



**RHODE ISLAND GOVERNMENT REGISTER  
PUBLIC NOTICE OF PROPOSED RULEMAKING**

**AGENCY:** Executive Office of Health and Human Services

**DIVISION:** Medicaid Policy Unit

**RULE IDENTIFIER:** Medicaid Code of Administrative Rules, Section #0390, "Flexible Test of Income"  
ERLID # 7147

**REGULATION TITLE:** Section #0390, "Flexible Test of Income"

**RULEMAKING ACTION:** Regular Promulgation Process

**Direct Final:** N/A

**TYPE OF FILING:** Repeal

**TIMETABLE FOR ACTION ON THE PROPOSED RULE:** Public comment will end on **Monday, August 6, 2018.**

**SUMMARY OF PROPOSED RULE:** This rule sets forth requirements related to "Medically Needy (MN)" eligibility for Medicaid long-term services and supports (LTSS), previously referred to as the "Flexible Test of Income", that enables people with income above the federal benefit cap to obtain Medicaid LTSS coverage in certain circumstances.

**COMMENTS INVITED:** All interested parties are invited to submit written or oral comments concerning the proposed adoption of these regulations by **Monday, August 6, 2018** to the address listed below.

**ADDRESSES FOR PUBLIC COMMENT SUBMISSIONS:**

All written comments or objections should be sent to the Secretary of EOHHS, Eric J. Beane, c/o Elizabeth Shelov, Medicaid Policy Office, Rhode Island Executive Office of Health & Human Services

**Mailing Address:** Virks Building, Room 315, 3 West Road, Cranston, RI 02920

**Email Address:** [Elizabeth.Shelov@ohhs.ri.gov](mailto:Elizabeth.Shelov@ohhs.ri.gov)

**WHERE COMMENTS MAY BE INSPECTED:**

**Mailing Address:** Executive Office of Health & Human Services, Virks Building, Room 315, 3 West Road, Cranston, RI 02920

**PUBLIC HEARING INFORMATION:**

If a public hearing is requested, the place of the public hearing is accessible to individuals who are handicapped. If communication assistance (readers/ interpreters/captioners) is needed, or any other accommodation to ensure equal participation, please call (401) 462-6266 or RI Relay 711 at least three (3) business days prior to the meeting so arrangements can be made to provide such assistance at no cost to the person requesting.

**ALTERNATIVE PUBLIC HEARING TEXT:**

In accordance with R.I. Gen. Laws § 42-35-2.8, an oral hearing will be granted if requested by twenty-five (25) persons, by an agency or by an association having at least twenty-five (25) members. A request for an oral hearing must be made within ten (10) days of this notice.



**FOR FUTURE INFORMATION CONTACT:**

Elizabeth Shelov, Interdepartmental Project Manager, Medicaid Policy Office, Rhode Island Executive Office of Health & Human Services, Virks Building, Room 315, 3 West Road, Cranston, RI 02920 or [Elizabeth.Shelov@ohhs.ri.gov](mailto:Elizabeth.Shelov@ohhs.ri.gov)

**SUPPLEMENTARY INFORMATION:**

**Regulatory Analysis Summary and Supporting Documentation:**

Societal costs and benefits have not been calculated in this instance. To be in conformity with the state and federal requirements, the state has little discretion in promulgating this rule. For full regulatory analysis or supporting documentation see agency contact person above.

**Authority for this Rulemaking:** Federal Authorities: Federal Law: Title XIX, of the federal Social Security Act at: 42 USC § 1396a, 42 USC § 1396b, 42 USC § 1396k; Federal regulations: 42 C.F.R. §§ 435.301 et seq. The RI Medicaid State Plan and the Title XIX, Section 1115 (a) Demonstration Waiver (11-W-00242/1), effective through December 31, 2018. State Authorities: Among other statutes, R.I. Gen. Laws §§ 40-6 and 40-8.

**Regulatory Findings:**

In the development of the proposed regulation, consideration was given to: (1) alternative approaches; (2) overlap or duplication with other statutory and regulatory provisions; and (3) significant economic impact on small business. No alternative approach, duplication, or overlap was identified based upon available information.

**The Proposed Repeal:**

This rule discusses the “medically needy” LTSS eligibility pathway. It will be replaced by the requirements contained in the “Medicaid Long-Term Services and Supports: Medically Needy Eligibility Pathway”, 210-RICR-50-00-2 that will be newly adopted.



**STATE OF RHODE ISLAND  
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES  
PUBLIC NOTICE OF RULE-MAKING**

***Medicaid Code of Administrative Rules, Section #0390, "Flexible Test of Income"***

In accordance with Chapter 42-35 of the Rhode Island General Laws, as amended, and pursuant to the provisions of Chapters 40-6 and 40-8 of the Rhode Island General Laws, as amended, the Secretary of the Executive Office of Health & Human Services (EOHHS) hereby proposes to repeal the rule referenced above. This rule will be replaced by the requirements contained in the "Medicaid Long-Term Services and Supports: Medically Needy Eligibility Pathway", 210-RICR-50-00-2 that will be newly adopted.

In accordance with R.I. Gen. Laws 42-35-2.8(c), an opportunity for a hearing will be granted if a request is received by twenty-five (25) persons, or by a governmental agency, or by an association having not less than twenty-five (25) members, within ten (10) days of this notice that is posted in accordance with R.I. Gen. Laws 42-35-2.8(a). A hearing must be open to the public, recorded, and held at least five (5) days before the end of the public comment period.

In the development of these proposed regulations, consideration was given to the following: (1) alternative approaches; (2) overlap or duplication with other statutory and regulatory provisions; and (3) significant economic impact on small businesses in Rhode Island. No alternative approach, duplication or overlap, or impact upon small businesses was identified based upon available information.

These proposed rules are accessible on the R.I. Secretary of State's website: <http://www.sos.ri.gov/ProposedRules/>, the EOHHS website: [www.eohhs.ri.gov](http://www.eohhs.ri.gov), or available in hard copy upon request (401 462-1575 or RI Relay, dial 711). Interested persons should submit data, views, or written comments by **Monday, August 6, 2018** to: Elizabeth Shelov, Medicaid Policy Office, RI Executive Office of Health & Human Services, Virks Building, 3 West Road, Room 315, Cranston, RI 02920 or [Elizabeth.Shelov@ohhs.ri.gov](mailto:Elizabeth.Shelov@ohhs.ri.gov).

The Executive Office of Health and Human Services does not discriminate against individuals based on race, color, national origin, sex, gender identity or expression, sexual orientation, religious belief, political belief or handicap in acceptance for or provision of services or employment in its programs or activities.

The Executive Office of Health & Human Services in the Virks Building is accessible to persons with disabilities. If communication assistance (readers /interpreters /captioners) is needed, or any other accommodation to ensure equal participation, please notify the Executive Office at (401) 462-6266 (hearing/speech impaired, dial 711) at least three (3) business days prior to the event so arrangements can be made to provide such assistance at no cost to the person requesting.

*Original signed by:* \_\_\_\_\_

Eric J. Beane, Secretary

Signed this 29<sup>th</sup> day of June 2018

## June 2018: THE FOLLOWING RULE WILL BE REPEALED IN ITS ENTIRETY

### ~~0390 FLEXIBLE TEST OF INCOME~~

#### ~~0390.05 USE OF EXCESS INCOME~~

~~REV:06/1994~~

~~An institutionalized individual who meets the other eligibility requirements, but has income in excess of the Medically Needy income limits may be eligible for Medical Assistance in accordance with the Flexible Test of Income.~~

~~During any month in which an institutionalized spouse is in the institution, no income of the community spouse shall be deemed available to the institutionalized spouse.~~

### ~~0390.10 DETERMINE SPENDDOWN LIABILITY~~

~~REV:01/2000~~

### ~~CATEGORICALLY NEEDY~~

~~To be eligible as Categorically Needy, the gross income of an institutionalized individual (who is not an SSI recipient or receiving 1619(b) benefits) may not exceed the FEDERAL CAP set forth in Section 0386.05.~~

### ~~MEDICALLY NEEDY~~

~~An applicant who has countable income less than or equal to the Medically Needy Income Limit (MNIL) is eligible as Medically Needy, without regard to the cost of medical services.~~

~~If countable income is greater than the Medically Needy Income Limit, a flexible test calculation must be completed. The flex test BUDGET PERIOD IS ONE MONTH for institutionalized individuals. (Although the budget period is one month, the APPLICATION PERIOD is the same as for other institutionalized individuals. A NEW APPLICATION IS NOT NEEDED FOR EACH MONTH.) The flex test calculation is as follows:~~

~~From the applicant's monthly gross income, first deduct the \$20 general disregard (from unearned income first), then any other applicable disregards (\$65 and 1/2 the balance of wages, etc.) Compare the countable income to the MNIL for an individual set forth in Section 0386.05. If income exceeds the MNIL, deduct the MNIL from the countable income. The balance is the monthly excess income.~~

~~From the monthly excess income, deduct the PROJECTED cost of institutional care over the month, if any. The projected cost of institutional services is the number of days of institutional care (not covered by Medicare) multiplied by the PRIVATE per diem rate. If the excess income is absorbed, the applicant is eligible for Medical Assistance for the month. If the excess income is not absorbed, then deduct the documented monthly cost of Medicare and other medical insurance premiums, then the documented cost of incurred medical expenses (including coinsurance liabilities) for the month in question. If, after the previous deductions, a balance of excess income remains, the individual is ineligible because of excess income. The balance of excess income becomes the flex test spend down liability for the month. The individual does not become eligible~~

~~until and unless s/he incurs costs for OTHER non-covered medical services which equal or exceed the remaining balance of income.~~

~~If, after the deduction of projected institutional expenses and incurred medical expenses, the individual still has excess income, s/he is ineligible. S/he must be notified that eligibility does not exist and notified in writing of the amount of excess income which must be absorbed each month in order to establish eligibility.~~

~~If eligibility is established for a month, the individual must be so notified. At the same time, if the case is being certified for the current month only, written notification is sent to notify the client of the closing.~~

~~If Medical Assistance payment is requested for an individual's institutional care expenses, the post-eligibility treatment of income described in Section 0392 must be followed to apply the individual's income to the cost of the institutional care. Those medical expenses actually INCURRED (not projected) for services in the current month that are used to establish flex-test eligibility are deducted from income before applying income to the cost of care~~

~~If the institutionalized individual is eligible for MA, either as Categorically Needy or Medically Needy, go to the discussion of Resource Transfers in Section 384. If not eligible for MA, the applicant must be notified in writing that eligibility does not exist.~~

~~0390.10.05 When Eligibility Begins  
REV: 06/1994~~

~~The date of eligibility is the actual day of the month on which the applicant incurs a medical expense which reduces income to the income standard. THEREFORE, THE DATE OF ELIGIBILITY IS THE DAY THAT THE MEDICAL SERVICE IS PROVIDED AND NOT THE DATE OF THE BILLING, which may be a later date. The expense is incurred on the day of the service.~~

~~When an incurred medical expense is a hospital bill, the date of eligibility is the first day of hospitalization. An AP 758 is required to establish the amount of the hospital bill for which the individual is liable. The individual's liability is his/her excess income on the first day of hospitalization, providing there is no expense subsequently incurred which reduces such excess income to a lesser amount.~~

~~0390.15 RECOGNIZED MED/REMEDIAL CARE  
REV: 06/1994~~

~~Care which is not being provided within the MA scope of services and which may be used to offset excess income includes:~~

~~o Adult Day Care;~~

~~o Respite Care; and,~~

~~o Home Health Aide/Homemaker Services.~~

~~0390.15.05 Adult Day Care  
REV: 06/1994~~

~~The cost of adult day care services may be used to offset a flexible test spenddown liability. In order to be considered a cost of "medical or remedial care", these conditions must be met:~~

~~o The service must have been rendered by a provider agency approved by the Department of Elderly Affairs (DEA); and,~~

~~o The service was required to assist an individual, who because of severe disability related to age or chronic illness, encountered special problems resulting in physical and/or social isolation detrimental to his/her well being, or required close monitoring and supervision for health reasons.~~

~~0390.15.10 Respite Care  
REV:06/1994~~

~~The cost of respite care may be used to offset a flexible test spenddown liability if the applicant receives overnight respite care at a licensed nursing facility or in home respite care as provided by the Department of Elderly Affairs (DEA).~~

~~0390.15.15 Home Health Aide/Homemaker Ser  
REV:06/1994~~

~~The cost of Home Health Aide services or Homemaker services may be used to offset a flexible test spenddown liability under certain circumstances. In order to be considered a cost of "medical or remedial care", the following three conditions must be met:~~

~~o The service must have been rendered by an agency licensed by the Rhode Island Department of Health, and recognized as a service provider by DHS under the Homemaker Program (see Section 0530.35 for list); and,~~

~~o At least a portion of the service provided each month MUST be for personal care services (assistance with bathing, dressing, grooming, etc.). If the applicant does not (or did not) receive assistance with personal care during a month, no part of that month's cost of service may be used to offset the flexible test spenddown liability; and,~~

~~If the foregoing three criteria are met, eligibility staff may recognize, without further review, the cost of up to 65 hours per month in Home Health Aide/Homemaker services to offset a flexible test spenddown liability. Deductions in excess of this amount must be approved in writing by the Nurse/Consultant for Homemaker Services located at 111 Fountain Street, Providence. The referral to the Nurse/Consultant is comprised of a brief cover memo prepared by the agency representative, a copy of the individual's Plan of Service obtained from the provider agency, and a copy of the physician's certification of need for services. The Nurse/Consultant reviews the material to determine the extent to which the costs of service in excess of 65 hours per month may be recognized as a deduction from excess income. Only the cost of substantive services may be allowed as a deduction from excess income.~~

~~0390.20 DEDUCT LOANS TO PAY MED BILLS~~

~~A loan can be an incurred health care expense and, in some circumstances, may be applied against the CURRENT spenddown liability when the applicant has a CURRENT obligation under the loan. The objective of the policy is to allow the recipient to use his or her liability to the lender in place of his or her liability to the provider. However, since the applicant may apply only the amount that would have been deducted had the provider's bill been used, the deduction of interest paid or payable on the loan is precluded.~~

~~A loan that is taken out in the current eligibility period to pay a health care provider for services rendered in the same period (or, in the case of a new application, for services rendered in the month of application or within the three preceding months) may be applied against the spenddown liability for the current period IN PLACE OF the provider's bill. (The loan expense and the provider's bill may not BOTH be applied against the spenddown liability).~~

~~A loan taken out in the current period or a preceding period to pay a provider's bill incurred in a preceding period may be applied against current spenddown liability to the extent of any unpaid balance in certain cases. Current principal payments and any remaining unpaid principal balance on the loan may be applied against the spenddown liability to the extent that:~~

~~o The proceeds from the loan WERE actually used to pay the provider's bill (i.e., the loan payments are not deductible until after the proceeds have been paid to the provider); and,~~

~~o Neither the provider's charges nor the loan payments and the unpaid balance were previously applied against spenddown liability or deducted from income.~~

~~Loan proceeds that will not be used until after the current eligibility period may not be applied against the spenddown liability in the current period because only loan proceeds THAT HAVE BEEN USED to pay for health care expenses may be applied.~~

~~However, such proceeds could be used against any spenddown liability for the subsequent period in which they actually are used.~~

~~This policy gives the recipient the relief intended by the spenddown (i.e., application of the remaining liability for old medical expenses against the person's spenddown liability). The policy does not change the treatment of old bills that remain unpaid — i.e., they are still deductible in the spenddown to the extent that a current liability continues to exist and the bills have not been previously deducted.~~