

August 31, 2003

Question: A juvenile court judge who is concerned about health care services for children in state custody has contacted me. After speaking with him, I contacted a local Medicaid eligibility worker. He told me that children committed to a state juvenile justice agency and placed in a locked detention facility are not eligible for Medicaid by virtue of federal law. Is this correct?

Answer: The Medicaid Act places prohibitions on federal funding for inmates of public institutions. The statute does not provide that the inmate is not eligible for Medicaid.

Discussion: Children and youth who enter the juvenile justice system often do so with a number of medical and mental health needs. Many have not seen a doctor in years. It is important for these children to obtain timely screening services and appropriate treatment for their identified health care needs.

Many of the children in the juvenile justice system are poor or of limited income. A 1999 survey of chief county probation officers in California estimated that from 15-99 percent of children in county juvenile probation populations are Medi-Cal eligible, with an estimated average of 47 percent. [\[1\]](#) Thus, the Medicaid program seems to be a potential source of funding for needed health care, particularly given the comprehensive nature of the Early and Periodic Screening, Diagnosis and Treatment (EPSDT) services that are mandated for children and youth under age 21. See 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43), 1396d(a)(4)(B), 1396d(r).

### The Medicaid Act and regulations

However, the Medicaid Act prohibits federal financial participation (FFP) "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)." *Id.* at § 1396d(a)(27)(A); see 42 C.F.R. §§ 441.33(a)(1), 435.1008(a)(1). The funding exclusion "does not apply during that part of the month in which the individual is not an inmate of a public institution." 42 C.F.R. § 435.1008(b).

Implementing regulations say, "Inmate of a public institution means a person who is living in a public institution." 42 C.F.R. § 435.1009. An individual is not considered to be living in a public institution if:

(a) He is in a public educational or vocational training institution for purposes of securing education or vocational training; or

(b) He is in a public institution for a temporary period pending other arrangements appropriate to his needs.

*Id.* A public institution is defined as "an institution that is the responsibility of a governmental unit or over which a governmental unit exercises administrative control." *Id.* It does not include a medical institution, an intermediate care facility, a publicly operated community residence that serves no more than 16 residents, or a child-care institution with respect to children receiving foster care or foster care payments.

[\[2\]](#)

*Id.*

See

*Dixon v. Stanton*

, 446 F. Supp. 335 (N.D. Ind. 1979) (holding homes for the developmentally disabled regulated by the state but not under its administrative control were not public institutions).

### Federal policy guidance

In December 1997, the Department of Health and Human Services (DHHS) issued a letter to all regional Medicaid administrators that further clarifies the statute and regulations. See Letter from Robert A. Streimer, Director, DHHS Disabled and Elderly Health Programs Group, to All Associate Regional Administrators (Dec. 12 1997) ("December 1997 policy letter"); HCFA Program Issuance Transmittal Notice Region IV (Mar. 6, 1998) (Clarification of Medicaid coverage policy for inmates of a public institutions) (transmitting December 1997 policies to Medicaid agencies in AL, FL, GA, KY, MS, NC, SC, TN).

### Prohibitions on FFP

The policy notes that two criteria must be met when determining whether FFP is prohibited. First, the individual must be an inmate, and second, the facility in which the individual is residing must be a public institution. According to DHHS, "An individual is an inmate when serving time for a criminal offense or confined *involuntarily* in State or Federal prisons, jails, detention facilities, or other penal facilities." *Id.* (emphasis in original).

FFP would not be available in the following situations:

1. Individuals who are being held involuntarily in detention centers awaiting trial.
2. Inmates involuntarily residing at a wilderness camp under governmental control.
3. Inmates involuntarily residing in half-way houses under governmental control.
4. Inmates receiving care on the premises of the prison, jail, detention center, or other penal setting.

The following are examples of when FFP would be available:

1. Infants living with the inmate in a public institution.
2. Paroled individuals.
3. Individuals on probation.
4. Individuals on home release, except during those times when reporting to a prison for overnight stay.
5. Individuals living voluntarily in a public educational or vocational training institution.
6. Individuals living voluntarily in a detention center, jail, or county penal facility after their case has been adjudicated or while other living arrangements are being made for them (e.g. transfer to a community residence).

According to the DHHS 1997 policy letter, the "other living arrangements" situation does not exist if the individual is involuntarily residing in a public institution awaiting criminal proceedings, penal dispositions, or other involuntary detainment determinations. DHHS states: "For purposes of excluding FFP, a juvenile awaiting trial in a detention center is no different than an adult in a maximum security prison – both are considered inmates of a public institution." *Id.* However, FFP should be available for children who have been "sentenced" to placement in a non-secure setting, and being found "guilty" of a crime should not be a determining factor.

*Compare*

*Brown v. County Commissioners of Carroll County,*

658 A.2d 255, 262 (Md. 1995) (finding pretrial detainee's jail stay was "temporary pending other appropriate arrangements" because he was in jail only until he could post bail or until the disposition of the criminal charges against him).

### **The medical institution exception**

The Medicaid Act provides an exception to the FFP prohibition where the inmate becomes a patient in a medical institution. See 42 U.S.C. § 1396d(a)(27)(A). According to DHHS, this happens when a person is admitted as an *inpatient* to a hospital, nursing facility, juvenile psychiatric facility, or intermediate care facility for the mentally retarded.

See

December 1997 Policy Letter. Thus, FFP is available for any Medicaid-covered services provided to Medicaid-eligible inmates who are in any of these settings, provided they meet any additional criteria for the service, such as level of care requirements for long-term nursing care. FFP is not available for inmates receiving care as an outpatient.

### **Implications for Medicaid eligibility**

The federal law does not say that inmates in public institutions are not eligible for Medicaid or that they automatically lose Medicaid eligibility upon becoming an inmate. Rather, the federal law applies only to prohibit FFP for inmates of public institutions. See December 1997 Policy Letter ("[T]he statute refers only to FFP not being available. It does not specify, nor imply, that Medicaid eligibility is precluded for those individuals who are inmates of a public institution."); Letter from Mary Jean Duckett, Director, CMS Division of Benefits, Coverage and Payment, to Mr. Robert J. Raubach, Georgia Advocacy Office (Sept. 29, 1999) ("Regarding the question of eligibility, there are no Federal requirements which preclude an inmate of a public institution from retaining Medicaid eligibility status.") Accordingly, inmates of a public institution may be eligible for Medicaid if the appropriate eligibility criteria are met.

Thus, states need not and arguably should not terminate Medicaid eligibility during an individual's period of incarceration. The state can program its computers to suspend Medicaid payments during the period of incarceration.

There are numerous reasons why states should suspend payments rather than terminate eligibility. Maintaining eligibility ensures that inmates will receive prompt Medicaid coverage if they do become inpatients of an institution while they are incarcerated. In addition, the individual can avoid having to re-apply for Medicaid once the period of incarceration has ended, thus assuring that Medicaid services, such as needed mental health and drug coverage, will be provided immediately upon release. In other words, Medicaid benefits should be immediately restored upon release from incarceration unless there has been a determination that the individual is no longer eligible for benefits. This also means that an inmate should remain eligible for Medicaid until found by the state to be ineligible under the program's eligibility criteria. See 42 C.F.R. § 435.930; see *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding constitutional due process requires that public benefits not be terminated prior to an opportunity for impartial review).

A pending Tennessee case, *Grier v. Goetz*, illustrates how advocates can work with the FFP limitations of the statute to benefit children and youth.

See

Civil Action No. 79-3107 (M.D. Tenn.) (Pending Order September 2003),

at

<http://www.tnjustice.org>.

*Grier*

involves due process protections for individuals who are eligible for the statewide Medicaid managed care program, TennCare. The certified class includes children and youth. A pending settlement agreement provides that class members who are residing in state-run youth prisons, called Youth Development Centers, may pursue appeals of Medicaid denials, including entitlement to corrective action under 42 C.F.R. § 431.246, where:

1. The class member was TennCare-eligible and receiving services prior to entering the Center, and the appeal involves a question of reimbursement for services denied prior to entering the Center.
2. The child can pursue an appeal to obtain needed services upon discharge if he will be TennCare eligible upon discharge and is within 45 days of discharge or can show that, but for the unavailability of the services at issue, he would be within 45 days of discharge.
3. The child was eligible for TennCare services prior to entering the Center but did not receive them because of an adverse action by TennCare or a managed care organization, and the child still needs the services but is not receiving them in the Center. She may seek through the appeal process an administrative directive instructing TennCare or the MCO to provide the services now, as corrective action under 42 C.F.R. §§ 431.246, 431.250(b), to remedy the failure to provide needed services in a timely fashion before she was institutionalized.

[1] Discussion manuscript of Sue Burrell and Alice Bussier, Youth Law Center (Oct. 4, 2002) (citing A.M. Libby et al, Center for Mental Health Services Research, University of California Berkeley and San Francisco, *Mental Health Screening, Assessment, and Treatment Services and Additional Costs for Children in Foster Care or on Probation and Their Families* 22 (June 30, 1999)).

[2] See 42 C.F.R. § 435.1009 (further defining the listed institutional settings).