Joint State Advisory 16-19: CMS Guidance Clarifies Policy on Federal Payment for Services Provided to Inmates of a Public Institution

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The Medicaid statute precludes federal financial participation (FFP) for health care services provided to "inmates" in a "public institution." Although inmates in public institutions may remain enrolled in Medicaid coverage during their time in custody, the State cannot claim FFP for health care services delivered to inmates while in custody, except in limited circumstances. In recent years, with the expansion of Medicaid under the Affordable Care Act (ACA) and an increasingly aging prison population, several States have implemented policies and established programs and facilities to increase access to Medicaid coverage for individuals transitioning out of prison.

Last month, the Centers for Medicare and Medicaid Services (CMS) issued new guidance describing the parameters of Medicaid eligibility and coverage for individuals transitioning in or out of a correctional institution. While this guidance generally reaffirms longstanding CMS policy defining "inmates" in "public institutions," CMS does announce one significant policy change: expansion of Medicaid coverage to individuals in halfway houses.

Definition of Inmate

As mentioned above, FFP is not available for services provided to an "inmate of a public institution." Social Security Act (SSA) § 1905(a)(29)(A). However, States are eligible to receive Medicaid payment for services provided to individuals who are not considered inmates, or who are not residing in a "public institution."

CMS regulations define the phrase "inmate of a public institution" simply as a "person who is living in a public institution." 42 C.F.R. § 435.1010. Longstanding CMS guidance has focused the inquiry further on whether the individual is being held involuntarily in lawful custody through the operation of law enforcement authorities. Regardless of the label attached to any particular custody status, CMS considers an individual to be an "inmate" if his or her legal ability to exercise personal freedom is limited.

The new CMS guidance reaffirms the agency's position that the definition of "inmate" hinges on whether an individual is residing *involuntarily* in the public institution. The guidance also reaffirms that individuals who are on parole, probation, or have been released to the community pending trial, including under pre-trial supervision, are *not* considered inmates. FFP is available for services provided to such individuals.

Halfway Houses

In a significant reversal of policy, the new guidance announces that residents in state or local supervised community residential facilities, including halfway houses, are not "inmates," and thus FFP is available for their health care (if they are Medicaid-eligible), "unless the individual does not have freedom of movement and association while residing at the facility." FFP is available regardless of whether the halfway house is publicly or privately owned.

In order to claim FFP for Medicaid-services provided to individuals in a halfway house, the state Medicaid agency must ensure that the facility operates in accordance with three tenets:

1. Residents are not precluded from working outside the facility in employment available to individuals who are not under justice system supervision.
2. Residents can use community resources at will, including for example, libraries, grocery stores, recreation, and education.
3. Residents can seek health care treatment in the broader community to the same or similar extent as other Medicaid enrollees in the state.

These tenets do not preclude a community facility from implementing "house rules" requiring residents to report back to the center during certain times to sign in or out, or restricting residents from frequenting certain locations associated with high criminal activity. Previous CMS policy did not authorize FFP to facilities enforcing these types of "house" rules, on the ground that such rules were part of the State's criminal justice system and the facilities enforcing them substituted as "institutions for incarceration."

While FFP is available for residents of state and local halfway houses, FFP is not available for Medicaid-covered services provided to individuals in Federal "Residential Reentry Centers." The guidance does not explain why these federal reentry centers are treated differently than state halfway houses.

Definition of Public Institution

CMS regulations define a "public institution" as an institution that is the responsibility of a governmental unit, or over which a governmental unit exercises administrative control, including a correctional or holding facility for prisoners, a facility holding individuals pending trial, and a facility holding material witnesses. § 435.1010. Medical institutions, intermediate care facilities, publicly operated community residences serving 16 or fewer residents, and certain child-care institutions are excluded from this definition. *Id.*

CMS guidance has interpreted correctional facilities broadly, to include private facilities that are either under direct contract with a governmental entity to provide correctional services, or that otherwise are acting as an "institution for incarceration" on behalf of the state's criminal justice system. These facilities are considered "public institutions" regardless of whether a governmental entity exerts any direct control over the facility's operations. In previous guidance, CMS cautioned that FFP would not be available for programs, whether private or publicly organized, that are an integral part of the State's criminal justice system and act on behalf of an overburdened traditional prison system.

The new CMS guidance reaffirms that the involuntary detention of an individual, without more, does not automatically convert a facility into a public institution. For example, FFP would be available for Medicaid services provided to individuals on home confinement, despite the involuntary nature of their confinement.

Medicaid Eligibility and Enrollment

As mentioned above, while States generally cannot claim FFP for services to inmates residing in a public institution, Medicaid-eligible inmates may be enrolled in Medicaid while serving their sentence.

The new CMS guidance continues to encourage states and local agencies to take a proactive role in enrolling Medicaid eligible inmates in the program prior to their release, in order to ease their transition back into the community. CMS also encourages states to suspend the eligibility of inmates during incarceration, rather than terminating participation and re-enrolling such individuals prior to release. Federal funding is available to States for eligibility and enrollment activities relating to inmates. 42 C.F.R. § 433.112.

Inpatient Exception to the General Coverage Exclusion for Inmates in a Public Institution

The Medicaid statute carves out an exception to the general rule excluding coverage for inmates in a public institution for inmates who are "patient[s] in a medical institution." SSA § 1905(a)(29)(A). In order to qualify for the exception, the inmate must be an inpatient at the medical institution. FFP is unavailable for outpatient services, including services provided in a local hospital emergency department, an urgent care center, a clinic, or a Federally Qualified Health Center/Rural Health Clinic.

CMS regulations define "medical institution" broadly, as any institution that is:

- organized to provide medical care, including nursing and convalescent care;
- has the necessary professional personnel, equipment, and facilities to manage the medical, nursing, and other health needs of patients on a continuing basis in accordance with accepted standards;
- is authorized under State law to provide medical care; and
- is staffed by professional personnel who are responsible for professional medical and nursing services.

§ 435.1010.

CMS guidance has significantly narrowed the definition of "medical institution," by excluding any "[h]ospitals, nursing facilities, or other medical institutions operated primarily to serve inmates." CMS reasoned that such facilities would instead qualify as correctional institutions, and would thus not be eligible to receive FFP. As a result, medical institutions must be generally available to the public and organized primarily for the provision of medical care. In determining whether a medical institution is available to the public, CMS looks to the overall nature of the medical institution, whether the institution admits members of the general public, and whether beds are filled and staffed based on treatment needs rather than incarceration status.

Transitioning Aged and Disabled Prisoners into Nursing Homes in the Community

In recent years, several States have helped establish or considered establishing medical facilities that serve aging and disabled individuals who are released from prison.

States considering implementing this type of medical transition program must determine whether the individuals served through the program would qualify as "inmates" in the first instance. If individuals receiving treatment in the facility are living there voluntarily, they should not be considered "inmates" and FFP should be available.

Whether FFP is available for services provided to former inmates in these facilities may also depend in part on whether the applicable facility would being considered a "medical institution" open to the public, rather than a "public institution" housing inmates in custody. On May 3, 2016, as a follow-up to last month's guidance, CMS's Survey & Certification Group issued a memorandum to state survey agency directors providing guidance on determining whether a nursing facility or hospital is considered a "medical institution" or a "public institution." The Survey & Certification Group explained that, to be considered a "medical institution," a nursing facility or a hospital must comply with the federal requirements and conditions of participation for medical facilities, found at 42 C.F.R. Part 483, and cautioned that it would be inconsistent with Part 483 for a nursing facility or hospital to enforce correctional policies. For example, a nursing facility cannot: incorporate correctional restrictions into plans of care; allow parole officers into care planning meetings; or allow state corrections officials to maintain an office in the nursing facility. Similarly, residents must be free from restraints and be free to choose activities and schedules.

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.