

STATEMENT OF CONSIDERATION RELATING TO
907 KAR 9:010

Department for Medicaid Services
Amended After Comments

(1) A public hearing regarding 907 KAR 9:010 was not requested and; therefore, not held.

(2) The following individuals submitted written comments regarding 907 KAR 9:005:

<u>Name and Title</u>	<u>Organization/Agency/Other Entity</u>
Kathy Adams, Director of Public Policy	The Children's Alliance; Frankfort, KY

(3) The following individuals from the promulgating agency responded to comments received regarding 907 KAR 9:010:

<u>Name and Title</u>	<u>Organization/Agency/Other Entity</u>
Neville Wise, Deputy Commissioner	Department for Medicaid Services
Dr. Allen Brenzel, Clinical Director	Department for Behavioral Health, Developmental and Intellectual Disabilities
Jill Hunter, Director	Department for Medicaid Services, Division of Health Care Facilities Management
Stuart Owen, Regulation Coordinator	Department for Medicaid Services

SUMMARY OF COMMENTS AND AGENCY'S RESPONSE

(1) Subject: Per Diem Rate

(a) Comment: Kathy Adams, Direct of Public Policy of the Children's Alliance, stated the following:

"Recommend striking the word 'all-inclusive' from the definition of 'per diem rate' since the rate, as specified by this regulation, does not include the cost of drugs and is therefore, not all-inclusive.

(b) Response: DMS is revising the definition in an "amended after comments" regulation by deleting "all-inclusive."

(c) Comment: Kathy Adams, Direct of Public Policy of the Children's Alliance, stated the

following:

“Recommend including in this regulation, how the ‘per diem rate’ is ‘calculated by the department’. Recommend the regulation include provisions for how rates for PRTF IIs will be calculated in the future.

(d) Response: DMS prefers to not insert language establishing how a per diem rate will be calculated.

(2) Subject: Rate Group Descriptions

(a) Comment: Kathy Adams, Director of Public Policy of the Children’s Alliance, stated the following:

“Recommend this section be re-written to be descriptive of the recipients, not programs. As written, it appears to limit a program to serving only type of youth. A PRTF program can have youth from more than one population group and as written, this regulation could preclude this.”

(b) Response: DMS is revising subsections (2) and (3) in an “amended after comments” regulation to be make the criteria descriptive of the recipients criteria rather than the PRTFs. The amended language is as follows:

“(2) The department shall reimburse a per diem rate as follows for Level II PRTF services and costs for a recipient not enrolled in a managed care organization:

(a) \$345 for **Level II PRTF services to a recipient who meets the rate group (one) criteria established in subsection (3)(a) of this section**~~[a rate group one (1) Level II PRTF]~~;

(b) \$365 for **Level II PRTF services to a recipient who meets the rate group two (2) criteria established in subsection (3)(b) of this section**~~[a rate group two (2) Level II PRTF]~~;

(c) \$385 for **Level II PRTF services to a recipient who meets the rate group three (3) criteria established in subsection (3)(c) of this section**~~[a rate group three (3) Level II PRTF]~~; or

(d) \$405 for **Level II PRTF services to a recipient who meets the rate group four (4) criteria established in subsection (3)(d) or (e) of this section**~~[a rate group four (4) Level II PRTF]~~.

(3)(a) **Rate group one (1) criteria shall be**~~[A rate group one (1) Level II PRTF shall be a Level II PRTF that serves recipients who are not enrolled in a managed care organization and are]~~;

1. Aged twelve (12) years or younger;

2. Male or female; and

3.a. Sexually reactive; or

b. Who:

(i) Have a severe and persistent aggressive behavior;

(ii) Do not have mental retardation or a developmental disability; and

(iii) Have an intelligence quotient higher than seventy (70).

(b) Rate group two (2) criteria shall be [A rate group two (2) Level II PRTF shall be a Level II PRTF which serves recipients who are not enrolled in a managed care organization and are]:

1. Aged twelve (12) years or younger;

2. Male or female; and

3.a. Sexually reactive; and

b. Who:

(i) Have a severe and persistent aggressive behavior;

(ii) Do not have mental retardation or a developmental disability; and

(iii) Have an intelligence quotient higher than seventy (70).

(c) Rate group three (3) criteria shall be [A rate group three (3) Level II PRTF shall be a Level II PRTF which serves recipients who are not enrolled in a managed care organization and are]:

1. Aged thirteen (13) years or older;

2. Male or female; and

3.a. Sexually reactive; or

b. Who:

(i) Have a severe and persistent aggressive behavior;

(ii) Do not have mental retardation or a developmental disability; and

(iii) Have an intelligence quotient higher than seventy (70).

(d) Rate group four (4) criteria shall be [A rate group three (3) Level II PRTF shall be a Level II PRTF which serves recipients who are not enrolled in a managed care organization and are]:

1. Aged thirteen (13) years or older;

2. Male or female; and

3.a. Sexually reactive; and

b. Who:

(i) Have a severe and persistent aggressive behavior;

(ii) Do not have mental retardation or a developmental disability; and

(iii) Have an intelligence quotient higher than seventy (70).

(e) Rate group four (4) criteria shall be [A rate group four (4) Level II PRTF shall be a Level II PRTF which serves recipients who are not enrolled in a managed care organization and are]:

1. Under twenty-two (22) years of age;

2. Male or female; and

3.a. Sexually reactive; or

b. Who:

(i) Have a severe and persistent aggressive behavior;

(ii) Have mental retardation or a developmental disability; and

(iii) Have an intelligence quotient lower than seventy (70).”

(3) Subject: References to “Recipients Who are not Enrolled in a Managed Care Organization

(a) Comment: Regarding the phrase “PRTF that serves recipients who are not enrolled

in a managed care organization” in Section 3(3), Kathy Adams, Direct of Public Policy of the Children’s Alliance, stated the following:

“Recommend deleting the phrase ‘who are not enrolled in a managed care organization and are’ throughout Subsection (3), in (3)(a),(b),(c), (d) and (e) as it is not necessary and as written, appears to prevent PRTF IIs from serving MCO recipients. This regulation should not prevent PRTF I’s or II’s from serving recipient’s enrolled in a MCO.

(b) Response: Section 3 establishes the Department for Medicaid Services’ reimbursement, not managed care organizations’ reimbursement, for Level II PRTF services. The managed care organizations will cover Level I and II PRTF services but are not required to reimburse the same amount as DMS does for Level I or II PRTF services.

(4) Subject: Rate Group Three [Section 3(3)(d)]

(a) Comment: Kathy Adams, Direct of Public Policy of the Children’s Alliance, stated the following:

“Error. Recommend (d) be re-written as rate group four (4), not three (3). There should be two (2) rate group fours (4’s), instead of two (2) rate group threes (3).”

(b) Response: DMS is revising the language in an “amended after comments” regulation to establish two (2) rate group four (4) scenarios – subsection (3)(d) and (e) - rather than two (2) rate group three (3) scenarios.

(5) Subject: Per Diem Rate Annual Increase for Level II PRTFs

(a) Comment: Kathy Adams, Direct of Public Policy of the Children’s Alliance, stated the following:

“Recommend inserting a new subsection (4) to read: **‘the Per diem rates referenced in Subsection (2) of this section shall be increased each biennium by 2.22 percent.’**”

Renumber the current subsection (4) and (5) to (5) and (6) respectively. This language is consistent with the PRTF I language.”

(b) Response: DMS is not inserting an automatic rate increase for Level II PRTF services. DMS needs to assess level II PRTF costs for a substantial period (via cost reports) to determine if its reimbursement structure is appropriate given PRTF costs. DMS thinks it would be inappropriate to automatically insert a reimbursement increase without first assessing and analyzing cost and reimbursement for a substantial period after level II PRTF services have been provided.

(6) Subject: Level II PRTF Per Diem Rate Analysis

(a) Comment: Kathy Adams, Direct of Public Policy of the Children's Alliance, stated the following:

"Recommend language be added that says what is done if their analysis and other factors is found to alter the cost of efficiently providing Level II PRTF services. Will and this information be used to adjust or increase the PRTF II rate, and if so, the regulation should specify when and how?"

(b) Response: DMS will insert language in an "amended after comments" regulation to clarify that it will use such evaluation, review, and analysis to determine if an adjustment to Level II PRTF reimbursement would be appropriate.

(7) Subject: Cost Reporting Requirements (Section 4)

(a) Comment: Kathy Adams, Direct of Public Policy of the Children's Alliance, stated the following:

"Recommend Section 4 be deleted and the remaining Sections renumbered accordingly if the CMS 2552-96 will not be used. Currently the form is not required to be submitted as it is not used."

(b) Response: Concurrent with promulgating the regulation, DMS has submitted a state plan amendment to the Centers for Medicare and Medicaid Services (CMS) in order to procure federal funding and approval for the policies. As part of approving a reimbursement policy, CMS requires DMS to demonstrate the basis of DMS's reimbursement proposal and CMS has urged DMS to use cost reports in other programs as a basis for determining reimbursement. It is particularly critical for DMS to have a compelling basis for its proposed reimbursement structure for level II PRTF services as they are services not previously covered by Kentucky's Medicaid program. DMS intends to analyze cost reports to determine if the reimbursement rates are appropriate given PRTF costs. If the cost reports indicate that reimbursement is inadequate or excessive in comparison to costs, DMS will adjust reimbursement. Until DMS has a solid foundation of cost reports to analyze, it does not intend to consider removing the cost report requirement.

(c) Comment: Kathy Adams stated the following:

"Recommend, if the requirement to complete and submit the CMS 2552-96 form is kept, that language be added to allow a PRTF to request an exception or extension to the 90-day timeframe submission requirement. Completion of the form is contingent upon completion of the agency's audit, which is often not able to be completed within 90 days of the end of the agency's fiscal year."

(d) Response: DMS is revising the language in an "amended after comments" regulation to establish the option of a thirty (30)-day extension for submitting a cost report.

(e) Comment: Kathy Adams stated the following:

“Recommend, if Section 4 is not deleted, that (2) be modified to clarify the purpose of the review/audit and what is done with the results of the review/audit.”

(f) Response: DMS is revising the language in an “amended after comments” regulation to establish that the review/audit will be performed to determine if the information provided is accurate.

(8) Subject: Access to Records’ Requirement (Section 5)

(a) Comment: Kathy Adams, Direct of Public Policy of the Children’s Alliance, stated the following:

“Recommend deleting “upon request, all” and rewriting to say “A Level I or II PRTF shall provide, ~~upon request, all~~ fiscal and service records as requested, to the....” Providing “all” records is unreasonable.”

(b) Response: DMS is revising the language in an “amended after comments” regulation to clarify that a facility shall provide all fiscal and service records relating to services provided to Medicaid recipients.

(9) Subject: Bed Reserve Rates

(a) Comment: Kathy Adams, Direct of Public Policy of the Children’s Alliance, stated the following:

“Recommend deleting Section 6(1)(a)-(b) and subsection (2) and add ‘reimbursed at the recipient’s per diem group rate.’ after ‘shall be’ on line 7.”

(b) Response: DMS is not amending the bed reserve reimbursement rates. DMS does not believe that reimbursing a full rate for an empty bed is appropriate.

(c) Comment: Kathy Adams, Direct of Public Policy of the Children’s Alliance, stated the following:

“Payment of bed reserve days should not be based upon occupancy percent. In Kentucky, PRTF I’s are only 9 bed facilities. There are currently no economies of scale. PRTF costs do not decrease simply because a child is not there for a few days.

Recommend that if occupancy rate is kept, that how the occupancy rate is determined (i.e. last calendar year; most recent six months; most recent three months) be specified in this Section.”

(d) Response: DMS is revising the language in an “amended after comments” regulation to establish that the occupancy percent shall be based on a midnight census.

(10) Subject: Applicability to Managed Care Organizations

(a) Comment: Kathy Adams, Direct of Public Policy of the Children's Alliance, stated the following:

"Recommend amending the 'Necessity, Function and Conformity' section of the regulation to be inclusive of Section 9, which applies to MCOs."

(b) Response: DMS is revising the Necessity, Function and Conformity paragraph in an "amended after comments" regulation as follows:

"This administrative regulation establishes Medicaid reimbursement policies for Level I and II psychiatric residential treatment facility services provided to a Medicaid recipient who is not enrolled in a managed care organization. **A managed care organization may elect to reimburse for Level I and II psychiatric residential treatment facility services in accordance with this administrative regulation if the managed care organization so chooses. The reimbursement policies established in this administrative regulation shall not apply to a managed care organization, except the requirement that a Level I or II PRTF service shall be in accordance with 907 KAR 9:005 in order to be reimbursable under the Medicaid program.**"

(11) Subject: Regulatory Impact Analysis and Tiering Statement

(a) Comment: Kathy Adams, Direct of Public Policy of the Children's Alliance, stated the following:

"Recommend the Regulatory Impact Analysis and Tiering Statement be corrected. (3) Incorrectly states that 303 Level I beds and 132 Level II beds are filled. These numbers represent the number of beds allocated under the CON process, but in no way indicates how many beds are filled. Some issued PRTF I CON's have not been used, nor are there 33 operational facilities. Currently there are no PRTF II facilities licensed or operating in the state."

(b) Response: DMS is amending subsection (3) of the Regulatory Impact Analysis and Tiering Statement in an "amended after comments" regulation to read as follows:

"Level I and Level II psychiatric residential treatment facilities will be affected by the amendment. Level I and II PRTF beds are awarded through a certificate of need process. The Office of Certificate of Need has limited the number of Level I PRTF beds statewide to 315 and the number of Level II PRTF beds to 145 statewide. Not all Level I PRTF certificates of need have been used and currently there are no licensed or operational Level II PRTFs."

(c) Comment: Kathy Adams stated the following:

“Recommend (4)(b) be changed to accurately reflect the additional costs these regulatory amendments will have on the regulated entities. Additional costs will be incurred due to requirements to complete the CMS 2552-96 and providing **all** fiscal and service records when requested, which would be a huge administrative and financial burden. A PRTF will not be paid for holding a recipient’s bed if they are below a 50% occupancy rate , which means they will have to absorb the costs of necessary hospitalizations or pass days when working to successfully transition the recipient home. In some instances, PRTFs will get paid for 5 reserve days, but they will no longer be paid the per diem rate for bed reserve days and the reduction to 5 partially paid days is a significant decrease from the full per diem reimbursement for 14 hospital and 21 pass days currently allowed. Cutting pass days and the reimbursement amount is the same as a rate cut. The outcome for children will ultimately result in more hospitalizations and re-admits, as well as increased costs for PRTFs.”

(d) Response: DMS is amending subsection (4)(b) of the Regulatory Impact Analysis and Tiering Statement in an “amended after comments” regulation to read as follows:

“The Children’s Alliance stated the following as a response to this question: ‘Additional costs will be incurred due to requirements to complete the CMS 2552-96 and providing **all** fiscal and service records when requested, which would be a huge administrative and financial burden. A PRTF will not be paid for holding a recipient’s bed if they are below a 50% occupancy rate , which means they will have to absorb the costs of necessary hospitalizations or pass days when working to successfully transition the recipient home. In some instances, PRTFs will get paid for 5 reserve days, but they will no longer be paid the per diem rate for bed reserve days and the reduction to 5 partially paid days is a significant decrease from the full per diem reimbursement for 14 hospital and 21 pass days currently allowed. Cutting pass days and the reimbursement amount is the same as a rate cut. The outcome for children will ultimately result in more hospitalizations and re-admits, as well as increased costs for PRTFs.’”

SUMMARY OF STATEMENT OF CONSIDERATION
AND
ACTION TAKEN BY PROMULGATING ADMINISTRATIVE BODY

The Department for Medicaid Services (DMS) has considered the comments received regarding 907 KAR 9:010 and is amending the administrative regulation as follows:

Page 1
Necessity, Function, and Conformity Paragraph
Line 20

After “organization.”, insert the following:

A managed care organization may elect to reimburse for Level I and II psychiatric residential treatment facility services in accordance with this administrative regulation if the managed care organization so chooses. The

reimbursement policies established in this administrative regulation shall not apply to a managed care organization, except the requirement that a Level I or II PRTF service shall be in accordance with 907 KAR 9:005 in order to be reimbursable under the Medicaid program

Page 2

Section 1(6)

Line 10

After "total", delete ", all-inclusive,".

Page 3

Section 3(2)(a)

Line 21

After "for", insert the following:

Level II PRTF services to a recipient who meets the rate group one (1) criteria established in subsection (3)(a) of this section

Delete the following:

a rate group one (1) Level II PRTF

Page 3

Section 3(2)(b)

Line 22

After "for", insert the following:

Level II PRTF services to a recipient who meets the rate group two (2) criteria established in subsection (3)(b) of this section

Delete the following:

a rate group two (2) Level II PRTF

Page 3

Section 3(2)(c)

Line 23

After "for", insert the following:

Level II PRTF services to a recipient who meets the rate group three (3) criteria established in subsection (3)(c) of this section

Delete the following:

a rate group three (3) Level II PRTF

Page 4

Section 3(2)(d)

Line 1

After "for", insert the following:

Level II PRTF services to a recipient who meets the rate group four (4) criteria established in subsection (3)(d) or (e) of this section

Delete the following:

a rate group four (4) Level II PRTF

Page 4

Section 3(3)(a)

Line 2

After “(3)(a)”, insert the following:

Rate group one (1) criteria shall be

Delete the following:

A rate group one (1) Level II PRTF shall be a Level II PRTF that serves recipients who are not enrolled in a managed care organization and are

Page 4

Section 3(3)(b)

Line 11

After “(b)”, insert the following:

Rate group two (2) criteria shall be

Delete the following:

A rate group two (2) Level II PRTF shall be a Level II PRTF which serves recipients who are not enrolled in a managed care organization and are

Page 4

Section 3(3)(c)

Line 20

After “(c)”, insert the following:

Rate group three (3) criteria shall be

Delete the following:

A rate group three (3) Level II PRTF shall be a Level II PRTF which serves recipients who are not enrolled in a managed care organization and are

Page 5

Section 3(3)(d)

Line 6

After “(d)”, insert the following:

Rate group four (4) criteria shall be

Delete the following:

A rate group three (3) Level II PRTF shall be a Level II PRTF which serves recipients who are not enrolled in a managed care organization and are

Page 5

Section 3(3)(e)

Line 15

After “(e)”, insert the following:

Rate group four (4) criteria shall be

Delete the following:

A rate group four (4) Level II PRTF shall be a Level II PRTF which serves recipients who are not enrolled in a managed care organization and are

Page 6

Section 3(5)

Line 12

After “(5)”, insert “(a)”.

Line 15

After “services.”, insert a return and the following:

(b) The department shall use the evaluation, review, and analysis referenced in paragraph (a) of this subsection, to determine if an adjustment to Level II PRTF reimbursement would be appropriate.

Page 6

Section 4(1)

Line 16

After “(1)”, insert “(a)”.

Page 6

Section 4(1)

Line 18

After “Form CMS 2552-96”, insert a return and the following:

(b) The department shall grant a thirty (30)-day extension for submitting a legible and completed Form CMS 2552-96 to the department if an extension is requested by a Level I or II PRTF.

Page 6

Section 4(2)

Line 19

After “(2)”, insert “(a)”.

After “department”, insert a return and the following:

(b) The review and audit referenced in paragraph (a) of this subsection shall be to determine if the information provided is accurate.

Page 6

Section 5

Line 21

After “records”, insert the following:

relating to services provided to a Kentucky recipient

Page 7

Section 6

Line 5

After “Reserve”, insert “and Therapeutic Pass”.

Page 7

Section 6(1)

Line 7

After “organization”, insert the following:

or a therapeutic pass day which qualifies as a therapeutic pass day pursuant to 907 KAR 9:005 for a recipient not enrolled in a managed care organization

Page 7

Section 6(2)

Line 14

After "day", insert "or therapeutic pass day".

Line 15

After "percent.", insert a return and the following:

(3) A Level I or II PRTF's occupancy percent shall be based on a midnight census.