



Department of Health | Office of Children and Family Services

KATHY HOCHUL
Governor

MARY T. BASSETT, M.D., M.P.H.
Commissioner of Health, DOH

SHEILA J. POOLE
Commissioner, OCFS

April 15, 2022

Dear Colleagues:

The New York State Office of Children and Family Services (OCFS) and Department of Health (DOH) are issuing this letter to provide an overview of provisions of the Title IV-E Family First Prevention Services Act (FFPSA) impacting states' ability to receive Medicaid funding for Qualified Residential Treatment Programs (QRTPs) that meet the federal definition of an Institution for Mental Disease (IMD) as defined by the Centers for Medicaid Services (CMS). The enactment of FFPSA placed limitations on the use of Title IV-E in residential settings and by extension, required that New York submit a serious mental illness/serious emotional disturbance (SMI/SED) Medicaid 1115 Demonstration Waiver under section 1115(a)(2) of the Social Security Act to request CMS approval to ensure the availability of Medicaid dollars to support youth in certain categories of residential settings.

On October 19, 2021, CMS issued specific policy guidance to states on this issue and since then OCFS and DOH have been working collaboratively to develop a framework for New York. In collaboration with key stakeholders, the state will begin an accelerated assessment of programs currently designated as QRTPs to determine whether they meet the definition an IMD and the development of a plan to address the outcome of the assessment. At the conclusion of this process, OCFS and DOH will submit an SMI/SED 1115 Demonstration Waiver to allow Medicaid funding to be used for services provided to members residing in facilities that meet the criteria of an IMD. The waiver will provide an opportunity to better serve children, youth and their families by building on the continuum of care we have already been working toward.

Both Title IV-E and Medicaid are integral to the continuum of child welfare service provision in residential and non-residential settings. Implementation of the waiver will require partnership, communication and shared planning with state, local government and not-for-profit providers. The goal of this effort is compliance with the federal Medicaid requirements while ensuring that NYS's system of care can be improved to meet the needs of children in foster care. The information below provides greater background and detail on the issue and provides an overview of our plan in the coming months beginning with stakeholder involvement.

Family First Prevention Services Act and the Qualified Residential Treatment Program

The Family First Prevention Services Act (FFPSA), enacted as part of the federal Bipartisan Budget Act of 2018, amends Title IV-E of the Social Security Act to limit foster care maintenance payments (FCMPs)¹ to **14 days** for children placed in child care institutions (CCIs or congregate care settings). The limitations on Title IV-E funding supports FFPSA's goal to prioritize family-based placement of youth with kinship and non-relative foster care, thereby eliminating the over-institutionalization of youth.

FFPSA also established a new classification of child care institutions, known as the qualified residential treatment program (QRTP). A QRTP is defined as "a program that has a trauma-informed treatment model designed to address the needs, including clinical needs of children with serious emotional or behavioral disorders or

¹ Foster Care Maintenance Payments (FCMPs) include payments for room, board, and certain other costs for children in foster care.



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disturbances.” Programs designated by states as QRTPs are eligible to access Title IV-E dollars beyond FFPSA’s 14-day limitation.

1. Medicaid and Institutions of Mental Disease (IMD)

Section 1905(i) of the Social Security Act (the “Act”) defines an institution for mental disease (IMD) as a “hospital, nursing facility, or other institution of **more than 16 beds**, that is primarily engaged in providing diagnosis, treatment, or care of persons with mental diseases including medical attention, nursing care, and related services.” Whether an institution is an IMD is determined by its overall character as an institution established and maintained primarily for the care and treatment of individuals with mental disease, which includes serious emotional or behavioral health diagnosis, regardless of licensure.

Pursuant to section 1905(a) of the Act, without an 1115 waiver, states are prohibited from using federal Medicaid payments for any services provided to an individual under 65 years of age who is residing in an IMD.² According to CMS, “[n]othing in FFPSA amended Medicaid statute to exempt QRTPs with more than 16 beds from the IMD exclusion.”³ Absent a legislative change by the federal government expressly declaring QRTPs are not IMDs, a QRTP *over 16 beds may* meet the Medicaid definition of an IMD.⁴ As a result, states may be prohibited from claiming any federal Medicaid dollars for services delivered to children residing or receiving treatment in QRTPs that meet the IMD definition, without an 1115 waiver. The prohibition applies to services provided on the campus as well as those provided by the QRTP in the community.⁵

NYS OCFS and DOH have worked with many advocates, coalitions, and other states advocating for amendments to the federal legislation to expressly exempt QRTPs from the Medicaid IMD exclusion. These efforts continue though no legislation has been enacted to date. In a “Questions and Answers” document dated October 19, 2021, CMS referenced that QRTPs are not universally exempt from the IMD exclusion and states should *assess all* QRTPs to determine whether such facilities are IMDs⁶.

Additionally, in the aforementioned document, CMS provided direction regarding the ability for states to modify and submit a serious mental illness/serious emotional disturbance (SMI/SED) Medicaid 1115 demonstration waiver, in order to request authority to receive federal financial participation (FFP) for Medicaid services provided to Title IV-E beneficiaries in QRTPs with more than 16 beds. Under such a waiver, federal Medicaid funding is available for services provided to individuals residing in an IMD for an average of up to 30 days, not to exceed a maximum of 60 days. CMS has granted an exception to this limitation for child welfare facilities, which will allow states to claim federal financial participation regardless of length of stay in a QRTP during the first two years of the waiver demonstration period⁷.

According to CMS, for facilities which meet the criteria of an IMD, states have three options, which are not mutually exclusive, to qualify for federal financial participation (FFP) Medicaid dollars for services delivered in an IMD:

² CMS guidance dated September 20, 2019 <https://www.medicaid.gov/federal-policy-guidance/downloads/faq092019.pdf>

³ CMS guidance dated October 19, 2021 [CMS 1115 waiver faq101921](#)

⁴ CMS guidance dated September 20, 2019

⁵ CMS guidance dated September 2019.

⁶ CMS guidance dated October 19, 2021

⁷ CMS guidance dated October 19, 2021



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- reduce the bed size of residential programs to fewer than 16 beds, or ameliorate other conditions that result in the QRTP being considered an IMD;
- license qualified programs as psychiatric residential treatment facilities (PRTF) for youth younger than 21; and/ or
- pursue an 1115 demonstration waiver to ensure continued federal Medicaid participation for services provided youth in facilities that meet the definition of an IMD.

2. Serious Mental Illness/Serious Emotional Disturbance Section 1115 Demonstration Waiver

Recognizing that QRTPs *may be* IMDs, after careful consideration, New York State has determined that participation in a serious mental illness/serious mental disturbance (SMI/SED) 1115 demonstration waiver is necessary to ensure federal Medicaid funding for Medicaid-covered services provided to individuals residing in IMDs. Upon approval, the waiver will guarantee New York State can claim federal Medicaid dollars for services provided to youth in an IMD. The 1115 SMI/SED waiver will offer New York the time and opportunity to assess our continuum of residential care and implement the foundational changes necessary to align our system with federal requirements. More importantly the waiver will provide the flexibility to build upon the work New York has been engaged in for a number of years, designing the broad continuum of services we know our children and families need: high quality, well-coordinated, clinically appropriate, integrated, seamlessly accessed residential and community-based behavioral, mental and physical health services.

3. Developing New York State's SMI/SED 1115 Waiver Application and Implementation Plan

Over the course of the next few months, in partnership with you, our stakeholders, New York State will design an SMI/SED 1115 waiver application and federally required implementation plan in preparation for a Fall 2022 submission. This aggressive timeline will require intensive work and close collaboration:

1. OCFS and DOH must develop a New York State IMD self-assessment tool which providers will use to assist the assessment process and guarantee consistency across the state;
2. OCFS and DOH, in partnership with programs designated as QRTPs, must perform a baseline assessment of all QRTPs to determine whether the program meets the basic IMD criteria;
3. DOH will submit an 1115 application and implementation plan to CMS;
4. OCFS and DOH will provide technical assistance to QRTPs to reduce the need for residential placements and shorten lengths of stay for those requiring placement:
 - a. Developing new models to support transitioning youth from residential programs to community-based settings;
 - b. Enhancing supports for kinship and non-relative foster care placements;
 - c. Strengthening community-based services to further reduce the need for residential placements;
 - d. Create opportunities for IMD providers to diversify their models of care;
 - e. Develop models to convert IMDs from current design;



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5. OCFS and DOH will support statewide and regional learning collaboratives.

While the system is in the midst of transformation, this is an opportunity for New York State to continue to enhance our service provision and strengthen our commitment to eliminate the over institutionalization of children. We have been engaged in meaningful system transformation for a number of years. The majority of our child care institutions have recently conducted significant operational changes to comply with state and federal requirements:

- a. In response to the enactment of FFPSA, many providers pursued designation as QRTPs to enhance the programs and treatment services for children placed in their facility and to maximize Title IV-E foster care maintenance payments.
- b. To facilitate improved care, many providers became licensed as Article 29-I health facilities allowing them to provide Medicaid-funded health and health-related services in residential or community-based settings.

These key transformations are central to our effort to improve outcomes for New York's children and families. We will continue to build upon this significant work.

4. Stakeholder Involvement

On May 4th, 2022, from 12:00 PM to 2:00 PM, NYS OCFS and DOH will host a statewide webinar to discuss the SMI/SED 1115 waiver process as outlined in this letter, as well as any developments we may have from CMS. Attendees will have the opportunity to ask questions during the webinar. Advanced registration will be required, a meeting notice and registration information will be sent under separate cover.

OCFS and DOH will use the OCFS Statewide Implementation Team (SIT) as an advisory group guiding the application design. During these meetings we will provide updates on the waiver application, solicit feedback and provide an opportunity for discussion and input. In addition to the current SIT members, we will add caregivers and youth with lived experience as participants.

While the SMI/SED 1115 IMD waiver application will require significant work, we cannot lose sight of the opportunity it presents to build the child and family well-being continuum of care we have been working toward. The implementation of innovative community-based intensive services will better serve the communities, parents, and youth we serve. By working closely with you all, together we can make great progress to meet the needs of children and families of New York State.

Sincerely,

Sheila J. Poole, Commissioner
NYS Office of Children and Family Services

Brett R. Friedman, Acting Medicaid Director
NYS Department of Health