

DEPARTMENT OF HEALTH & HUMAN SERVICES  
Centers for Medicare & Medicaid Services  
Boston Regional Office  
JFK Federal Building, Government Center  
Room 2325  
Boston, Massachusetts 02203



**Division of Medicaid and Children's Health Operations / Boston Regional Office**

December 14, 2012

JudyAnn Bigby, M.D., Secretary  
Executive Office of Health and Human Services  
One Ashburton Place, Room 1109  
Boston, Massachusetts 02108

Dear Dr. Bigby:

We have enclosed the draft report of the Centers for Medicare & Medicaid Services (CMS) quality review of the home and community-based services (HCBS) waiver, MA-0827.R00. The HCBS waiver serves individuals aged 18 years and older with intellectual disabilities who meet the State's criteria for care in Intermediate Care Facilities for Individuals with Intellectual Disabilities. We appreciate Dr. Julian Harris's response letter dated September 14<sup>th</sup> and additional documents received in response to our July 11<sup>th</sup> request letter. We understand that the Department of Developmental Services will provide information regarding children's Medicaid State plan services. The enclosed report is limited to an assessment of the HCBS waiver.

We thank everyone who assisted in the review process. The summary data you provided demonstrates substantial compliance with five of the six HCBS waiver review components. The State demonstrated that the quality systems in place are implemented to oversee, monitor and improve HCBS waiver quality. The information generally reflected positive outcomes for the participants reviewed. However, certain waiver participants, most notably individuals receiving aversive behavioral interventions described as Level III interventions in State regulations (115 CMR 5.14(3)(d)), are being served in residential and service settings which appear clearly inappropriate for HCBS waiver participants. Therefore, we determined that the State has not demonstrated that it substantially meets the waiver assurance for participant health and welfare.

Residential and service settings operated by the Judge Rotenberg Educational Center (JRC) are of particular concern. The State indicated that JRC is the only provider currently using Level III interventions, described in the September 14<sup>th</sup> response letter as, "painful, aversive stimuli and deprivation procedures." Level III interventions include use of an electronic shock device known as a graduated electronic decelerator, or GED, in use solely by JRC. In addition, issues noted by the Department of Developmental Services in a January, 2012, provider report include deficiencies with regard to community integration for certain individuals receiving services from the JRC.

Residential facilities and the use of aversive interventions including GED and the use of food deprivation procedures are regulated by the State. The State has described its movement toward positive behavioral reinforcement processes. However, as reasonable people will agree that

electric shock and withholding of meals have no place in their homes or communities, we therefore request that the State provide immediate assurance that the use of Level III aversive interventions have been eliminated for any and all individuals enrolled in the HCBS waiver. The State should provide a written corrective action plan (CAP) to demonstrate how on an ongoing basis the State will ensure that all individuals receiving services through an HCBS waiver remain free from Level III aversive interventions. The CAP should include steps to remediate the concerns described in this letter and enclosed report by the expiration date of the waiver, June 30, 2013. At a minimum, the settings in which waiver participants are served must not include any in which State regulation authorizes the use of Level III interventions. This condition must be met no later than the effective date of the waiver renewal. In the interim the State should cease all billing for FFP for HCBS services provided to individuals residing in residences practicing these procedures.

In addition, it is the State's obligation to ensure that these settings are not an institution for mental diseases (IMD). An IMD is defined at 42 CFR 435.1010 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 institution for mental diseases is determined by its overall character as a facility established and maintained primarily for the care and treatment of individuals with mental diseases, whether or not it is licensed as such." Section 4390 of the State Medicaid Manual provides further criteria for determining whether an institution is an IMD, such as if the facility specializes in the provision of psychiatric care and treatment and if the current need for institutionalization for more than 50 percent of the patients results from mental illness. Regulations at 42 CFR 441.13(a)(2) provide that FFP is unavailable for services provided to "any individual who is under age 65 and is in an institution for mental disease, except an individual who is under age 22 and receiving inpatient psychiatric services under Subpart D of this part." The State must review these settings in light of these regulations and the regulations regarding common ownership and inform CMS of their findings. Please note that the State cannot claim FFP for services rendered to individuals who reside in an IMD.

The CAP should include the steps the State will take to remove from the Medicaid waiver all service settings (residential and service sites) in which Level III aversive interventions are authorized and/or implemented. Oversight and monitoring of all other aversive interventions and deprivation procedures including Level II interventions should be fully described in the renewal application for this program, including in the Quality Improvement Strategy (QIS) sections. The State should also address how it will resolve the IMD issue in the CAP. Please include timeframes and details regarding responsibility for implementing the CAP.

As part of the Federal review process for the renewal of this HCBS waiver, CMS will closely review the State's description of settings in which waiver participants receive Medicaid residential and community-based services, including employment and day services. For CMS guidance concerning employment and employment related services, see the CMCS Informational Bulletin issued September 16, 2011, at: <http://downloads.cms.gov/cmsgov/archived-downloads/CMCSBulletins/downloads/CIB-9-16-11.pdf>.

A proposed rule published in the Federal Register on April 15, 2011, addresses HCBS settings and person-centered planning [See CMS-2296-P]. Although the proposed rule has not been finalized, please refer to the document for a description of community based settings and person-centered planning. A description of the qualities of community-based settings is also included in the enclosed report under the assurance section for health and welfare.

Please review the draft report and submit your comments and CAP by January 18, 2013. Your response will be incorporated into the final report. We are available to discuss the report and to provide technical assistance. Do not hesitate to let us know how we may be of assistance. Please let me know if you have any questions about this letter.

Sincerely,

/s/

Richard R. McGreal,  
Associate Regional Administrator

Enclosure

cc: Julian J. Harris, M.D., Medicaid Director