§ 31.04 Regulatory powers of the commissioner.

(a) The commissioner shall have the power to adopt regulations to effectuate the provisions and purposes of this article, including, but not limited to, the following:

1. establishing classes of operating certificates based upon such factors as physical plant, program, and staff.

2. setting standards of quality and adequacy of facilities, equipment, personnel, services, records, and programs for the rendition of services for the mentally disabled pursuant to an operating certificate.

3. specifying a definite period for which the operating certificate will be in effect for each class.

* 4. establishing procedures for the issuance, amendment, and renewal of operating certificates, including temporary operating certificates, and for the suspension or revocation of operating certificates. Such procedures shall specify that no application for the issuance or renewal of an operating certificate for a hospital, which is operated as part of a hospital as defined in article twenty-eight of the public health law, shall be effective until such hospital is granted approval to admit patients in emergencies for immediate observation, care and treatment in accordance with section 9.39 or 9.40 of this chapter, provided that the commissioner shall waive this requirement for two year periods upon his determination that (i) there is no need for additional beds for emergency psychiatric admissions in the local geographic area, (ii) the hospital lacks the physical capacity to reasonably accommodate such emergency admissions without extensive structural changes, (iii) the hospital does not and reasonably could not provide the scope of services necessary to assure adequate and appropriate psychiatric care and treatment for patients in emergency situations, or (iv) the hospital has agreed to accept referrals of involuntary psychiatric patients under an emergency admissions system which has been approved by the commissioner. Provided, however, nothing in this paragraph shall be interpreted to require a hospital without an onsite emergency room to accept patients in need of emergency observation, care and treatment.

* NB Effective until July 1, 2027

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* NB Effective July 1, 2027

5. setting for the operation of certified family care homes standards governing adequacy of the building and equipment, fire protection, safety, sanitation, food service, programs for the rendition of service, recreation and religious participation, medical services, personnel, insurance, record keeping procedures and statistical records as well as appropriate standards governing or precluding ownership of more than one such home.

6. establishing criteria for use by staff of department facilities, social services officials and directors of local governmental units for determining the appropriateness of referring patients to family care homes, other community residences and residential care centers for adults.

7. establishing criteria for determining the public need for family care homes, other community residences and residential care centers for adults in each geographical area of the state.

8. establishing a schedule of fees for the purpose of processing applications for the issuance of operating certificates. All fees pursuant to this section shall be payable to the office for deposit into the general fund.

* (b) The commissioner shall promulgate regulations establishing criteria for the operation of certified comprehensive psychiatric emergency programs including but not limited to criteria governing the staffing, staff qualifications, equipment, record keeping, safety requirements, required services, discharge planning, appropriate linkages to alcohol and substance abuse programs, space requirements, quality and adequacy of such programs, and the required posting of a notice of patient rights. In addition, the regulations shall require such programs to include appropriate facilities to permit persons to rest comfortably while awaiting observation, care or treatment.

* NB Repealed July 1, 2027

* (c) Prior to the adoption, amendment, suspension or repeal of any regulation under this article, the commissioner shall give notice and offer any person or other agency an opportunity to present data, views, or arguments, as follows:

1. The commissioner shall, at least sixty days prior to the adoption, amendment, suspension or repeal of a regulation, notify the mental health services council for its advice, in accordance with subdivision (i) of section 7.05 of this chapter.

2. The commissioner shall, at least twenty-one days prior to the adoption, amendment, suspension or repeal of a regulation, (i) publish notice of its proposed action in the state bulletin and, when appropriate in the judgment of the commissioner, in such newspaper or newspapers of general circulation or, in such professional publications as the commissioner may select, and (ii) notify any person or agency filing written request, such request to be renewed yearly in December,

for notice of proposed action which may affect that person or agency, notification being by mail or otherwise in writing to the last address specified by the person or agency. The commissioner may charge for such notice a fee, which shall consist of the cost of preparation, handling, and postage for the notice.

3. The notice shall (i) refer to the statutory authority under which the action is proposed, (ii) give the time and place of any public hearing, or state the manner in which data, views, or arguments may be submitted to the commissioner by any person or state agency, whether orally or in writing, (iii) either state the express terms or indicate where the express terms may be obtained and describe the substance of the proposed regulation, amendment, suspension or repeal, or state the subjects and issues involved, and (iv) include any additional matter required by any statute.

4. Irrespective of the requirements of any other statute, if the commissioner finds that it is necessary for the preservation of the public health, safety, or general welfare to dispense with the requirements of notice and opportunity to present views on the proposed regulation, amendment, suspension, or repeal under the provisions of this subdivision, the commissioner may dispense with such requirements, or any part thereof, and adopt the regulation, amendment, suspension, or repeal as an emergency measure. The commissioner's finding and a brief statement of the reasons for his finding shall accompany the emergency measure. Such emergency measure shall not remain in effect for longer than sixty days unless within that time the commissioner complies with paragraphs (1) and (2) of this subdivision, and takes final action relating to the emergency measure.

5. Upon the adoption, amendment, suspension, or repeal of a regulation, the commissioner shall publish notice of the action taken in the state bulletin. The notice shall refer to the statutory authority under which the action was taken and shall include either the express terms or describe the substance of such action and where the express terms may be obtained.

6. No regulation hereafter adopted is valid unless adopted in substantial compliance with this subdivision, provided, however, that the inadvertent failure to mail notice to any person or agency as provided in this subdivision shall not invalidate any regulation adopted hereunder. A proceeding to contest any regulation on the ground of non-compliance with the procedural requirements of this subdivision must be commenced within four months from the effective date of the regulation.

7. The validity or applicability of any regulation may be determined upon petition presented under article four of the civil practice law and rules or in an action for a declaratory judgment when it appears that the regulation or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights, property or privileges of the petitioner. The department shall be made a party to the proceedings. Such a special proceeding may not be maintained or a declaratory judgment rendered unless the petitioner has first requested the commissioner to pass upon the validity or applicability of the regulation in question. The court shall declare the regulation invalid or inapplicable if it finds that it violates constitutional provisions or exceeds the statutory authority of the department. Nothing in this section shall be construed to prohibit the determination of the validity or applicability of the regulation in any other action or proceeding in which its invalidity or inapplicability is asserted, and nothing in this section shall be construed to limit any rights which may exist under article seventy-eight of the civil practice law and rules.

* NB Effective until July 1, 2027--on which date this subdivision (c) becomes subdivision (b)

(d) The commissioner of mental health shall be authorized to promulgate regulations which impose reasonable restrictions on the marketing and advertising practices by or on behalf of any facility, which are targeted toward the provision of services to persons aged twenty-one years or younger. These reasonable restrictions may include, but not be limited to, prohibitions against false, deceptive or misleading advertising. However, the regulations may not restrict advertising which solely provides factual information that describes the product or services offered or information regarding the cost of

products or services, nor may the regulations require prior submission or approval of advertising by the office of mental health. The commissioner shall be authorized to inquire into the marketing practices of any applicant or holder of an operating certificate.

(e) The commissioner shall promulgate rules and regulations prohibiting the co-mingling of children and adolescent patients with adult patients, in hospitals licensed by the office. Such rules and regulations shall provide that children and adolescents shall not be co-mingled with adults in residential areas of such hospitals, nor shall children and adolescents receive services in groups which include adults. In extraordinary circumstances, such co-mingling may be permitted upon written approval of the office, considering the clinical needs of patients, as well as applicable health and safety concerns. The provisions of this subdivision shall not apply to residential treatment facilities for children and youth.