

2016 NEW YORK STATE REPORT

We previously reported about the “ICF Transition Plan” announced in 2014 by the NYS Office for People with Developmental Disabilities (OPWDD) that revealed New York’s planned closure of its developmental centers (DCs) and other intermediate care facilities for individuals with developmental disabilities (ICFs).¹ OPWDD’s downsizing endgame is for New York to have only 150 ICF beds for adults by October 1, 2018.²

Since June of last year, OPWDD closed two more DCs – the Brooklyn DC, closed in December 2015, and the Broome DC (in Binghamton), closed in March 2016. The Bernard M. Fineson DC (in Queens) is slated for closure in 2017. After that, there will be only 150 ICF beds for adults: 105 beds at the Sunmount DC in Tupper Lake (a small town in the Adirondacks, about 300 miles from New York City and 71 miles from the Canadian border) and 45 beds at the Valley Ridge Center for Intensive Treatment in Norwich, a small town about 185 miles from NYC).³

Our report last year referred to OPWDD’s ICF Transitions Update dated 4/23/15 stating that since August 2013, it had moved 693 people out of ICFs. As part of that update, OPWDD released data showing the then-current census of individuals in DCs as 457, in SOICFs as 503, and in VOICFs as 5,566 (including 456 children at residential schools).⁴ This left 6,070 adults in DCs or other ICFs as of April 2015. OPWDD’s most recent ICF Transitions Update, dated 12/22/15, states that “[s]ince August 2013, 1,377 people have transitioned out of Developmental Centers (DCs) and ICFs into community-based residential settings”⁵ – an additional 684 in the nine months since the 4/23/15 update. The December 2015 update does not give current census numbers for DCs, SOICFs, or VOICFs, so the breakdown among those categories is unknown. In the aggregate, that leaves 5,386 adults in DCs and other ICFs as of year-end 2015.

While OPWDD has not been specific as to what kind of setting each of the more than 5,000 individuals who will be “transitioned” out of ICFs by the fall of 2018 will be “transitioned” to, it has made general comments including the following in the January 2016 Guidance for ICF Conversions with No Change in Capacity:

In support of the DC closures and the ICF Transition Plan, OPWDD has joined the New York State Money Follows the Person (MFP) Demonstration and the

¹ A copy of OPWDD’s January 29, 2014 chart showing the timeline for implementation of the “ICF Transition Plan” is attached as Exhibit A.

² The 456 “VOICF” beds shown on the chart as existing as of October 1, 2018 are Children’s Residential Program beds at residential schools. “VOICF” is the acronym for ICF’s operated by “Voluntary Organizations” – i.e., the nonprofit agencies that OPWDD pays to provide services to people with intellectual and developmental disabilities (“I/DD”), in contrast with the “SOICFs” – ICFs that are “State Operated.” The chart draws a distinction between “SOICF-Campus” and “SOICF-Community,” an admission by New York that it regarded at least the non-campus based ICFs as being in the “community.” (The chart does not distinguish between campus-based and “community” based VOICFs, and we have been unsuccessful in securing from OPWDD under the Freedom of Information Law or otherwise a list of the campus-based VOICFs which we believe to be very few.)

³ According to a 3/28/16 newspaper article, there were 213 residents at Sunmount and Valley Ridge combined at the end of 2015. <http://www.pressconnects.com/story/news/local/2016/03/28/broome-developmental-center-closing-its-doors/82338564/>

⁴ <http://www.opwdd.ny.gov/sites/default/files/documents/ICF-Transitions-News-Update-4-23-15.pdf>

⁵ <https://opwdd.ny.gov/transformation-agreement/mfp/icf-transitions-update-dec-22-2015>

Balancing Incentives Program (BIP), both of which bring additional resources to New York State in support of a more balanced system of long-term supports and services. Through these programs OPWDD will be actively assisting individuals with developmental disabilities in moving from campus and community-based ICFs and nursing homes into private homes, apartments, or other community residential settings. Some individuals will move out of ICFs and DCs, while others may remain living in their current location, but experience greater community integration as ICFs (an institutional program model) convert to IRAs.⁶

An ICF with fewer than 14 residents can relatively easily be converted to an Individualized Residential Alternative (IRA). An IRA is an OPWDD-licensed and regulated community residence with 14 or fewer residents.⁷ Unlike an ICF, which is required to provide all of the mandated services and supports (including a day program and clinical services) under a bundled rate, an IRA provides room and board and what OPWDD describes as “individualized service options,” which, to the extent OPWDD agrees to fund them, may be provided by agencies other than the operator of the residence. Some IRAs, known as “supervised” IRAs, have 24/7 staffing (these can have up to 14 residents), while others, known as “supported IRAs,” are limited to three or fewer individuals living in their own home or apartment who do not require 24/7 support and supervision. Unlike an ICF, an IRA is not federally licensed and is not required to follow the federal laws, regulations, and guidance governing ICFs (including the requirement of “active treatment”). Neither is it subject to federal oversight including federal surveys and inspections.

As stated in the 8/18/15 ICF Transitions Talking Points prepared by OPWDD for operators of VOICFs, “[c]urrently, any ICF that supports 14 or fewer individuals can convert to an IRA without reducing capacity.”⁸ OPWDD has assured the agencies that run VOICFs that they are free to convert them to IRAs before undergoing the “heightened scrutiny” process (including public comment) to demonstrate that they are truly “home and community based” as required under the regulations promulgated by the Centers for Medicare and Medicaid (CMS): “OPWDD approval of the evidence/documentation for Heightened Scrutiny *is not required* prior to conversion.”⁹ OPWDD has announced that it will not begin enforcing compliance with the HCBS settings standards even for existing non-compliant waiver settings until October 1, 2018.

OPWDD takes the position that individuals in ICFs that will be converted to IRAs are not entitled to – and should not be given – notice of Due Process rights to object to this change. In the 8/18/15 ICF Transitions Update, discussing OPWDD’s delegation to the private agencies of the responsibility for notifying the residents of converting ICFs about the change, OPWDD emphasizes – in capital letters – that the notification letters about the conversion “should NOT include a due process approval form in the notification.”¹⁰ The template of the notification letter prepared by OPWDD for the agencies’ use states in relevant part:

⁶ http://www.opwdd.ny.gov/sites/default/files/documents/ICF-ConversionGuidanceFinal_0.pdf

⁷ https://www.opwdd.ny.gov/opwdd_services_supports/residential_opportunities/individualized_residential_alternative

⁸ https://www.opwdd.ny.gov/transformation-agreement/mfp/ICF_Transitions_Plan_Talking_Points

⁹ <https://opwdd.ny.gov/sites/default/files/documents/CommunicationtoProvidersonHCBShSPProcessandRequirements.pdf>

¹⁰ https://opwdd.ny.gov/transformation-agreement/mfp/ICF_Transitions_News_Update

If you want to stay in your home, you will be asked to sign up for the Home and Community Based Services waiver program No one will be forced to move in or out of the home because of this change unless he or she asks to move to a different home If you ask to move to another ICF or choose another living option, you will be helped to choose a new home and to create a new service plan.

It is only if the agency seeks to discharge the individual at or around the time of the conversion, or if the individual asks to move to another ICF or other placement, that notice of Due Process rights – in this case, the right to a hearing concerning the proposed new placement – are given. But, in OPWDD’s opinion (or at least what OPWDD is telling the voluntary agencies), there are no Due Process rights to object to the conversion. There is no ability to say “Yes, I want to stay in my home, and yes I want it to stay in an ICF.”

For individuals who want to remain in an ICF, as noted above, after October 1, 2018, there are only two options under OPWDD’s ICF Transition Plan: move to the Sunmount DC in Tupper Lake, or move to Valley Ridge Center for Intensive Treatment in Norwich. Of course, that depends on whether capacity will be available given OPWDD’s plan for 105 beds at Tupper Lake and 45 at Valley Ridge – less than the number of residents currently there.

Both Sunmount and Valley Ridge have a troublesome history. Both have been primarily secure facilities for developmentally disabled individuals referred by the criminal justice system, including sex offenders. They are in such geographically remote and isolated areas that, as stated in an article by Sheila E. Shea, the Director of the Mental Hygiene Legal Service for the Third Judicial Department (a branch of the New York court system established to represent institutionalized individuals with mental health and/or developmental disability diagnoses), speaking specifically about Sunmount, “it may be difficult for counsel to maintain contact with her client.”¹¹ Ms. Shea is based in Albany, approximately 150 miles from Tupper Lake and 115 miles from Norwich – a considerable distance but just a fraction of the trip from New York City, Long Island or other parts of the “downstate” area of New York (which accounts for two-thirds of its population) that families there would face.

The remoteness and isolation of Sunmount and Norwich impact OPWDD’s ability to hire and retain adequate staff, including not only direct support staff but also clinicians like medical doctors, dentists, psychiatrists, psychologists, behaviorists, occupational therapists, physical therapists, and speech and language therapists whose services are essential to providing “active treatment” as federal law requires in ICFs. Tupper Lake has a population of 3,667 individuals (1,638 households) and Norwich has 7,190 residents, many of whom are employed at these facilities. When staff are criminally prosecuted for abuse of residents, or when residents are criminally prosecuted for harms allegedly committed against staff or fellow residents – all-too-frequent occurrences – what are the chances of an unbiased jury and a fair outcome?

Given that the 150 beds at Sunmount and Valley Ridge are to be the sole remaining ICF spots in the State after October 1, 2018, it’s clear that OPWDD wishes to scare off those who would otherwise assert their federal right to prompt placement in an ICF. In other words, OPWDD aims to make ICF placement so harrowing as to functionally preclude it entirely. If Sunmount is too geographically remote for MHLS attorneys to maintain contact with clients, what does that mean for the family – often aged parents – whose loved one’s only “choice” of ICF is banishment to some remote location?

¹¹ <http://www.courts.state.ny.us/ad3/mhls/Representing%20Clients%20with%20Mental%20Disabilities.pdf>

As stated in the December 2011 “Joint Report of Investigations of Allegations of Abuse and Reviews of Conditions at the Office for People with Developmental Disabilities’ Valley Ridge Center for Intensive Treatment” by the New York State Inspector General and the Commission on Quality of Care and Advocacy for Persons with Disabilities:

Valley Ridge . . . is one of two highly secure OPWDD centers for intensive treatment [Sunmount is the other] and provides care for up to 60 individuals with developmental disabilities *in the most restrictive environment* in the OPWDD system. Many residents of Valley Ridge are *involuntarily* placed there as a court-ordered condition of probation or parole following incarceration; some are voluntarily admitted by family members or guardians. *Most have committed crimes, have serious behavioral issues, or are a threat to themselves or others.*¹²

This is how the Joint Report (at p. 4) described Valley Ridge:

As a secure facility, Valley Ridge is surrounded by a 14-foot high curved perimeter fence. Security officers patrol the facility and staff the entrances. Access to the facility, the houses and the rooms within is gained by electronic key cards issued to all staff. Employees also carry personal alarms to summon other staff in an emergency.

As reported by North Country Public Radio (NCPR), which covered Sunmount in a series of stories last year, “Sunmount has been plagued by scandal and mismanagement in recent years and has been the focus of investigative reports by the New York Times and the Adirondack Daily Enterprise. Last November, Sunmount’s director was dismissed from her post after she was accused of driving drunk in Tupper Lake.”¹³ Her eventual replacement, after a prolonged period with only an acting director, was the former director of the now-closed Brooklyn DC,¹⁴ which as we noted our report last year, was on OPWDD’s “Early Alert” list for years because of serious unremedied deficiencies as found during its Medicaid surveys and Justice Center site visits.

Last spring, after initially promising an interview to a team of reporters from NCPR and the Adirondack Daily Enterprise, OPWDD then agreed only to respond to written questions.¹⁵ Some of the highlights of those responses (provided to reporters by OPWDD’s media office) follow:

- “[W]e anticipate that this capacity will be transitional in nature and that individuals coming to the campus will receive the services they need to assist them to return to a community setting as soon as possible.”
- In answer to the question of why there have been 12 employee arrests at Sunmount since January, all involving allegations of violence against

¹² <https://www.justicecenter.ny.gov/sites/default/files/archivereports/Publications/CQC123011.pdf>

¹³ <http://www.northcountrypublicradio.org/news/story/28182/20150428/three-more-sunmount-employees-charged-with-assault?noseries=1>

¹⁴ <http://adirondackdailyenterprise.com/page/content.detail/id/556570/OPWDD-names-new-Sunmount-director.html?nav=5279>

¹⁵ <http://www.northcountrypublicradio.org/news/story/28502/20150528/state-officials-respond-to-sunmount-questions>

developmentally disabled residents, and whether there is a climate or pattern of abuse at Sunmount, OPWDD said only: “Any abuse of people in our care is completely unacceptable. Overall, incidents at Sunmount are actually down this year. If you look at the arrests that have taken place in 2015, you will see that several of the arrests involved investigations that originated from prior years’ allegations. Our numbers actually show a significant decrease [40%] in reported incidents from calendar year 2013 [770] to 2014 [451].”¹⁶

- In answer to a question noting that, in addition to the staff arrests, there were two arrests of residents in 2015 and asking if the facility is safe, OPWDD responded: “The facility is safe.”¹⁷
- In answer to questions noting that “Sunmount is an important economic engine in Tupper Lake – but is it located appropriately? Is it close enough to families so that they can monitor residents’ welfare? Is it located near a large enough pool of qualified employees?” OPWDD responded: “[M]ultiple factors such as size, geographic location, layout, security and staffing were considered when we determined which facilities would retain capacity to support the individuals with developmental disabilities who need short-term intensive supports for behavioral and other issues. Sunmount and Valley Ridge were found to be the best locations to meet the needs of these individuals.”

How OPWDD can say such things with a straight face – while violating federal law with its “ICF Transition Plan” – is beyond us. We fear for the safety and wellbeing of our family members with developmental disabilities, and for the others who need and are entitled to active treatment in an ICF, and at that, an ICF that abides by federal laws, regulations, guidance, and is located somewhere that the residents can maintain ties with their families, guardians, advocates, and attorneys.

Respectfully submitted,

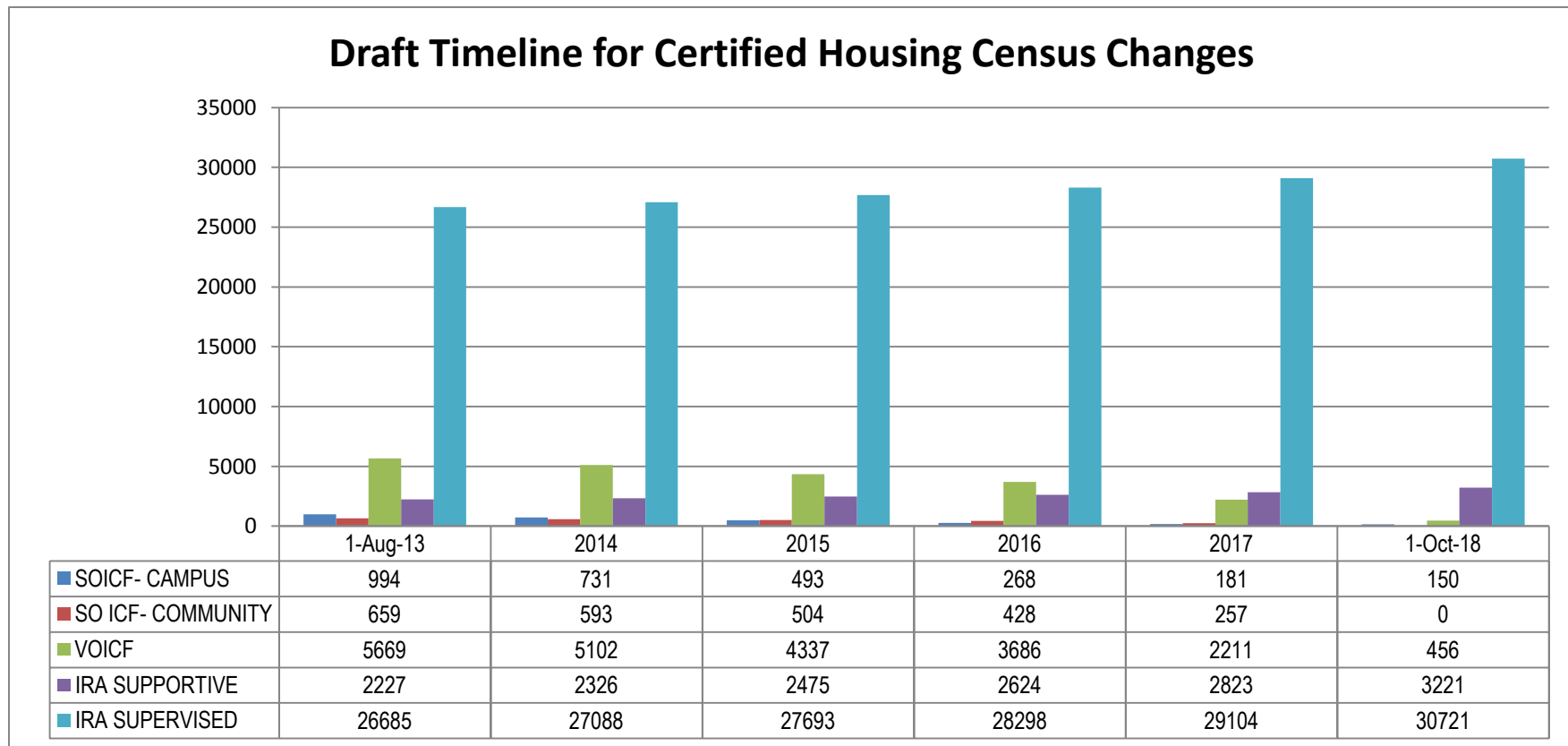
Michael Klurfeld
VOR New York State Co-Coordinator
Hugo and Cristy Dwyer
VOR New York State Co-Coordiators

¹⁶ In September 2015, North Country Public Radio reported the arrest of an additional four Sunmount employees for attacks on residents, bringing to “at least 15” the number of such arrests in 2015.” NCPR noted that “in at least two of the cases, workers at the facility are also accused of covering up assaults and abuse.”
<http://www.northcountrypublicradio.org/news/story/28182/20150428/three-more-sunmount-employees-charged-with-assault>

¹⁷ Despite OPWDD’s assurance in May 2015 that Sunmount is safe despite the arrests of residents, it was reported in the local press on December 11, 2015 that a Sunmount resident who was a Level 3 sex offender was arrested and charged with second-degree rape and first-degree endangerment of the welfare of an incompetent or physically disabled person (another resident, who unlike the alleged perpetrator, lacked the capacity to consent to sexual relations). The article stated that the alleged perpetrator had been incarcerated on a felony conviction of first-degree sexual abuse from 2010-13 (with a 3-year old and a 6-year old female among the victims), with post-release supervision required until 2018 (the apparent reason why this individual was at Sunmount).
http://www.pressrepublican.com/news/local_news/sunmount-ddso-client-charged-with-rape/article_666dd916-1b0a-5961-bae5-10576f2fc74c.html

ICF Transition Plan

Housing Options	August 1, 2013 ¹	2014	2015	2016	2017	October 1, 2018
CERTIFIED HOUSING:						
SOICF- CAMPUS	994	731	493	268	181	150
SO ICF- COMMUNITY	659	593	504	428	257	0
VOICF	5669	5102	4337	3686	2211	456
IRA SUPPORTIVE	2227	2326	2475	2624	2823	3221
IRA SUPERVISED	26685	27088	27693	28298	29104	30721



¹ This represents projections based on demographic data on the individuals who were living in ICF's at the time that the plan was developed in the spring/summer of 2013

ICF Transition Plan

ICF Transition Year to Year Growth	August 1, 2013	2014	2015	2016	2017	October 1, 2018
IRA BASED HOUSING	0	502	754	754	1005	2015
NON-TRADITIONAL RESIDENTIAL HOUSING AND PERSON CONTROLLED HOUSING	0	394	338	198	728	28
TOTAL	0	896	1092	952	1733	2043

January 29, 2014