

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
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Disabled and Elderly Health Programs Group

July 30, 2020

Ms. Jacey Cooper
Chief Deputy Director, Health Care Programs
California Department of Health Care Services
P.O. Box 997413, MS 0000
Sacramento, CA 95899-7413

Dear Ms. Cooper:

Thank you for your letter to Mr. James Scott about the Family First Prevention Services Act (FFPSA) requirements for Qualified Residential Treatment Programs (QRTPs), Short-Term Residential Therapeutic Program facilities (STRTPs) in California and their intersection with the Medicaid Institution for Mental Diseases (IMD) exclusion. I am responding on Mr. Scott's behalf since Medicaid IMD coverage policy is within the Disabled and Elderly Health Programs Group's portfolio.

You provided a detailed explanation in your letter about California's plans for implementation of the FFPSA requirements for QRTPs and why you believe that California's STRTPs would not be considered IMDs. Unfortunately, the Centers for Medicare & Medicaid Services (CMS) is unable to provide California the blanket assurance requested that STRTPs are not IMDs. Section 1905(i) of the Social Security Act (Act) defines an 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." QRTPs were added to title IV-E with no cross reference to Medicaid statute allowing them to be considered as an exception to the IMD exclusion. Additionally, title XIX was not changed as a result of the changes in title IV-E of the Social Security Act (the Act) as amended by Division E, title VII Family First Prevention Services Act of the Balanced Budget Act of 2018 (BBA of 2018, Pub. L. 115-123 to exempt QRTPs from the IMD exclusion.

As outlined in the September 2019 CMS guidance entitled, "Qualified Residential Treatment Programs (QRTP) and Serious Mental Illness (SMI) and Serious Emotional Disturbance (SED) Demonstration Opportunity Technical Assistance Questions and Answers," CMS has not determined that all QRTPs will be IMDs. Consistent with current practices, states must make an IMD assessment and determination on a facility by facility basis according to CMS's existing statute, regulation and sub-regulatory guidance.

In title IV-E, a QRTP must be licensed as a “child care institution” and is defined as a program that “provides a trauma-informed model of care designed to address the needs, including clinical needs, of children with serious emotional or behavioral disorders or disturbances...”

Section 4390 of the State Medicaid Manual (SMM) sets forth criteria for a state to consider when determining whether a treatment program is an IMD. Applying the criteria, you have determined that STRTPs that serve more than 16 children are not IMDs. We understand you made this determination based on your assessment that the STRTPs are not licensed or accredited as psychiatric facilities, are not under the jurisdiction of the mental health authority, do not primarily provide mental health treatment, do not specialize in providing psychological/psychiatric care, as evidenced by the lack of a requirement for such staff, and the current need for institutionalization for most of the children stems from the need for foster care placement and dependency findings, not a mental or substance use disorder. However, we believe your conclusions appear to be inconsistent with the criteria and other information in section 4390.

Specifically, it appears the state misconstrues the criterion in item 5, paragraph C of section 4390 that indicates, “The current need for institutionalization for more than 50 percent of all the patients in the facility results from mental diseases.” While the state posits that “most” of the children are in the treatment programs for reasons other than their mental or substance use disorder, we note that the definition of a QRTP includes a requirement that the program is for foster care children with “serious emotional or behavioral disorders or disturbances.”

Furthermore, the criterion in paragraph C of section 4390 needs to be applied on an individual-by-individual basis in order to determine if more than 50 percent of the individuals in an STRTP are there because of their mental or substance use disorder. Paragraph D of section 4390 states, “In applying the 50 percent guideline . . . determine whether each patient's current need for institutionalization results from a mental disease. It is not necessary to determine whether any mental health care is being provided in applying this guideline.” Therefore, we emphasize that each child in each facility requires an individualized determination of the reason they are institutionalized.

In addition, while the STRTPs may not be licensed as psychiatric facilities, the state reports that they do in fact provide, among other services, “mental health services.” Additionally, even though the STRTPs may not be under the jurisdiction of the mental health authority, the state reports that the mental health services furnished in them must be overseen by the Department of Health Care Services (DHCS) and County Mental Health Plans and the mental health programs must be approved within one year of licensure. Finally, the state also reports that STRTPs by regulation have a “half-time equivalent licensed mental health professional for every six children and a psychiatrist available.” Based on the foregoing, it appears that at least some of the STRTPs could be IMDs that are “primarily engaged in providing diagnosis, treatment, or care of persons with mental diseases.”

If, as a result of this clarification, the state determines that some of the STRTPs are in fact IMDs, we note that CMS outlined several options for states to consider in its September 2019 QRTP guidance given that CMS does not have the statutory or regulatory authority to exempt QRTPs

from the IMD exclusion. States may consider QRTPs that meet federal requirements, including Conditions of Participation governing restraint and seclusion, and seek certification, as a psychiatric residential treatment facility (PRTF), which is one of the facility types in the inpatient psychiatric services benefit for individuals under 21 and are an exception to the IMD exclusion. The state may also consider pursuing the section 1115 opportunity described in a November 2018 State Medicaid Director Letter entitled “Innovative Service Delivery Systems for Adults with a Serious Mental Illness or Children with a Serious Emotional Disturbance (SMI/SED)”. As clarified in the September 2019 guidance, QRTPs determined by the state as IMDs may be added to the section 1115 demonstration request. California currently has an approved Substance Use Disorder (SUD) section 1115 demonstration. CMS is available to provide technical assistance to California on developing an SMI/SED section 1115 demonstration that would include QRTPs.

Thank you again for your inquiry to CMS about QRTPs. CMS appreciates and shares your concerns about providing quality care to vulnerable foster care children in California. If you have further questions about QRTPs and the IMD exclusion, or would like to schedule a call to further discuss this letter, please contact Kirsten Jensen, Director of the Division of Benefits and Coverage, at 410-786-8146 or kirsten.jensen@cms.hhs.gov.

Sincerely,

Alissa Mooney DeBoy
Director

cc: James Scott, Director Division of Program Operations