

NYC DEPARTMENT FOR THE AGING

Notice of Public Hearing and Opportunity to Comment on Proposed Rules

What are we proposing? The Department for the Aging is proposing rules in relation to its authority pursuant to section 21-204 of the Administrative Code, regarding social adult day care programs operating in New York City. The proposed rules establish the procedures for the ombudsperson complaint process, which covers the processing of complaints received and accepted by the ombudsperson as well as investigations, referrals and any factual determinations made. It also establishes a civil penalty schedule for incurred violations as well as new registration reporting requirements and fees.

When and where is the hearing? The Department for the Aging (DFTA) will hold a public hearing on the proposed rule. The public hearing will take place at 10 a.m. on December 20, 2019. The hearing will be in the DFTA hearing room at 2 Lafayette Street, 6th floor, Room 624.

How do I comment on the proposed rules? Anyone can comment on the proposed rules by:

- **Website.** You can submit comments to the Department for the Aging through the NYC rules website at <http://rules.cityofnewyork.us>.
- **Email.** You can email comments to OmbudspersonRules@aging.nyc.gov.
- **Mail.** You can mail comments to Department for the Aging (Attn: Ombudsperson Unit/Rules Comments), 2 Lafayette Street, 7th Floor, New York, NY 10007.
- **By speaking at the hearing.** Anyone who wants to comment on the proposed rule at the public hearing must sign up to speak. You can sign up before the hearing by calling (212) 602-7751. You can also sign up in the hearing room before the hearing begins on December 20, 2019. You can speak for up to three minutes.

Is there a deadline to submit comments? Yes, comments must be submitted and received by the Agency by no later than December 20, 2019.

What if I need assistance to participate in the hearing? You must tell the Office of Legal Affairs if you need a reasonable accommodation of a disability at the hearing. You must tell us if you need a sign language interpreter. You can tell us by mail at the address given above. You may also tell us by telephone at (212) 602-7751. Advance notice is requested to allow sufficient time to arrange the accommodation. Please tell us by December 6, 2019.

This location has the following accessibility option(s) available: The location is accessible to individuals using wheelchairs or other mobility devices.

Can I review the comments made on the proposed rules? You can review the comments made online on the proposed rules by going to the website at <http://rules.cityofnewyork.us/>. A

few days after the hearing, copies of all comments submitted online, copies of all written comments, and a summary of oral comments concerning the proposed rule will be available to the public on the DFTA website.

What authorizes the Department for the Aging to make this rule? Section 1043 of the City Charter and section 21-204 of the Administrative Code authorize the Department for the Aging to make this proposed rule. This proposed rule was not included in the Department for the Aging's regulatory agenda for this Fiscal Year because it was inadvertently omitted.

Where can I find the Department for the Aging's rules? The Department for the Aging's rules are in title 69 of the Rules of the City of New York.

What laws govern the rulemaking process? The Department for the Aging must meet the requirements of Section 1043 of the City Charter when creating or changing rules. This notice is made according to the requirements of Section 1043 of the City Charter.

Statement of Basis and Purpose of Proposed Rule

Local Law 9 of 2015, codified at section 21-204 of the Administrative Code, authorizes and requires the Department for the Aging (DFTA) to regulate social adult day care (SADC) programs. These programs are structured programs which provide functionally impaired adults with supervision, care, nutrition, and opportunities to socialize, along with related services. A functionally impaired individual is a person who requires the assistance of another person in at least one of the following activities of daily living (toileting, mobility, transferring, or eating) or who needs supervision due to a cognitive and/or psycho-social impairment.

Due to concerns about potential violations of non-compliance in the SADC industry including allegations of widespread client ineligibility, and the sometimes-diminished ability of participants in SADC programs to effectively advocate for themselves, Local Law 9 also required the creation of an ombudsperson office within DFTA. The ombudsperson is responsible for receiving comments and complaints about SADCs and investigating those complaints. As appropriate, the ombudsperson will respond to those investigations by, among other things, alerting the managed long term care (MLTC) plans known to be reimbursing a particular SADC and by notifying other government regulators of the results of its investigation.

DFTA is now proposing to promulgate rules for the ombudsperson complaint process, which covers the processing of complaints received, reviewed and accepted as a SADC complaint by the ombudsperson. Upon acceptance of the complaint, the ombudsperson will refer the complaint to relevant government entities, as warranted, or conduct an investigation. After an investigation, the ombudsperson can make factual determinations, approve corrective action plans and impose civil penalties.

Section 21-204(c) of the Administrative Code also requires SADCs to register certain information with the Department and regularly update that information. The proposed rule

details the information required to be submitted with registration and sets a fee of \$900 for registering and \$240 for updating information with the Department. The law also provides for rules to set the civil penalties for violations. A schedule of these civil penalties is also proposed in this rule.

New material is underlined.

[Deleted material is in brackets.]

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Section 1. Title 69 of the Rules of the City of New York is amended by adding a new Chapter 2, to read as follows:

CHAPTER 2
SOCIAL ADULT DAY CARE

SUBCHAPTER 1
OMBUDSPERSON’S OFFICE

§ 2-01 Definitions. As used in this chapter, the following terms have the following meanings:

Commissioner. The term “Commissioner” means the commissioner of the Department for the Aging.

Complaint Subject. The term “Complaint Subject” means the program which is the subject of a complaint filed pursuant to section 2-02.

Department. The term “Department” means the Department for the Aging or, regarding the issuing of notices of violation, any other agency that may be designated by the Mayor to issue a notice of violation to enforce the provisions of this chapter or section 21-204 of the Administrative Code, pursuant to paragraph 3 of subdivision c of such section 21-204.

Dismiss. The term “Dismiss” means to dismiss without prejudice to a future complaint.

Managed Long Term Care or MLTC. The term “Managed Long Term Care” or “MLTC” means an entity that has received a certificate of authority from the New York State Department of Health to provide, or arrange for health and long term care services, including social adult day services, to people who are chronically ill or disabled and which held a contract for reimbursement with the Complaint Subject on the date of the complaint.

Social Adult Day Care or SADC. “Social Adult Day Care” or “SADC” has the same meaning as the term “social adult day care program” and defined in the State SADC Regulations.

State SADC Regulations. The term “State SADC Regulations” means the regulations of the Director of the New York State Office for the Aging regarding social adult day care programs, pursuant to section 215 of the elder law, and promulgated at 9 N.Y.C.R.R. § 6654.20, or such successor regulations.

§ 2-02 Filing Complaints.

a. Complaints may be filed with the ombudsperson by a participant of an SADC; by the parent, child, spouse, sibling, or legal guardian of a participant of a SADC; or by a person working at an SADC as an employee, contractor, or volunteer. Complaints filed by any other person may also be received at the discretion of the ombudsperson, who will consider, among other factors, the nature or severity of the alleged misconduct, the availability of evidence or witnesses, the credibility of the complaint, and the number of complaints received by the ombudsperson regarding the SADC.

b. Complaints to the ombudsperson may be submitted in a form and manner determined by the ombudsperson. If any complaint is submitted anonymously or without contact information, the ombudsperson will not be obligated to provide any notice to the complainant with respect to that complaint, notwithstanding any other provision of this chapter.

§ 2-03 Initial Processing of Complaints.

a. When a complaint is received, the ombudsperson will notify the complainant via email or first-class mail that their complaint has been received.

b. Upon receipt of a complaint, the ombudsperson will determine whether the Complaint Subject is operating as an SADC in New York City. If so, the complaint will be accepted. If not, the complaint will be dismissed.

c. The ombudsperson will determine whether the Complaint Subject has registered with the Department, as required by subdivision b of section 21-204 of the Administrative Code. If not, the ombudsperson will notify the Complaint Subject via email or first-class mail and notify the official responsible for enforcing such requirement of the SADC’s failure to register. Upon notification, the official may issue a notice of violation, returnable to the Office of Administrative Trials and Hearings, with a civil penalty pursuant to the schedule set forth in section 2-31 of this chapter.

§ 2-04 Referring Complaints.

a. Where the ombudsperson accepts a complaint that includes a matter within the sole jurisdiction of another agency, including but not limited to the Department of Buildings, the Department of Health and Mental Hygiene, the Fire Department, the Commission on Human Rights, or the state Office of the Medicaid Inspector General, the ombudsperson will refer the complaint to the other agency.

b. Where the ombudsperson accepts a complaint that includes a matter partly within the jurisdiction of another agency, the ombudsperson may refer the entire complaint to the other agency where, in the determination of the ombudsperson, it is appropriate for the entire complaint to be investigated by a single agency, or may refer only those elements of the complaint that are within the jurisdiction of the other agency to that agency.

c. If the ombudsperson refers any element of an accepted complaint to another agency pursuant to this section, the ombudsperson must (i) notify the Complaint Subject of its referral, (ii) notify the state Department of Health, the state Office for the Aging, and the state Office of the Medicaid Inspector General of the complaint and its referral, and (iii) notify the complainant of its referral. All such notices must be sent by email or first-class mail. If the ombudsperson referred the entire complaint to another agency, the ombudsperson will dismiss the complaint and notify the Complaint Subject and the complainant, by email or first-class mail, that the complaint has been referred to another agency and dismissed before the ombudsperson.

§ 2-05 Investigating Complaints.

a. If an accepted complaint has not been referred entirely to another agency or dismissed pursuant to subdivision c of section 2-04, the ombudsperson will investigate the complaint.

b. As part of such investigation, the ombudsperson may require that the Complaint Subject or an MLTC provide any information or records necessary to conduct such investigation. The ombudsperson may also visit the Complaint Subject facilities and other locations relevant to the subject matter of the complaint during normal operating hours, conduct interviews, inspect any records required to be maintained by the Complaint Subject by the State SADC Regulations, and collect any other relevant evidence necessary to conduct a thorough investigation.

c. If access to any property or records the ombudsperson seeks to inspect pursuant to this section is denied, the ombudsperson may seek judicial authorization and may access that property or records pursuant to the authorization. In exigent circumstances where there is an imminent and serious threat to health or safety, the ombudsperson may enter on any property without the judicial authorization to inspect for compliance with section 21-204 of the Administrative Code, in accordance with law.

§ 2-06 Factual Determinations.

a. Upon completion of its investigation, the ombudsperson will determine either that there is insufficient evidence or sufficient evidence to substantiate a violation of the provisions of subdivision a of section 21-204 of the Administrative Code.

b. If the ombudsperson determines that there is insufficient evidence of a violation, the complaint will be dismissed. The ombudsperson will notify the Complaint Subject, all known MLTCs, and the complainant, by email or first-class mail, that the complaint has been dismissed.

c. If the ombudsperson determines that there is sufficient evidence of a violation, a factual determination, in writing, describing the violation and the evidence of the violation will be made. The ombudsperson will notify the Complaint Subject, all known MLTCs, and the complainant, by email or first-class mail, of the determination that there is sufficient evidence of a violation. The notice must include the written factual determination. The notice must also include an explanation of the appeals process described in section 2-07, including that the determination may be modified or overturned upon an appeal.

§ 2-07 Appeals of Factual Determinations.

a. A Complaint Subject or any MLTC may appeal a factual determination that there was a violation to the Commissioner.

1. A notice of appeal must be filed with the Commissioner, at the address indicated in the notice of the factual determination, within 10 days of the factual determination that there was a violation. The notice of appeal must include the full name of the appellant, the identity and location of the Complaint Subject, a copy of the factual determination being appealed, and a statement that the appellant intends to appeal the factual determination.

2. The appeal must be perfected within 20 days of the factual determination. The appeal must be filed in writing with the Commissioner at the address indicated in the notice of the factual determination. The appeal must include the identity of the Complaint Subject, a copy of the factual determination being appealed, and a statement of the reasons why the Complaint Subject believes the factual determination to be incorrect.

3. Petitions for an extension of these deadlines may be presented in writing before the due date for a notice of appeal or the perfection of the appeal and will be granted upon a showing of reasonable cause.

4. The Commissioner will make best efforts to render a written decision as to whether the factual determinations are correct or incorrect, including a statement of the reasons for the decision, within 60 days of receipt of the perfected appeal. The Commissioner will provide its decision, by email or first-class mail, to the Complaint Subject, all MLTCs, and the complainant.

5. A written decision by the Commissioner upholding or modifying a factual determination will be considered a factual determination subject to section 2-08.

b. The ombudsperson may not issue a notice of violation or impose civil penalties pursuant to section 2-08 until: (i) the 10-day period during which an appeal may be noticed has elapsed; or (ii) the 20-day period during which an appeal may be perfected has elapsed where a notice of appeal has been timely filed; or (iii) until the Commissioner has rendered a written decision on an appeal where a perfected appeal has been timely filed.

c. If the Complaint Subject or an MLTC files a notice of appeal or perfects its appeal, the ombudsperson will notify all MLTCs of the action by email or first-class mail. The notice must

include an explanation of the appeals process, including that the factual determination made by the ombudsperson may be modified or overturned upon appeal.

d. The written decision of the Commissioner pursuant to this section may not be appealed.

§ 2-08 Corrective Action Plans and Violations.

a. After making a factual determination of a violation pursuant to section 2-06, the ombudsperson will request a corrective action plan from the Complaint Subject.

1. Along with or in addition to the notice of a factual determination made to the Complaint Subject pursuant to subdivision c of section 2-06, the ombudsperson will request that the Complaint Subject develop a corrective action plan in response to such determination.

2. The ombudsman may approve a corrective action plan provided by the Complaint Subject where the ombudsperson determines such plan is sufficient to resolve the violation that was the subject of the factual determination, and where the Complaint Subject provides a certification that all MLTCs have consented to the corrective action plan as sufficient to address the violations. If the corrective action plan is approved, the complaint will be marked resolved and the Complaint Subject will be responsible for implementing the corrective action plan.

3. In determining whether a corrective action plan is sufficient pursuant to paragraph 2 of this subdivision, the ombudsperson may consider the seriousness of the violation, the extent of any injuries or other detrimental effects caused by the violation, the Complaint Subject's past record of any related violations, and the Complaint Subject's past and present efforts to prevent any violations. The ombudsperson may also consider whether the corrective action plan identifies with specificity the causes of each violation described in the factual determination, provides a plan sufficient to correct each violation, and provides a plan to prevent the recurrence of each violation.

4. Where a complaint has been resolved through the approval of a corrective action plan, the ombudsperson will notify the complainant by email or first-class mail that a corrective action plan has been implemented and the complaint has been resolved.

5. The ombudsperson will monitor compliance with an approved corrective action plan through the investigative tools provided in section 2-05. If the ombudsperson determines the Complaint Subject has failed to fully implement the corrective action plan, the ombudsperson may make a new factual determination pursuant to section 2-06, and may consider the corrective action plan to not be implemented in accordance with subdivision b of this section.

b. The Department may issue a notice of violation, returnable to the Office of Administrative Tribunals and Hearings, and impose a civil penalty in accordance with the schedule in section 2-31, when a corrective action plan is not implemented within 60 days of a request made pursuant to this section, or when the ombudsperson determines the Complaint Subject has failed to implement an approved corrective action plan.

SUBCHAPTER 2
REGISTRATION

§ 2-21 Registration Requirements.

a. A SADC must register on the Department's website or using an electronic form as designated by the Department in accordance with subdivision b of section 21-204 of the Administrative Code. Such registration must include at least the following information:

1. Registrant's name and if SADC is operating under any other business name or names;
2. Registrant's address;
3. Registrant's phone number;
4. Registrant's Tax ID;
5. Days and hours of operation;
6. Year SADC established;
7. SADC Director's name and contact information;
8. Registrant's corporate structure and ownership;
9. Registrant's corporate address;
10. Date of Food Service Establishment Permit (if applicable);
11. Certificate of Occupancy (yes/no);
12. Certified with NYS Office of Medicaid Inspector General (yes/no);
13. Name of local fire jurisdiction and date notified of SADC's presence;
14. Physical accessibility of the SADC facility;
15. Contracted Managed Long Term Care plans;
16. Number of work shifts per day;
17. Anticipated average attendance per shift or per day; and
18. Anticipated average number of staff per shift or per day.

b. A fee of \$900 will be charged for each SADC registration.

c. A SADC must submit changes to any of the information required by subdivision a of this section on the Department's website or an electric form designated by the Department within 30 days of the effective date of such changes. A fee of \$240 will be charged for each such submission.

d. A SADC must notify the Department within 30 days of ceasing operation and request its registration be terminated.

§ 2-22 Registration Civil Penalties.

a. A business entity that operates as a social adult day care without registering shall be subject to a civil penalty pursuant to the schedule set forth in section 2-31.

SUBCHAPTER 3
PENALTIES

§ 2-31 Penalty Schedule.

Civil penalties for violations of this chapter or section 21-204 of the Administrative Code, shall be provided follows:

<u>Violation</u>	<u>Penalty</u>
<u>Failure to Register with the Department</u>	<u>\$1,000 per each day the SADC is operating</u>
<u>Failure to Submit Changes to Registration to the Department</u>	<u>\$500 per each day the SADC is operating</u>
<u>Failure to Adhere to Program Standards</u>	<u>\$500 per day, for each violation of the State SADC Regulations</u>

**NEW YORK CITY LAW DEPARTMENT
DIVISION OF LEGAL COUNSEL
100 CHURCH STREET
NEW YORK, NY 10007
212-356-4028**

**CERTIFICATION PURSUANT TO
CHARTER §1043(d)**

RULE TITLE: Processing of Complaints Against Social Adult Day Care Programs

REFERENCE NUMBER: 2019 RG 013

RULEMAKING AGENCY: Department for the Aging

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN
Acting Corporation Counsel

Date: November 8, 2019

**NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS
253 BROADWAY, 10th FLOOR
NEW YORK, NY 10007
212-788-1400**

**CERTIFICATION / ANALYSIS
PURSUANT TO CHARTER SECTION 1043(d)**

RULE TITLE: Social Adult Day Care Programs

REFERENCE NUMBER: DFTA-2

RULEMAKING AGENCY: Department for the Aging

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) When a finding/factual determination is made that a violation has occurred, DFTA may request a corrective action plan in response to that determination. Therefore, depending upon the circumstances, DFTA may allow a cure period.

/s/ Shevani Patel
Mayor's Office of Operations

November 8, 2019
Date