services, in the Department of Human Services.

“Education or training” means enrollment in courses or training programs related to the enhancement of a worker’s employment.

“Fiscal intermediary service organization” or “FISO” means a company or agency that is set up to disburse the cash benefit to consumers under the Personal Assistance Services Program. The latter will serve as the business agent for the consumer and prepare the payroll checks and other disbursements at the direction of the consumer, as well as keep records of all transactions.

**“Household” shall be determined to be the individual consumer and any dependents as defined by the Internal Revenue Service under Title 26 of the United States Tax Code.\***

“Parenting” means routine child rearing activities performed for a minor child under the age of five in circumstances where those activities are obligated by law and the failure of the parent to perform such activities would constitute neglect under State law.

“Permanent physical disability” means a severe impairment of an ongoing nature, which so restricts a person’s ability to perform essential activities of daily living that the person needs assistance to maintain the person’s independence and health.

“Personal assistance service” means health and chore-related tasks performed by a personal assistant. Personal assistance services include, but are not limited to, assistance in essential daily activities, such as bathing, dressing and feeding; assistance with light housekeeping activities, such as laundry, shopping and meal preparation; assistance with paperwork and communication; and assistance with mobility, including driving or other forms of transportation.

“Time sheets” means a legal document that is issued by the fiscal intermediary service organization and used by the consumer to verify the number of hours received under the program and signed by the consumer’s employee.

“Vendor” means an agency or business that provides a service under the Personal Assistance Services Program, that satisfy the needs and requirements of a consumer, including, but not limited to, a cleaning service and/or a laundry service.

“Volunteering” is the practice of people working on behalf of others or a particular cause without payment for their time and services.

10:140-1.5 Target population and priority for services

(a) (No change.)

(b) Prioritization for service delivery shall be determined by the county designated agency in the following order of priority, for consumers who are:

1.-2. (No change.)

3. Actively participating in community-based independent living (that is, volunteering).

i. A consumer shall volunteer for a minimum of 20 hours a month and provide supporting documentation upon request of the program.

ii. Existing consumers must meet this requirement by \*(30 days of the effective date of this amendment)]\* **May 16, 2012**\*. The Division shall impose a 90-day look-back period to verify both the longevity and sustainability of the volunteer activity.

(c) All consumers shall provide the Division with verifiable documentation of their respective qualifying program activity as set forth in (b)1 through 3 above. Failure to provide documentation shall render the individual to be ineligible for continued services under the program.

(d) The following activities shall not be considered as qualifying program activity under the PASP:

1. Participation in an avocation or hobby;

2. Parenting or child rearing activities not covered by N.J.A.C. 10:140-4.1; and

3. Homemaking.

SUBCHAPTER 2. ELIGIBILITY

10:140-2.1 Eligibility standards

(a) For the purposes of the Personal Assistance Services Program, an eligible applicant or consumer shall meet the following standards, except as noted in N.J.A.C. 10:140-2.2:

1. An eligible applicant or consumer shall be from the age of 18 through the age of 70 and shall have a permanent physical disability;

2. An eligible applicant or consumer shall be a resident of the State of New Jersey and must reside within the geographic boundaries thereof in order to qualify for services. Residency shall be determined by physical domicile in New Jersey.

3.-4. (No change.)

5. A relative or other informal caregiver is not available to provide the services that the consumer needs;

6. An eligible applicant or consumer shall live, or plan to live upon becoming eligible, in a private house or apartment, group home, educational facility (for example, dormitory or campus apartment), rooming or boarding house, residential health care facility or an alternative housing arrangement acceptable to the Division for the purposes of the Personal Assistance Services Program; and the personal assistance services that the eligible applicant or consumer receives are supplemental to, and not duplicative of, services provided to the person in the rooming or boarding house, group home, educational facility, transitional housing or residential health care facility pursuant to licensure requirements. Individuals who reside in, or are a patient in a facility or setting where personal care services are the responsibility of those entities shall be ineligible for the Personal Assistance Services Program. An exception to this paragraph may be granted by the Division Director in circumstances where personal care services are not being provided by the facility and the individual meets all other requirements of this chapter;

7. The attending physician for the eligible applicant or consumer shall confirm in writing that he or she has a permanent physical disability and is capable of self-direction, and that the personal assistance services will be appropriate to meet the eligible applicant or consumer’s needs; and

8. The eligible applicant or consumer shall receive no more than 40 hours per week of personal assistance services from the program in combination with any other program. Exceptions to this paragraph may be granted by the Division Director to individuals who can demonstrate the need for additional hours and demonstrate that the absence or loss of the services would constitute a clear risk to health and safety.

(b) Consumers must utilize any Federally funded programs for which they are entitled before receiving services from the program.

(c) The Division must operate the Personal Assistance Services Program within its financial appropriation and may suspend the enrollment of consumers or truncate the hours provided to consumers as financial restrictions/limitations require.

(d) In circumstances where requests for services exceed program resources, the Division shall invoke an order of selection to prioritize the order in which resources will be used to provide services to existing

consumers. The order of selection shall be based on the qualifying program activities set forth at N.J.A.C. 10:140-1.5(b).

(e) Services available under the program are limited to those services related to personal care. The Division has no obligation to fund or facilitate a consumer's ability to comply with program rules by providing other services or accommodations.

(f) It is the responsibility of the consumer to maintain program eligibility in good standing. A consumer shall be determined to be in good standing by doing the following:

1. Maintaining qualifying activity in accordance with this chapter;
2. Complying with the payment of cost share in accordance with N.J.A.C. 10:140-4.3; and
3. Complying with the training requirements in accordance with N.J.A.C. 10:140-6.1.

#### 10:140-2.2 Exceptions to eligibility standards

(a) Exceptions to the eligibility standards in N.J.A.C. 10:140-2.1(a)1, 6 and 8 may be granted as follows:

- 1.-3. (No change.)
- (b)-(c) (No change.)
- (d) In granting an exception to N.J.A.C. 10:140-2.1(a)1, the following standards shall be applied for consumers who are over age 70:

- 1.-3. (No change.)
- (e) (No change.)
- (f) No individual may receive more than one exception to the program's age criteria set forth in N.J.A.C. 10:140-2.1(a)1.

#### 10:140-2.3 Procedures for requesting and granting exceptions to eligibility standards

(a) Eligible applicants or consumers requesting exceptions shall adhere to the following procedures:

1. (No change.)
2. The written request for an exception shall be made to the Division and shall indicate the specific exception requested and provide justification; and
3. (No change.)
- (b) The Division shall review the request and make a written recommendation to the State Program Administrator. The State Program Administrator shall make a determination and inform the county designated agency of the results within 30 days from the date that the request was received by the Division.

### SUBCHAPTER 3. SCREENING, SERVICES AND APPEALS

#### 10:140-3.1 Screening

(a) Upon applicant inquiry to the county designated agency regarding the Personal Assistance Services Program, county designated agency staff shall obtain information necessary to conduct pre-application screening and shall complete the screening within five working days of applicant inquiry.

- (b) (No change.)
- (c) In the event the applicant appears to be eligible as a result of the screening, and Personal Assistance Services Program funding in the county designated agency is not presently available to provide services to the applicant, the applicant's name shall be placed on the waiting list maintained by the Division. The social and financial assessments, under N.J.A.C. 10:140-3.2, shall not be conducted at this time. Staff from the county designated agency shall inform the applicant in writing of this determination and advise the applicant that the documents necessary to process the application will be forwarded to the applicant when funding is available as determined by the Division. The social and financial assessments will be performed following completion of the application documents by the applicant. The position of the applicant's name on the waiting list shall be determined by the Division in accordance with the service priorities established under N.J.A.C. 10:140-1.5(b).

#### 10:140-3.2 Assessment

(a) The county designated agency shall arrange for a qualified assessor to perform an assessment within 30 days upon receipt of the application package, which includes the following:

- 1.-3. (No change.)
4. An Initial Consumer Plan of Service.

(b) Within 30 days of notification from the applicant of the completion of the application package, a qualified assessor, under (a) above, shall perform a social assessment of the applicant to determine if the applicant meets the eligibility criteria and to further determine the needs of the consumer.

(c) (No change.)

#### 10:140-3.3 Individual personal assistance services plan and cash management plan

(a) The individual personal assistance services plan shall be designed by the consumer in consultation with the county designated agency to meet his or her individualized needs for personal assistance services.

- (b) A personal assistance services plan shall include the following:
  1. A list of the personal assistance services to be provided;
  2. An estimate of the time needed and frequency of personal assistance services;
  3. A list of individuals and/or vendors who will provide the services denoted in (b)1 above; and
  4. An assessment of any cost share for which the consumer is to be responsible.

(c) The individual personal assistance services plan shall serve as the template for the creation of a consumer's cash management plan. The CMP shall serve as a budgetary document to show how a consumer's monthly cash allowance shall be utilized to meet the consumer's needs. A CMP must include at least:

1. The monthly cost and frequency of each service listed in (b)1 above;
2. The rate of pay that each individual or vendor named in (b)3 above; and
3. Other expenses that are mandated by the program as defined in N.J.A.C. 10:140-4.3(d) and 6.1(g).

(d) The county designated agency shall ensure that a social and financial reassessment is completed at 12-month intervals, or as often as necessary, commencing with the date of acceptance to the program. The social and financial reassessment shall be completed as follows:

1. The social reassessment shall be completed to determine if the consumer continues to meet the eligibility criteria pursuant to N.J.A.C. 10:140-2.1; and
2. The financial reassessment shall be completed to determine if the consumer is liable for cost share responsibilities, pursuant to N.J.A.C. 10:140-4.3.

(e) The consumer shall use no more than the monthly cash allowance authorized by the county designated agency under the approved cash management plan pursuant to (a) and (b) above. Cash allowance awarded to a consumer that remains unused after the end of the calendar year shall not accrue to the future use or benefit of that consumer, except to provide additional or emergency service hours. Requests from program consumers to use unspent funds to purchase additional service hours shall not be subject to appeal.

(f) Adjustments to increase the consumer's cash allowance shall be considered upon the request of the consumer, or shall be initiated upon the authorization of the county designated agency, subject to the availability of funding within the county designated agency.

(g) A consumer shall have only one active CMP at a time, but may revise their CMP monthly to adjust for changing needs.

(h) Cash management plans shall be developed by the consumer in consultation with the county designated agency, but shall not be considered to be active until approved by the State Program Administrator pursuant to (b) and (c) above.

#### 10:140-3.4 Disposition of application

(a)-(b) (No change.)

(c) In the event an applicant is determined eligible for the Personal Assistance Services Program and funding prohibits the start-up of services within 30 days from the date of the county designated agency notification to the applicant, pursuant to (a) and (b) above regarding the results of the social and financial assessments performed, such applicant shall be placed on a waiting list for services. An applicant's position on a waiting list shall be determined by the Division in accordance with N.J.A.C. 10:140-1.5(b).

## 10:140-3.5 Services

(a) (No change.)

(b) For the purposes of the Personal Assistance Services Program, the following service standards shall be met:

1. Program funds shall not be used for skilled professional medical services, including the supervision of registered nurses. It is not the responsibility of the Personal Assistance Services Program to arrange for or provide skilled nursing, therapy or related medical care and treatment services that the eligible consumer may need;

2. Personal assistance services provided for the purpose of receiving training or education shall not replace or duplicate those services provided by an educational institution as mandated by Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and

3. (No change in text.)

(c) (No change.)

## 10:140-3.6 Exceptions to service standards

(a) Exceptions to the service standards in N.J.A.C. 10:140-3.5(a), (b)2 and 3 shall be:

1. (No change.)

2. Reviewed on a case-by-case basis by the Division; and

3. Consumers have the right to appeal decisions regarding denials of the exception to the service standards. Appeals shall be challenges to the material facts of the case, and shall be made to the Division Director or designee, who shall be the ultimate authority to render a decision.

(b)-(d) (No change.)

## 10:140-3.7 Procedures for requesting and granting exceptions to service standards

(a) Eligible applicants or consumers requesting exceptions shall follow the procedures listed below:

1. Requests for exceptions to N.J.A.C. 10:140-3.5(a) through \*(d)\* \*(c)\* shall be made in writing; and

2. The written request for an exception shall be made to the Division and shall indicate the specific exception requested and provide justification.

(b) The Division shall review the request and respond to the request within 30 days.

## 10:140-3.8 Transfer of services to another county

(a) (No change.)

(b) In order to effect a transfer of personal assistance services, the eligible consumer shall notify the county of origin and the destination county of his or her intention to move. Notification shall be in writing or, where appropriate, verbally or through alternative communication methods. It is the consumer's responsibility to provide a recent copy of their current cash management plan.

1. (No change.)

## 10:140-3.9 Suspension of service and termination of service

(a)-(d) (No change.)

(e) Involuntary suspensions or terminations shall be a result of non-compliance with program rules and procedures, which include, but are not limited to:

1.-8. (No change.)

(f) (No change.)

## 10:140-3.11 Hearings and appeals

(a) Administrative hearings under this chapter shall be conducted pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

1. (No change.)

2. A consumer who has maxed out his or her eligibility for service under N.J.A.C. 10:140-2.1(a)1 or 8 shall not be eligible for a fair hearing, unless the consumer raises a challenge to a material fact.

3. (No change in text.)

(b)-(g) (No change.)

## SUBCHAPTER 4. INDIVIDUAL BUDGETS AND FEES

## 10:140-4.1 Contracting for services

(a) The consumer shall either:

1. Employ private individuals who are legally determined eligible to work as defined by the Internal Revenue Service (IRS) at I.R.C. § 31.3306(c)(2)-1(a)(2); or

2. Utilize the services of a vendor agency that can legally do business in the State of New Jersey.

## 10:140-4.2 Fees and individual budgets

(a) Fees for services under the Personal Assistance Services Program shall be based on an hourly rate determined by the consumer's cash management plan, which is established based upon the consumer's authorized plan of service hours. This number is then converted into a monthly dollar amount based on the flat rate as set forth in (b) below. Any additional costs that exceed that flat fee, shall be the financial responsibility of the county designated agency and not the Division.

(b) The reimbursement for personal assistance services shall not exceed a flat all-inclusive amount of \$15.00 per hour.

(c) (No change.)

(d) The fees for personal assistance services and assessments described in (b) and (c) above shall be reviewed by the Advisory Council every two years, or as needed, and recommendations made to the Division for adjustments.

## 10:140-4.3 Consumer cost share obligation fees and requirements

(a) A consumer's cost share obligation for personal assistance services shall only be determined by the gross annual income of the consumer. A consumer will have the responsibility for a cost share obligation only if that consumer's individual annual gross income exceeds the applicable eligibility limit of 350 percent of the Federal Poverty Level (FPL).

1. A consumer whose annual gross income is less than 350 percent of the FPL, for his or her family size, shall not be required to pay a cost share for personal assistance services.

(b) Failure of the consumer to pay the appropriate cost share obligation within 60 days of the date of billing, without good cause, shall be grounds for termination or suspension from the Personal Assistance Services Program.

(c) The Consumer Cost Share Obligation Table (set forth in the table in (j) below) indicates income ranges and associated percentages of the total cost of the service to be paid by a consumer whose income falls within those ranges shall be applied to eligible consumers. For the purposes of assessing consumer fees under the Consumer Cost Share Obligation Table set forth in (j) below, the county designated agency shall calculate family size and the consumer's individual annual gross income pursuant to the FPL at 350 percent.

(d) Each consumer shall have a current Worker's Compensation liability policy, which covers an employee's work-related personal injury claims prior to the direct employment of a domestic household employee under the program. This policy shall be paid for by the consumer.

(e) Each consumer shall provide verification of annual gross income for determination of applicable cost share obligation fees upon application to the Personal Assistance Services Program and every 12 months thereafter. The determination of the cost share obligation fees shall be made by the county designated agency and redetermined every 12 months.

1. (No change.)

(f) (No change.)

(g) The consumer receiving personal assistance services and each of their employees shall sign time sheets attesting to the hours of service rendered, and the individual personal assistant or provider agency shall then be paid by a fiscal intermediary service organization. Bills verifying receipt for services rendered or items purchased shall be submitted to the fiscal intermediary service organization for payment.

(h) Upon determination of the applicable cost share obligation pursuant to the table in (j) below, the fiscal intermediary service organization shall provide the consumer with a billing of the cost share obligation to be paid by the consumer on a monthly basis.

(i) All collected consumer cost share obligations shall be retained by the fiscal intermediary service organization for the provision of personal assistance services.

(j) The table below shall be updated annually in accordance with the change in the FPL as published by the U.S. Department of Labor. The amounts of the cost share obligations will be revised annually by a notice

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of administrative change published in the New Jersey Register; however, any change in the “income increment” or in the applicable percentage of the cost share obligation as listed in the table below shall be promulgated

through rulemaking pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.



Consumer Cost Share Obligation Table

Table with 12 columns: Federal Poverty Level (Family Size-1), Federal Poverty Level (Family Size-2), Federal Poverty Level (Family Size-3), Federal Poverty Level (Family Size-4), Federal Poverty Level (Family Size-5), Federal Poverty Level (Family Size-6), Federal Poverty Level (Family Size-7), Federal Poverty Level (Family Size-8), Federal Poverty Level (Family Size-9), Federal Poverty Level (Family Size-10), Federal Poverty Level (Family Size-11), Federal Poverty Level (Family Size-12). Each column contains sub-columns for Starting Range, Ending Range, Cost Share Percentage, and Income Increment.

10:140-4.4 Standards for adjustments in consumer cost share obligation  
 (a) Adjustments in consumer cost share obligation shall be based on verifiable expenses that result from the consumer's disability that are non-routine in nature and are due to unforeseen and emergent circumstances. Items that can be considered for reduction of cost share shall be limited to:

- 1.-2. (No change.)
3. Adaptations to home or vehicle that promote access or safety and are related to the consumer's disability;
4. Expenses paid by the consumer for personal care services that are beyond the services provided by the program, but meet the definition of personal care services utilized by the program;
5. Adaptive or assistive technology to compensate for a disability;
6. Expenses related to the care of a certified service animal; or
7. Unreimbursed costs related to the repair of a mobility device or adaptive equipment.

(b) Adjustments in cost share obligations shall be re-evaluated annually or more frequently if necessary in order to redetermine the eligible consumer's ability to pay for services. Reductions in cost share shall be at the discretion of the State Program Administrator based on the list of expenses in (a)1 through 7 above. Appeals of denials of cost share reduction shall be made to the Division Director, who shall render a final decision.

10:140-4.5 Procedures for requesting adjustments in consumer cost share obligation

- (a)-(g) (No change.)

#### SUBCHAPTER 5. PERSONAL ASSISTANTS

10:140-5.1 Requirements for personal assistants/domestic household employees

(a) All persons desiring to serve as personal assistants under the Personal Assistance Services Program shall be at least 18 years of age or of age to obtain working papers.

(b) Personal assistants are considered to be domestic household employees as defined by the Internal Revenue Service at I.R.C. § 31.3306(c)(2)-1(a)(2), and shall adhere to all criteria associated with that designation.

#### SUBCHAPTER 6. CONSUMER INFORMATION AND PERSONAL ASSISTANT TRAINING

10:140-6.1 Training requirements

(a) Newly eligible consumers under the Personal Assistance Services Program shall complete one mandatory training course entitled Orientation to Cash Model to be offered by the designated training agency, under contract with the Division. Consumers who have been previously trained may attend a refresher course as they deem it to be necessary.

1. Training will be available in lecture format and in self-paced format.

(b) All personal assistants may attend the Basic Techniques of Personal Assistance Course when offered, but only at the discretion of the consumer for whom they are employed.

(c) Training as set forth in (a) above shall be mandatory and no waivers of the requirement shall be considered.

(d) Consumer requests to receive in-home training sessions on the required training course shall be considered on a case-by-case basis.

(e) (No change.)

(f) The consumer shall provide or ensure the provision of necessary information on personal assistants to the designated training agency to enable compliance with (b) above. Such information shall be furnished upon request by the designated training agency, as approved by the State Program Administrator, and shall include, but is not limited to, names, addresses and telephone numbers of personal assistants, and as appropriate, written requests for a waiver of the Basic Techniques of Personal Assistance Services course.

(g) Consumers may request that the training vendor provide advanced or disability/task-specific training for their assistants, the cost of which will be the responsibility of the consumer and shall be deducted as an expense on the consumer's CMP.

(h) Newly hired staff of the county designated agency shall obtain training in the cash model within 45 days of their date of hire.

10:140-6.2 Penalties for noncompliance with training requirements

Consumers who fail to complete the required course shall have their personal assistance services suspended and/or terminated, pursuant to N.J.A.C. 10:140-3.9.

10:140-6.3 Compensation for attendance at training courses

(a) (No change.)

(b) Personal assistants shall be issued a stipend upon completion of training referenced in N.J.A.C. 10:140-6.1(b) at the rate of \$10.00 per hour by the designated training agency responsible for the administration of the Statewide training program under contract with the designated State agency.

#### SUBCHAPTER 7. COMPLIANCE WITH LAWS

10:140-7.1 Requirements of fiscal intermediary service organization

(a) The fiscal intermediary service organization shall abide by all laws and regulations concerning employment of persons hired to administer or work in the Personal Assistance Services Program including, but not limited to, the Rehabilitated Convicted Offenders Act, N.J.S.A. 2A:168A-1 et seq., and the Immigration Reform and Control Act of 1986 (P.L. 99-603).

(b) At the consumer's discretion, they may choose to have the fiscal intermediary service organization conduct a background check on a perspective employee. The cost of the background check shall be reflected on the CMP and be deducted from the consumer's cash allotment.

(c) The fiscal intermediary service organization shall establish a separate accounting regarding receipt and use of cost share fees collected to ensure that cost share funds are used to expand or enhance program services in that county. These funds shall not supplant any existing allocation. This separate accounting and supporting documentation shall be made available to the designated State agency.

10:140-7.2 Duties of county designated agency

(a) Under the direction of the designated State agency, the county designated agency shall perform the following duties:

1.-5. (No change.)

6. Designate a staff person to serve as a contact person for applicants, eligible consumers and personal assistants involved in the program and document such contacts;

Recodify existing 8. and 9. as 7. and 8. (No change in text.)

9. Serve as liaison to the designated State agency for the program; and

10. (No change in text.)

10:140-7.3 State Consumer Advisory Council on Personal Assistance Services

(a) The duties of the State Consumer Advisory Council on Personal Assistance Services shall consist of the following:

1.-4. (No change.)

5. Implement (a)1 through 4 above through utilization of staff and equipment as provided by the Division of Disability Services, Department of Human Services.

(b) The State Consumer Advisory Council on Personal Assistance Services shall adhere to the following requirements regarding membership:

1. The Advisory Council shall consist of 19 members appointed by the Commissioner, at least 75 percent of whom are consumers of personal assistance services;

2. Members shall serve for a term of three years from the date of their appointment, effective on \*[(the effective date of these amendments)]\* **\*April 16, 2012\***, and until their successors are appointed. Vacancies in the membership shall be filled in the same manner provided for the original appointments. A member of the council shall be eligible for reappointment. The Commissioner shall appoint the council to staggered terms, which shall begin at the beginning of each fiscal year.

i. Seven members of the Council shall serve a one-year term;

ii. Six members of the Council shall serve a two-year term; and

iii. Six members of the Council shall serve a three-year term;

3. The Advisory Council shall have the following county-based makeup:

i. No less than five of the members shall be residents of Central Jersey, which for the purposes of this subparagraph, shall consist of the counties of Burlington, Hunterdon, Mercer, Middlesex, Monmouth, Somerset and Warren;

ii. No less than five of the members shall be residents of North Jersey, which for the purposes of this subparagraph, shall consist of the counties of Bergen, Essex, Hudson, Morris, Passaic, Sussex and Union; and

iii. No less than five of the members shall be residents of South Jersey, which for the purposes of this subparagraph, shall consist of the counties of Atlantic, Camden, Cape May, Cumberland, Gloucester, Ocean and Salem;

4. Three members, appointed as follows:

i. One shall be a person representing a fiscal intermediary service organization;

ii. One representing a training vendor; and

iii. One from a vendor agency that provides personal care services;

5. The Commissioner or designee shall serve as a member of the Advisory Council;

6. The Advisory Council shall organize no later than 30 days after the appointment of its members and shall select a chairperson and vice chairperson from among its members and a secretary who need not be a member of the Advisory Council; and

\*[5.]\* \*7.\* (No change in text.)

(c) Local advisory bodies may form in the best interest of the program, but are not mandated and shall have no official duties.

## LAW AND PUBLIC SAFETY

### (a)

#### DIVISION OF CONSUMER AFFAIRS

#### NEW JERSEY STATE BOARD OF OPTOMETRISTS

#### New Jersey State Board of Optometrists Rules

#### Readoption with Amendments: N.J.A.C. 13:38

Proposed: April 4, 2011 at 43 N.J.R. 822(a).

Adopted: September 21, 2011 by the State Board of Optometrists, Mitchell Fink, O.D., President.

Filed: March 15, 2012 as R.2012 d.077, **with substantial changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3), **with the proposed amendments to N.J.A.C. 13:38-1.4(b)3 and 2.1(c) not adopted.**

Authority: N.J.S.A. 45:12-1 et seq.

Effective Dates: March 15, 2012, Readoption;  
April 16, 2012, Amendments.

Expiration Date: March 15, 2019.

#### Summary of Public Comments and Agency Responses:

The official comment period ended June 3, 2011. The Board received 10 comments from the following individuals:

1. Charles H. Fitzpatrick, O.D., President of New Jersey Society of Optometric Physicians (NJSOP)

2. Matthew S. Halpin, Opticians Association of New Jersey

1. COMMENT: Dr. Fitzpatrick commented on N.J.A.C. 13:38-1.4, which regulates practice under assumed names and requires disclosure of practice names. He expressed concern that the word "advertising" referred to in paragraph (b)1 should be more specific as to the media format included. Furthermore, he was concerned that the reporting requirement to the Board specified paragraph (b)3 appeared burdensome and duplicative because every registered corporation pursuant to the Professional Services Corporation Act, is required to file the identical information with the State each year. He also expressed concern that subsection (c) is unclear as to whether each individual corporate officer must comply with the filing requirement or whether each officer is responsible that this filing has been accomplished for the entity each year.

RESPONSE: The Board believes that the term "advertising" should remain broad so that new advertising formats that may become available in the future would be regulated under this section.

The Board agrees with Dr. Fitzpatrick that the reporting requirement to the Board specified in paragraph (b)3 is duplicative and burdensome to licensees. Licensees are required to file with the Board the same information that they must provide to the State pursuant to the Professional Services Corporation Act. Additionally, the Board does not use this information in its regulation of licensees. The Board is therefore not adopting the amendment proposed at paragraph (b)3 and is deleting existing paragraph(b)3 in its entirety upon adoption. Additional public notice and comment pursuant to N.J.A.C. 1:30-6.3 regarding this change is not required because the effect of the change is to relieve licensees of a ministerial requirement; the public would not be prejudiced because this information is still required by other means and would still be available as a public record.

2. COMMENT: Dr. Fitzpatrick commented on N.J.A.C. 13:38-2.1(c), the general rules of optometric practice. NJSOP believes that revisions to this subsection should reflect advances in technology, current practice patterns, and the use of ancillary personnel all designed to improve the accuracy and quality of the optometric eye examination and improve office efficiency to the benefit of the consumer. NJSOP believes that the proposed revision to this subsection is overreaching and regressive. Dr. Fitzpatrick expressed concern that the requirement that "any procedure involving contact with the surface of the eye shall be performed only by the optometrist" constitutes a substantive change from the existing language with broader implications than the presumed intent of the original rule. He points out that the new restriction ignores established technology, which already allows for safe, accurate, and benign measurement and routine office procedures to be performed by others who do not have a doctoral degree. Modern optometric practice is equipped with several modalities of measurement of ocular anatomy and performance that employ mechanical transducers, ultrasound, and laser technologies, some of which approximate but do not deform the ocular tissues. He believes that there is no reason why a properly trained technician under the direct supervision of an optometric physician cannot safely and accurately perform these measurements or continue to safely perform other routine office procedures. He believes that this revision adds no real benefit to the consumer but will add to the cost of patient care.

RESPONSE: As stated in the Summary in the notice of proposal, the Board proposed to amend the existing language in N.J.A.C. 13:38-2.1(c) in order to clarify that optometrists may not delegate to ancillary personnel any duties that involve contact tonometry. However, it appears from the comment that this change has created additional confusion over which tests must be performed by optometrists and which tests may be performed by trained technicians. The Board notes that the existing language, which requires any procedure involving contact tonometry be performed by an optometrist, has been sufficient to protect New Jersey consumers from harm. Therefore, the Board is not adopting the proposed amendment to N.J.A.C. 13:38-2.1(c).

3. COMMENT: Dr. Fitzpatrick commented on N.J.A.C. 13:38-2.3, the section requiring optometrists to prepare, and maintain for at least seven years, contemporaneous, legible, and permanent professional treatment and billing records made to patients or third-party carriers for professional services. He expressed concern that the proposed revision of the rule calls for more burdensome paperwork and record archiving for a period of time well beyond what is required in the normal course of business. He pointed out that, in many settings, the clinical record is maintained separately from the claim history and financial record of the practice or retail establishment. The HINT legislation and the Health Claims Authorization, Processing and Payment Act, N.J.S.A. 17B:30-48, call for a maximum look-back period on claim submission and claim payment review/recovery of three years. He states that no sensible explanation has been offered as to why the proposed revision should exceed industry standards.

RESPONSE: The Board considers the billing record to be part of the patient record, and the Board has always required that patient records be retained for seven years, as do most healthcare boards. Consumers frequently have questions about current and past bills, and the Board