LEGAL ACTION CENTER

# HIGHLIGHTS OF CMS'S GUIDANCE ON HEALTH INSURANCE COVERAGE AND THE CRIMINAL JUSTICE POPULATION

## Background:

Since passage of the federal health care law, the Affordable Care Act ("ACA"), in 2010, and implementation of the law's provisions to expand health insurance coverage through Medicaid and commercial insurance, there has been significant discussion of how the law relates to people involved in the criminal justice system. Although the ACA did not amend the "inmate exclusion provision" of Medicaid law which precludes federal Medicaid matching funds for health care services provided to incarcerated people, under the new law, many more justice-involved people are eligible for Medicaid coverage.

In light of continuing questions about when and how health insurance eligibility screening and enrollment can occur for justice-involved people and when matching federal Medicaid funds are available to states and localities, the U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services("CMS") issued new guidance on April 28, 2016. The guidance, issued through the form of a State Health Official ("SHO") Letter with Questions and Answers to facilitate successful re-entry for individuals transitioning from incarceration to their communities, both reviews existing policy and provides new insight into a number of Medicaid coverage issues important to the criminal justice system.

## Why is the CMS SHO letter important to the criminal justice system?

Available research indicates the majority of people who become involved in any of the various stages of the criminal justice system (from pre-booking, to arrest, through detention, and after release) tend to be uninsured and have limited incomes. This population is largely ineligible for traditional Medicaid coverage that requires an individual to satisfy state-specific criteria of having a certain level of low-income, and categorical eligibility requirements (e.g., pregnancy, disability status, or having dependent children). Even in those instances where someone may be insured, Medicaid and private health insurance coverage for mental health and substance use disorders ("SUD") related illnesses was optional and often very limited. Justice-involved individuals also have high rates of untreated chronic health issues, including mental health and substance use disorders ("SUD"). Unfortunately, there is a strong relationship untreated MH and SUD, criminal justice system involvement, and high rates of recidivism.

However, with access to coverage and care, health status can improve, along with declines in the rate of recidivism and costs to correctional and health systems. The CMS SHO letter specifically provides guidance on how states can better utilize Medicaid services for people leaving incarceration and returning to their communities, and identifies when matching federal Medicaid funds are available as states work to improve health and justice outcomes for this population, and to reduce costs.

**What are some of the highlights of the SHO letter?**

***Incarcerated people CAN be screened for Medicaid eligibility and enrolled in coverage:***
CMS's April 2016 guidance makes clear that while the inmate exclusion provision of the law precludes federal Medicaid reimbursement for health care services provided to incarcerated people, it does not preclude an incarcerated person from being screened for Medicaid eligibility and enrolled in appropriate coverage. The SHO letter explains that,

- Medicaid screening and enrollment can occur during a period of incarceration;
- state Medicaid agencies must accept enrollment or renewal applications submitted during the time of a person's incarceration; and
- if the incarcerated individual meets all of the Medicaid eligibility criteria, the state must enroll, or renew the enrollment of, the individual.

***States can suspend, instead of terminate, an incarcerated person's Medicaid eligibility****:*
The SHO letter makes clear that instead of terminating an incarcerated individual's Medicaid eligibility, states may 1) place the individual in a suspended eligibility status during the period of incarceration or 2) suspend coverage by establishing markers and edits in the claims processing system to deny claims for excluded services. The guidance notes that a temporary suspension process maintains the individual's eligibility for Medicaid and promotes continuity of care by allowing individuals to immediately access Medicaid-covered services when they leave incarceration.

***Medicaid suspensions should be promptly lifted when the suspension status no longer applies:***
CMS emphasizes that when this temporary suspension process is used, the suspension must be promptly lifted when the individual is released from incarceration or admitted under the inpatient care exception. The SHO letter states that state Medicaid agencies must be notified of an individual's release to ensure timely removal of the suspension or edits to the claim processing system. Acknowledging that certain states have faced challenges in placing Medicaid-eligible incarcerated individuals into a suspended status, the guidance explains that it is both feasible to do so and that enhanced federal funding exists for new or improved eligibility systems. See link, "Federal Funding for Medicaid Eligibility Determinations and Enrollment Activities," for further details.

***State Medicaid agencies and correctional departments and institutions should work together to ensure that Medicaid-eligible people reentering the community from incarceration have timely access to health coverage:***
The SHO letter encourages communication between state Medicaid agencies and correctional institutions, including local departments of corrections, prisons, and jails, to better ensure timely access to Medicaid coverage. The guidance indicates that these agencies can work together to help incarcerated people apply for and receive Medicaid eligibility determinations. The guidance strongly encourages correctional institutions and other state, local, and tribal agencies to actively prepare incarcerated individuals for release by assisting them with the Medicaid application process. In addition, the guidance makes clear that states can encourage or require the Medicaid managed care entities they contract with to work with state and local correctional agencies to connect individuals reentering the community from incarceration to health care.

The SHO letter also expresses support for work by correctional institutions to transfer medical records to health care providers (including primary health, mental health and substance use disorder treatment providers) to support continuity of care as people transition between incarceration and the community. The guidance also notes that federal Medicaid matching funds are available for application assistance and eligibility determinations for Medicaid-eligible individuals.

In the April 2016 SHO letter, CMS acknowledges the need for states that use Medicaid managed care plans to develop protocols for timely reporting to prevent capitated payments (fixed amount of money per patient per unit of time paid in advance to providers for delivering health care) from being made on behalf of individuals during the time they are incarcerated. The guidance asserts that Medicaid managed care contracts should exclude incarcerated individuals from the managed care plan or should provide for disenrollment from the plan when an enrollee becomes incarcerated. The contracts should also establish that the state will recoup a capitated payment made on behalf of an enrollee who is incarcerated or a portion of a capitation payment for an individual who becomes incarcerated mid-month.

The SHO letter notes the various ways in which people can apply for Medicaid:

- online through either www.healthcare.gov, the state Medicaid agency or state-based insurance Marketplace;
- by telephone through the Marketplace call center at 1-800-318-2596; and
- through paper application submitted by mail to the state Medicaid agency.

***Depending on a person's criminal justice status, matching federal Medicaid funds may be available for his/her health care:***

The SHO letter acknowledges that states and localities use numerous words to describe different custody arrangements and that it can be confusing to determine whether a person is an "inmate" under the law and, therefore, whether federal matching Medicaid funds may be available. To provide greater clarity, in its guidance, CMS defines a several key terms and includes a number of specific examples.

Section 1905 of the Social Security Act prohibits “payments with respect to care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution).”[1] This provision, known as “the inmate exclusion” provision, relates to all individuals involuntarily confined in state or federal prisons, jails, detention facilities, or other penal facilities. The inmate exclusion provision applies only to the availability of FFP -- it does not restrict the ability of states to utilize state dollars to pay for health care services for incarcerated individuals.

Under federal law, an "inmate" is defined as an individual who is in custody and held involuntarily by law enforcement authorities in a public institution. CMS explains that a determination of an individual’s “legal ability to exercise personal freedom,” is central to the

[1] §1905(a)(A), Social Security Act.

evaluation of whether a person is an "inmate." The guidance further defines a "public institution" as being operated by, or under contract with, the federal government, a state, a territory, a political subdivision of a state or a territory, or an Indian tribe. Examples of public institutions are: state or federal prisons, local jails, detention facilities, and other penal settings, including boot camps and wilderness camps.

***The SHO letter states that federal Medicaid dollars [Federal Financial Participation or ("FFP")] <u>ARE</u> available for covered Medicaid services for a number of justice-involved individuals, including:***

- People who are on parole;
- People who are on probation;
- People who have been released to the community pending trial, including those under pre-trial supervision;
- People who are living at home under home confinement;
- People who are living *voluntarily* in a detention center for a temporary period of time after his/her case has been adjudicated and arrangements are being made for a transfer to the community; and
- People who are receiving care that falls under the inpatient exception to the general coverage exclusion for inmates. The inmate exclusion provision expressly allows the use of federal Medicaid funding to finance care provided to an eligible incarcerated individual when that individual is "a patient in a medical institution."[2] This allows federal funds to be used when the incarcerated individual is admitted as an inpatient in a community-based hospital, nursing facility, juvenile psychiatric facility, or intermediate care facility for at least 24 hours.[3] Once the person has been admitted in the appropriate inpatient setting for at least 24 hours, the provider can bill Medicaid for all medically necessary Medicaid covered services (that are covered in a state's Medicaid plan) provided to that individual as an inpatient.
    - The guidance states that, in determining whether federal matching funds are available for an individual's inpatient care, states should examine whether members of the general public may be admitted to the medical institution. Admission into the institution or into specific beds within the institution should not be limited to individuals under the responsibility of the correctional facility. In determining whether matching federal Medicaid funds are available for an individual's inpatient care in a nursing home or an intermediate care facility, states should examine whether the same health care staff and the same services are generally available between any unit or wing and the rest of the medical institution. To determine whether care provided in a hospital is eligible for matching federal Medicaid funds, CMS encourages states to look at whether individuals are admitted to specific medical units based on their treatment

[2] §1905(a)(A), Social Security Act.

[3] U.S. Dep't of Health & Hum. Services, Center for Medicaid & State Operations, *Clarification of Medicaid Coverage Policy for Inmates of a Public Institution* (Dec. 12, 1997), available at https://csgjusticecenter.org/wp-content/uploads/2014/06/PolicyforInmatesofPublicInst1997.pdf.

needs and care plans, not based on their status as incarcerated individuals. The guidance also makes clear that federal Medicaid participation is available retroactively for the three months prior to application for covered inpatient services provided to an individual who would have been Medicaid-eligible.

***Matching federal Medicaid dollars (FFP) <u>MAY BE</u> available for covered Medicaid services for:***

- People residing in correctional halfway houses who have "freedom of movement and association" while living in the facility. The CMS guidance defines "freedom of movement and association" as allowing halfway house residents to:
    1. work outside the facility in employment positions that are also available to people not under criminal justice supervision;
    2. use community resources, such as libraries, grocery stores, recreation and educational facilities at will, and;
    3. seek health care treatment in the community, just as other Medicaid enrollees are permitted to do.

  In order for federal Medicaid to be available, the state Medicaid agency has to ensure that the supervised community residential facility meets the above-described requirements. In addition, CMS acknowledges that halfway houses often have house rules requiring residents to report during certain times and/or to sign in and out, or rules defining certain times when the residence may be closed or locked. However, the SHO letter makes clear that, as long as the above-described requirements are met, these types of reporting requirements do not interfere with the ability for federal funding for health care services provided to individuals living in correctional halfway houses.

***Matching federal Medicaid dollars (FFP) <u>ARE NOT</u> available for covered Medicaid services for:***

- Incarcerated individuals in prisons and jails, regardless of whether care is provided by the institution or through a health care management entity under contract with the correctional institution or the government (except for services provided inpatient in a medical institution, as discussed above).
- People incarcerated in residential Re-entry Centers, operated by the federal Bureau of Prisons ("BOP").
- Individuals who are involuntarily residing in a residential mental health or substance use disorder treatment facility, operated by law enforcement authorities (directly or by contract to a private entity).
- People who are receiving care in hospitals, nursing facilities, or other medical institutions run primarily or exclusively for incarcerated individuals.

***What next steps can criminal justice decision-makers take?***

- State and local health and corrections agencies should together gather and review all of the state and local policies and protocols related to health insurance screening and enrollment of justice-involved individuals.
- Corrections and health agencies should continue to work together with state Medicaid agencies to implement seamless policies and practices to enroll eligible justice-involved persons in Medicaid throughout available stages of the criminal justice system.
- Corrections and health agencies should examine ways in which other states have developed systems that promote seamless coverage and access to health care as people move between the criminal justice system and the community.

***Helpful Resources:***

- "The Importance of Medicaid Coverage for Criminal Justice Involved Individuals Reentering Their Communities," the U.S. Department of Health and Human Services Office of the Assistant Secretary for Planning and Evaluation (ASPE) Issue Brief, April 2016
- "Health Care Reform, The Patient Protection and Affordable Care Act: A Practical Guide for Corrections and Criminal Justice Professionals," U.S. Department of Justice, Bureau of Justice Assistance and the American Correctional Association, July 2016
- Martha R. Plotkin and Alex M. Blandford, Critical Connections: Getting People Leaving Prison and Jail the Mental Health Care and Substance Use Treatment They Need (New York, NY: Council of State Governments Justice Center, 2017).
- Legal Action Center resources on health coverage for justice-involved individuals

***For additional information, please contact LAC at nationalpolicy@lac.org or 202-544-5478***