

**OFFICE OF POLICY AND LEGAL ANALYSIS
BILL ANALYSIS**

TO: Members, Joint Standing Committee on Criminal Justice and Public Safety

FROM: Jane Orbeton, Legislative Analyst

DATE: April 7, 2021

LD: 476 An Act To Provide Licensed Assisted Living and Nursing Facilities Levels of Care for Incarcerated Persons

Summary

This bill requires the Department of Corrections to provide assisted living and nursing facility levels of care in licensed units in DOC correctional facilities and in licensed facilities in the community for persons in DOC custody. The bill requires DOC to adopt routine technical rules to implement the long-term care services requirement.

The bill requires DOC to assess medical and social need using the MaineCare eligibility assessment.

The bill requires DOC to work with the DHHS to develop licensed units in correctional facilities, to provide long-term and assisted living and nursing facility levels of care in licensed facilities in the community and to encourage licensed community facilities to accept prisoners as residents.

The bill requires DOC to train community facilities on the specific needs of prisoners.

Testimony

Proponents:

1. Representative Morales sponsored the bill, testified in support and provided written testimony. Rep Morales cited the increasing age of the state prison population, the infrequent use of supervised community confinement for prisoners who are terminally ill or suffer from severely incapacitating medical conditions, the potential use of MaineCare to fund assisted living and nursing facility levels of care and the Mountain View assisted living unit which does not meet DHHS licensing standards.
2. Matthew Morgan submitted testimony for the Maine Association of Criminal Defense Lawyers (MACDL), supporting the bill and suggesting the addition of language giving a prisoner the right to appeal to a court the decision of the DOC Commissioner not to provide care requested by a prisoner. Richard Erb, representing the Maine Health Care Association, testified in favor and provided written testimony. Mr. Erb cited the need to meet the health care needs of an aging prison population and the importance of planning for future needs, stressing the importance of licensed community providers having the opportunity to participate, the need for specialized training and the need for adequate reimbursement rates. Mr. Erb offered to assist with future study.

3. The following persons testified on behalf prisoners in DOC custody: Alexis Phillips for Jeffrey Taylor; Carissa Young for Leo Hylton; Faith Nkansah-Siriboe for Nathan Goodwin; and Carla Hunt for Ralph Nichols.

4. Testifying in support of the bill or submitting written testimony as members of the Maine Prisoner Advocacy Coalition were Irving Faunce, Robert Payzant, Jan Collins, Peter Lehman and Gaelyn Aguilar. Also testifying in support in person or in writing were Cushman Anthony. A former legislator and House chair of the Select Committee on Corrections, Marissa Weil, a volunteer at the Maine State Prison, Anthony Lombardi, legal fellow at GLBTQ Legal Advocates and Defenders, and Mary Bonauto, civil rights project director at GLBTQ Legal Advocates and Defenders, and home health nurse Holly Reid. Kandyce Powell, representing the Maine Hospice Council, testified in support, provided information about the hospice unit at the Maine State Prison and suggested that a hybrid model that provides choices may be required. Foster Bates, representing the Maine State Prison Branch of the NAACP, submitted written testimony in support, citing the increasing age of the prison population and the residents' unresolved health issues. Michael Kebede, representing the ACLU, testified and provided written testimony in support, citing the 8th Amendment guarantee of health care and the need to establish appropriate standards of care for residents of prisons.

Opponents:

1. Commissioner Liberty of DOC testified and provided written testimony in opposition to the bill. Commissioner Liberty provided information about the Helping Hands peer assistant program, the assisted living unit for women in the Women's Center in Windham, the assisted living unit for men at Mountain View Correctional Facility and the hospice unit in the infirmary at the Maine State Prison, which can serve women and men. Commissioner Liberty testified that DHHS standards for licensing assisted living and nursing facilities do not consider resident and staff safety, security and operational needs for a correctional setting and that Maine Care eligibility criteria are ill-suited to the correctional context. DOC opposes a new DOC role in developing and working with assisted living and nursing facilities in the community as beyond the purview of DOC, impractical and cost-prohibitive and opposes a training duty on the basis of cost. DOC opposes standard rules for eligibility on the basis that they would exclude persons currently served in the women's unit in Windham. Commissioner Liberty suggested an amendment to replace the bill that would read:

Sec. 1. 34-A MRSA §1402, sub-§14 is enacted to read:

14. The commissioner shall establish and maintain or contract for long-term care services, including assisted living and nursing facility levels of care, for prisoners for whom such services are necessary as determined by the facility's treating physician.

INFORMATION REQUESTED:

1. Information was requested from DHHS on Maine Care eligibility for persons in the custody of DOC, including those who may reside in a correctional facility and those who may reside in the community in a licensed assisted living or nursing facility. An email on this topic from Molly Bogart of DHHS is attached, as are a 2016 guidance letter from federal DHHS to state Medicaid directors and an article on the topic of Medicaid coverage for persons serving sentences of imprisonment from the Pew Charitable Trust.
2. Information was requested about long-term care services currently provided by Wellpath.

Orbeton, Jane

From: Bogart, Molly <Molly.Bogart@maine.gov>
Sent: Thursday, April 1, 2021 5:32 PM
To: Orbeton, Jane
Subject: RE: LD 476 in CJPS Committee

Follow Up Flag: Follow up
Flag Status: Flagged

This message originates from outside the Maine Legislature.

Here you go from OFI. If you have follow up/need more clarity, let me know!

Inmates of public institutions may be enrolled in Medicaid, but coverage is limited to inpatient services furnished to the individual while admitted to a medical institution for at least a 24-hour inpatient stay (CFR 435.1010). So, if the individual is residing in a public institution services provided in the prison would not be covered. If they were admitted to a facility (medical institution available to the public) as an inpatient, funding may be available.

This is old CMS guidance, but it's still relevant and provides examples of when inmates may qualify for Medicaid funding:
<https://www.medicaid.gov/sites/default/files/Federal-Policy-Guidance/Downloads/sho16007.pdf>

Molly Bogart, Director of Government Relations
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Who we serve. What we do. Who we are.

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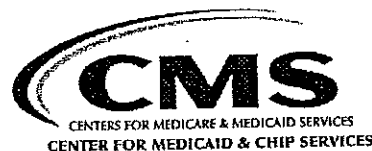
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From: Orbeton, Jane <Jane.Orbeton@legislature.maine.gov>
Sent: Thursday, April 01, 2021 8:41 AM
To: Bogart, Molly <Molly.Bogart@maine.gov>
Subject: LD 476 in CJPS Committee

Hello, Molly,

Thank you for your note earlier this week.

The work session for LD 476 on assisted living and nursing facility level care in a correctional facility or under the supervision of DOC has been set for work session on Friday March 9 at 2pm.



SHO # 16-007

**RE: To Facilitate successful re-entry for
individuals transitioning from incarceration to
their communities**

April 28, 2016

Dear State Health Official:

The purpose of this letter and its attachment is to provide guidance on facilitating access to covered Medicaid services for eligible individuals prior to and after a stay in a correctional institution. This State Health Official Letter with attached Questions and Answers (Qs & As) describes how states can better facilitate access to Medicaid services for individuals transitioning from incarceration to their communities.

As a result of changes states are adopting in their Medicaid programs, individuals in many states who were previously uninsured now are eligible for Medicaid coverage, including a significant numbers of justice-involved individuals. While the Medicaid statute limits payment for services for individuals while residing in correctional institutions, Medicaid coverage can be crucial to ensuring a successful transition following incarceration. Many individuals in the justice-involved population have a high prevalence of long-untreated, chronic health care conditions as well as a high incidence of substance use and mental health disorders. Facilitating enrollment in Medicaid and supporting access to services following incarceration has the potential to make a significant difference in the health of this population and in eligible individuals' ability to obtain health services that can promote their well-being. Such enrollment will also help individuals with disabilities obtain critical community services to avoid crises and unnecessary institutionalization.

As states consider eligibility and coverage issues, many have asked questions about the longstanding provision of the Medicaid statute that excludes Medicaid payment for services provided to inmates of public institutions, including correctional institutions, except for services provided as "a patient in a medical institution". We address them in the following Qs & As. The Centers for Medicare & Medicaid Services (CMS) Center for Medicaid and CHIP Services (CMCS) welcomes the opportunity to work closely with states to identify ways to improve access to needed health care for individuals returning to the community following incarceration.

Page 2 – State Health Official and State Medicaid Director

If you have any questions regarding the information in the Qs & As, please send questions to CMCSMedicaidQAInmates@cms.hhs.gov.

Sincerely,

/s/

Vikki Wachino
Director

cc:

National Association of Medicaid Directors
National Academy for State Health Policy
National Governors Association
American Public Human Services Association
Association of State Territorial Health Officials
Council of State Governments
National Conference of State Legislatures

Enclosure:

Questions & Answers

Section 1: Inmate Definition

Inmates of a public institution who are held involuntarily may be enrolled in Medicaid, but may not receive Medicaid covered services. The inmate coverage exclusion applies to Medicaid services to inmates, except as inpatients in a medical institution as provided in statute and described in Section 3 of this document.

Q1. Inmate Defined: *Who is an inmate of a public institution?*

A1. Medicaid regulations at 42 Code of Federal Regulations (CFR) 435.1010 define an inmate of a public institution as "a person living in a public institution" and define a public institution as "an institution that is the responsibility of a governmental unit or over which a governmental unit exercises administrative control." A public institution includes a correctional institution. There are separate definitions for "child care institutions" and "publicly operated community residences," and we interpret such institutions to be in a separate category and therefore not included as public institutions for the purposes of identifying who is in an inmate in this guidance.

CMS considers an individual of any age to be an inmate if the individual is in custody and held involuntarily through operation of law enforcement authorities in a public institution, other than a child care institution, publicly operated community residence that serves no more than 16 residents, or a public educational or vocational training institution for purposes of securing educational or vocational training. Correctional institutions include facilities operated by, or under contract with, the United States, a state, a territory, a political subdivision of a state or territory, or an Indian tribe for the confinement or rehabilitation of persons charged with or convicted of a criminal offense or other persons held involuntarily in lawful custody through operation of law enforcement authorities. Correctional institutions include state or federal prisons, local jails, detention facilities, or other penal settings (e.g., boot camps, wilderness camps). While correctional institutions may provide medical and related services, they are organized for the primary purpose of involuntary confinement. Thus, correctional institutions are never considered to be medical institutions (which are defined in 42 CFR 435.1010 to be organized to provide medical care).

We recognize that federal, state, local, and tribal authorities attach different names, conditions, and requirements to individuals in various custody arrangements. Regardless of the label attached to any particular custody status, an important consideration of whether an individual is an "inmate" is his or her legal ability to exercise personal freedom.

Q2. Individuals on Parole or Probation: *Is Federal Financial Participation (FFP) available for eligible individuals who are in the community on parole or probation, or have been released to the community pending trial (including those under pre-trial supervision)?*

A2. Yes. Individuals who are on parole, probation, or have been released to the community pending trial (including those under pre-trial supervision) are not considered inmates, and thus are not subject to the prohibition on providing Medicaid covered services to inmates. If they are otherwise eligible for Medicaid, FFP is available for covered services provided to such individuals.

Q3. Residence in a Halfway House: *When is FFP available for Medicaid-covered services to individuals residing in state or local private or publicly operated corrections-related “supervised community residential facilities”?*

A3. FFP is available for covered services for Medicaid-eligible individuals living in state or local corrections-related supervised community residential facilities (whether operated by a governmental entity or a private entity) unless the individual does not have freedom of movement and association while residing at the facility. In order for FFP to be available for covered services for Medicaid-eligible individuals living in such a facility, the facility would have to operate in such a way as to ensure that individuals living there have freedom of movement and association according to the following 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 (libraries, grocery stores, recreation, education, etc.) at will; and (3) residents can seek health care treatment in the broader community to the same or similar extent as other Medicaid enrollees in the state. For this purpose, “at will” includes and is consistent with requirements related to operational “house rules” where, for example, the residence may be closed or locked during certain hours or where residents are required to report during certain times and sign in and out. Similarly, an individual’s supervisory requirements may restrict travelling to or frequenting certain locations that may be associated with high criminal activity. To claim FFP for Medicaid-covered services furnished to Medicaid-eligible individuals while they are living in a supervised community residential facility, the state Medicaid agency must ensure that the facility meets the requirements described above.

Q4. Residential Reentry Centers: *Is FFP available for Medicaid-covered services to individuals residing in federal “Residential Reentry Centers”?*

A4. No. The Department of Justice, Bureau of Prisons (BOP) retains responsibility for payment of health care services rendered to individuals in Residential Re-entry Centers (RRCs). RRC residents previously enrolled in their state Medicaid program would have benefits suspended while serving a duly adjudicated term of incarceration in a federal facility or RRC.

RRC residents not previously enrolled in their state Medicaid program would be able to apply to their intended release state of residency for eligibility determination while incarcerated, but would not be eligible to receive Medicaid benefits until their status changed to home confinement, parole, probation, or full-term release.

Q5. Free Choice of Provider: *Must individuals in transitional or supervisory arrangements have the ability to freely choose their Medicaid providers, as required in Federal law at Section 1902 (a)(23) of the Act?*

A5. Yes. Eligible individuals who are not inmates but rather who are in transitional or supervisory arrangements, as beneficiaries of the Medicaid program, have the same ability to choose their providers of health care services as afforded to other Medicaid beneficiaries in their states.

Q6. Individuals on Home Confinement: *Is FFP available if an individual is on home confinement?*

A6. Yes. An individual's private place of residence generally would not meet the definition of a "public institution", which is a component of the coverage exclusion, despite the involuntary nature of the home confinement scenario. FFP is available for expenditures under the approved state plan for covered Medicaid benefits furnished to eligible individuals living at home under home confinement.

Q7. Voluntary and Temporary Residence in a Public Institution: *Is an individual considered an inmate of a public institution if residing there voluntarily for a temporary period?*

A7. No. An individual is not considered an inmate when residing in a public institution voluntarily and the coverage exclusion does not apply. For example, FFP is available for services when an individual (if eligible and enrolled in Medicaid) is living voluntarily in a detention center for a temporary period of time after his case has been adjudicated and arrangements are being made for his transfer to a community residence. The voluntary nature of the residence is critical; an individual would be considered an inmate during temporary involuntary residence in a public institution imposed by the justice system (for example when confined pending trial) but not when the individual is free to leave, but is "residing in a public institution for a temporary period pending other arrangements appropriate to his needs" consistent with 42 CFR 435.1010.

Q8. Residence in Facilities for Treating Mental Health and Substance Use Disorders: *Is FFP available for mental health or substance use disorder services, furnished exclusively to inmates, in a residential treatment facility?*

A8. No. FFP is not available for services in a residential treatment facility for inmates who are involuntarily residing in the facility by operation of law enforcement authorities, since this facility would be a correctional institution (even if it were operated by a private entity under contract).

In addition to the inmate exclusion, the Medicaid statute also includes a coverage exclusion related to services for patients in Institutions for Mental Diseases (IMDs), which include residential treatment facilities of over sixteen beds that are primarily engaged in the diagnosis, treatment, or care of persons with mental diseases.¹

Q9. Applicability of other Medicaid Requirements: *Will services provided to individuals who have been released to the community be subject to any other requirements before being qualified for Medicaid reimbursement?*

A9. Yes. All Medicaid rules apply in determining the circumstances in which reimbursement is available, including the coverage exclusion for services provided to individuals who are in an IMD and the Home and Community Based Services (HCBS) requirements relating to the provision of services authorized under 1915(c) HCBS waivers, 1915(i) HCBS state plan options, and 1915(k) Community First Choice programs.²

Section 2: Eligibility and Enrollment

Q10. Medicaid Eligibility While Incarcerated: *Does being incarcerated prevent an inmate from being determined eligible for or maintaining eligibility for Medicaid?*

A10. No. The inmate exclusion is a general coverage exclusion; it is not an eligibility exclusion. Incarceration does not preclude an inmate from being determined Medicaid-eligible. The state Medicaid agency must accept applications from inmates to enroll in Medicaid or renew Medicaid enrollment during the time of their incarceration. If the individual meets all applicable Medicaid eligibility requirements, the state must enroll or renew the enrollment of the individual effective before, during, and after the period of time spent in the correctional facility. Once enrolled, however, the state may place the inmate in a suspended eligibility status during the period of incarceration, or it may suspend coverage by establishing markers and edits in the claims processing system to deny claims for excluded services, as discussed below.

It should be noted that, due to Medicaid retroactive eligibility provisions at section 1902(a)(34) of the Social Security Act, FFP is available for Medicaid-covered inpatient services provided in

¹ The exclusion for services provided to individuals who are in an Institution for Mental Disease can be found at section 1905(a)(29)(B) of the Act.

² The exclusion for services provided to individuals who are in an Institution for Mental Disease can be found at section 1905(a)(29)(B) of the Act; qualities of a home and community based setting are outlined in 42 CFR 441.301(c)(4).

a medical institution to an inmate in the 3-month period prior to application, if the individual would have been Medicaid-eligible.

We strongly encourage correctional institutions and other state, local, or tribal agencies to take an active role in preparing inmates for release by assisting or facilitating the application process prior to release. Individuals can apply for Medicaid online at www.HealthCare.gov or through their state Medicaid agency or state-based Marketplace. If restrictions on internet access make it impossible or impractical for an inmate to file an online application, then a paper application may be used. A telephone application is another option; individuals may call the Marketplace call center at 1-800-318-2596 to apply 24 hours a day, 7 days a week. Correctional institutions and other entities should coordinate with their state Medicaid agencies in order to receive paper copies of forms. In accordance with federal regulations governing Medicaid applications at 42 CFR 435.907, state Medicaid agencies must accept applications that are submitted online, through the mail, or by phone.

We also support correctional institutions' efforts to transfer medical records to new primary care, mental health providers, substance use treatment providers, other specialists, and other providers to ensure continuity of care, including electronic means of maintaining and transferring such records. Various types of financial match are available for states to support these activities. In addition, federal Medicaid matching funds are available for application assistance and eligibility determination, assuming all other qualifications are met.

Q11. Financial Eligibility: *How does incarceration affect a Medicaid-enrolled individual's household income?*

A11. The effect of incarceration on an individual's financial eligibility for Medicaid depends on the individual's circumstances. For most individuals, financial eligibility is determined using modified adjusted gross income (MAGI), which is generally based on tax filing relationships and taxable income. There are no special rules or exceptions for incarcerated individuals. If the incarcerated individual does not expect to file taxes, then Medicaid financial eligibility would be based solely on the income of the individual.

Q12. Suspended Status: *How should states handle the situation when a Medicaid-enrolled individual is or becomes incarcerated?*

A12. To ensure that FFP is only claimed for Medicaid-covered inpatient services delivered to inmates in a medical institution, states should consider placing the eligibility of a Medicaid-enrolled inmate in a suspended status upon incarceration and/or setting up claims processing markers and edits to ensure that services are limited to only inpatient services. Other methods may also be used to accomplish the same result (suspending coverage instead of eligibility). A temporary suspension process maintains the individual's eligibility for Medicaid and provides for continuity of care so that the individual can immediately access Medicaid-covered services

upon release from the facility. Whatever approach is used, the suspension must be promptly lifted when the inmate exclusion no longer applies (e.g., upon release, or when the individual is admitted as a patient for inpatient treatment in a medical institution). Establishing proactive communication processes between the state Medicaid agency and state and local correctional facilities can help to ensure prompt notification of release and timely access to coverage.

Q13. Feasibility of Suspended Status: *Is it feasible for states' eligibility determination systems to accommodate a suspension process when a Medicaid-eligible individual is incarcerated? Are there resources available to support modernizing states' eligibility systems, to allow for suspended enrollment status?*

A13. Yes for both. While some states have a history of suspending eligibility for incarcerated individuals, others have faced challenges with their legacy eligibility and enrollment systems when placing Medicaid-eligible inmates in a suspended status. Addressing these challenges should be possible with the availability of enhanced federal funding for new or improved eligibility systems, as specified in the final rule, codified at 42 CFR 433.112, "Federal Funding for Medicaid Eligibility Determination and Enrollment Activities, FR 2011-09340," published in April 2011.

Q14. Promoting Enrollment to Ensure Continuity of Care: *What can states do in order to promote enrollment for Medicaid-eligible individuals who are incarcerated?*

A14. State Medicaid agencies can work with their local departments of corrections, prisons, and jails to assist incarcerated individuals, who may not have been enrolled in Medicaid at the time of their incarceration, to apply and receive an eligibility determination for Medicaid. Once enrolled, states may employ various approaches to suspend eligibility, such as implementing a claims processing edit, instead of terminating the Medicaid eligibility of an incarcerated individual. Suspension of eligibility or claims processing edits allow for individuals to retain eligibility for Medicaid-covered inpatient services provided in a medical institution while incarcerated. States and local jurisdictions, or their contractors, need to be proactive in notifying the state Medicaid agency of an inmate's release, to ensure timely removal of suspension or claims processing edits. This will ensure active Medicaid coverage at re-entry and timely access to the full array of Medicaid-covered services upon release. To further assist individuals exiting incarceration, states can encourage or require their Medicaid managed care entities to work with state and local correctional agencies to connect such individuals to needed health services upon release.

Q15. Eligibility and Transfers to Another State: *When an inmate is involuntarily transferred to a correctional institution out of the individual's home state, how does that affect the individual's eligibility for Medicaid and a state's ability to maintain, suspend, or terminate existing coverage?*

A15. If the inmate was incarcerated by a home state but sent to an out-of-state institution meeting the definition of “a public institution” under 42 CFR 435.1010, for any reason, including the home state not having capacity to house the individual, the home state remains the state of residence (see 42 CFR 435.403(b) and(e)). Therefore, in this scenario, the inmate would retain residency for purposes of Medicaid eligibility in the home state. The inmate would have Medicaid coverage from the home state for incurred costs for inpatient services provided within the exception to the inmate exclusion, even if such services were provided outside the home state.

Individuals who have committed a crime outside of their home state and are placed in a correctional institution in and by the state in which the crime was committed would be considered to be residents of that state while incarcerated, as provided at 42 CFR 435.403(h)(5). In these circumstances, it is, therefore, the responsibility of the state in which the individual is incarcerated to determine how eligibility is established and how inpatient costs incurred for the inmate would be reimbursed (e.g., claimed by the Medicaid agency under the exception to the coverage exclusion, if the individual is eligible for Medicaid in that state, or borne by the Department of Corrections in that state).

Q16. Home Addresses: *Can an individual incarcerated in a correctional institution be determined eligible for Medicaid in the state of incarceration using the correctional institution as the home address?*

A16. Yes. The correctional institution could be used as the home address for establishing residency for purposes of Medicaid eligibility, except in the scenario described in the preceding question, when the individual is placed in an out-of-state facility by their home state.

Q17. Avoiding Simultaneous Eligibility: *If an inmate is enrolled in Medicaid in the state in which he/she is incarcerated, does that Medicaid coverage need to be terminated before he/she can begin the process of enrolling in Medicaid in the home state to which he/she will be returning upon release from the correctional institution?*

A17. There should not be simultaneous Medicaid coverage in multiple states. However, it would be possible to initiate an application for benefits in a second state prior to termination in the first state. In this situation, there should be communication between the respective state agencies to ensure there are no overlapping coverage periods.

Q18. Applying for Medicaid in a Different State: *Prior to release, can an individual incarcerated in a correctional institution apply for Medicaid in a different state in which the individual intends to reside upon release?*

A18. Yes. States can process applications of incarcerated individuals prior to the individual's release, regardless of whether the individual intends to reside in the same state or a different

state upon release. In the case of individuals who intend to reside in a different state, the address where the individual being released intends to live or the address of a probation or parole office or community residential facility may be used. We note that, in accordance with 1902(b)(2) of the Act and 42 CFR 435.403(h) and (i), Medicaid does not require an individual to have a fixed or home address in the state, but in that situation an address through which the state can contact the individual after release is needed. The effective date of eligibility would be the date the individual arrives in their new state of residence. Alternatively, if, for operational reasons, a state preferred to make eligibility effective prior to the date of release or arrival, the state could cover these individuals as non-residents, if these individuals otherwise meet the eligibility criteria in the state.

Q19. Filing an Application for a Different State: *How does the application process work for an individual who is incarcerated and is preparing for release, but is not yet living in the state to which he or she is applying and intending to reside?*

A19. Individuals who are incarcerated are permitted to file applications through modalities generally available to applicants in accordance with §435.907— i.e., online, by telephone and by mail. However, as a practical matter, states may need to employ a variety of approaches to assist with the determinations of eligibility and enrollment for individuals in this situation, depending on the systems' capability and operations in the state. We encourage states to work cooperatively with corrections facilities operated in their own and other states, as well as with the Federal Bureau of Prisons, to achieve as coordinated and seamless a process for these individuals as possible. CMS is available for technical assistance.

Q20. Agreements with Medicaid Managed Care Plans: *How can states that use Medicaid managed care plans prevent capitated payments from being made on behalf of individuals who are incarcerated?*

A20. States should establish agreements with their Medicaid managed care plans to ensure timely reporting in order to prevent capitated payments being made on behalf of individuals who are incarcerated. Contracts should exclude individuals who are incarcerated from the managed care plan, or provide for disenrollment from the plan when an enrollee becomes incarcerated. States should establish in their contracts 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.

Q21. Eligibility under Alternative Benefit Plans: *Is FFP available for inmates eligible under the new adult group for inpatient services covered under Medicaid Alternative Benefit Plans (ABPs)?*

A21. The coverage exclusion applies generally to medical assistance, whether provided through an ABP or other coverage. FFP is available for services received during an inpatient

stay only pursuant to the inmate payment exclusion exception provided in statute and described in Section 3 of this document. States are not eligible for federal payments for services inconsistent with the exclusion.

Section 3: Services Covered Under the Exception to the General Coverage

Exclusion for Inmates

Q22. Services, Settings, and Conditions: *For which services and settings is FFP generally available under the inpatient exception to the general coverage exclusion for inmates?*

A22. To qualify for the inpatient exception, services must be covered under the state's Medicaid Plan, delivered in a prescribed setting in a way that is consistent with other terms of the state's Medicaid Plan, and provided by a certified or enrolled provider that maintains compliance with federal requirements. In this document, we use the term "federal requirements" to refer to all federal requirements, including the CMS Conditions of Participation (CoPs).

Under the law at section 1905(a)(29)(A) of the Act, FFP is only available for inpatient services furnished to patients in a medical institution (including services furnished by such providers during the inpatient stay, which is defined in CFR 435.1010 as a stay of 24 hours or more in which there is an admission of the individual to the facility as an inpatient on the orders of the practitioner responsible for the care of the patient).

Additional information about federal requirements for medical institutions is available through the Center for Clinical Standards and Quality, Survey & Certification Group and CMS interpretive guidelines for surveyors at <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Policy-and-Memos-to-States-and-Regions.html>

Q23. Services Not Available to Others: *Is FFP available for inpatient services to inmates for conditions that Medicaid would otherwise not reimburse in an inpatient setting?*

A23. No. Covered Medicaid inpatient services are the same for all Medicaid eligible individuals, including individuals who are in a medical institution but who would otherwise be in a correctional institution. FFP is not available for services that are not otherwise covered under the state plan in that setting.

Q24. Third Party Resource: *Do state, local, and correctional entities meet the definition of a third party resource, for purposes of inpatient care provided to inmates of public institutions?*

A24. We do not require states to treat state, local, and tribal correctional entities as legally liable third parties, and Medicaid may pay primary to such entities for covered inpatient

services, unless the state has elected under state law to consider these entities as legally liable third parties.

CMS maintains its policy that state and local correctional entities are considered a source of third party coverage for purposes of the hospital-specific limit on disproportionate share hospital (DSH) payments when they, in fact, are obligated to pay for the services because Medicaid payment is not available. To the extent that services are under the exception to the inmate coverage exclusion, and Medicaid pays primary, uncompensated costs not paid by state and local correctional entities would be part of the Medicaid shortfall and could support DSH payments.

Q25. Outpatient Services: *Is FFP available, under the inmate coverage exclusion exception, for outpatient services furnished by or in a local hospital emergency department, an urgent care center, a clinic, or a Federally Qualified Health Center/Rural Health Clinic?*

A25. No. FFP is not available for outpatient services for inmates, including but not limited to services in a local hospital emergency department, an urgent care center, a clinic, or a Federally Qualified Health Center/Rural Health Clinic.

Q26. Contracts with Health Care Management Entities: *Some state and local correctional entities contract with a health care management entity to provide medical services to inmates. Is FFP available for services to inmates provided by the health care management entity?*

A26. No. FFP is not available for services furnished in a correctional institution to an inmate regardless of whether those services are provided through a health care management entity under contract with a correctional institution or between the health care management entity and the United States, a state, a territory, a political subdivision of a state or territory, or an Indian tribe. FFP is available for inpatient services in a medical institution furnished by qualified providers with a provider agreement with the State Medicaid Agency under the circumstances described above. To the extent that state or local entities contract with a health care management entity to provide medical services to inmates, that health care management entity would be a liable third party for services under its contract. To the extent that services furnished during an inpatient stay in a medical institution affiliated with a health care management entity under contract with state or local entities are not included in the contract, the Medicaid program can pay for such services when within the scope of Medicaid coverage and provided to eligible individuals by a provider meeting federal and state requirements and Conditions of Participation.

Q27. Correctional Hospitals or Nursing Facilities: *Can hospitals or nursing homes that exclusively serve inmates qualify for FFP?*

A27. No. Hospitals, nursing facilities, or other medical institutions operated primarily or exclusively to serve inmates are considered correctional institutions and FFP would not be available for services. Nursing facilities and all medical institutions under this exception to the general exclusion must be operated as medical institutions generally available to the public, organized primarily for the provision of medical care, meet federal requirements discussed in A21, and meet the additional requirements of the definition of medical institution at 42 CFR 435.1010.

Q28. Additional Considerations: *In addition to the considerations included under the previous Qs & As, what other criteria must be applied when determining whether FFP would be available for costs of inpatient care provided to individuals otherwise in a correctional institution?*

A28. FFP is available for such inpatient care when the other factors identified in federal guidance are met and when:

- The overall nature of the medical institution is one of community interaction such that members of the general public may be admitted to receive services and admission into the medical institution or into specific beds within the institution is not limited to individuals under the responsibility of the correctional facility.
 - For nursing facilities and Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFs/IID, the same staff (i.e., physicians, nurses, aides) are generally available between any unit or wing and the remainder of the medical institution (Note: this does not preclude the deployment of staff with specialized expertise or experience working with individuals under the jurisdiction of the correctional system);
 - For nursing facilities and ICFs/IID, the same services are provided between the units, departments or other locations and the remainder of the medical institution;
 - For hospitals, the individuals are admitted to specific medical units based not on their status as inmates of a correctional institution, but rather based on their treatment needs and plan of care and generally are placed in units also serving other individuals with similar treatment needs and plans of care; and
- Allowable medical services are those provided under the state Medicaid Plan, at approved rates, as would be the case for any other similarly situated Medicaid beneficiary.

Q29. Hospital Conditions of Participation: *What requirements pertain to hospitals and other medical institutions serving inpatients who otherwise would be in correctional institutions? To which Conditions of Participation should hospitals pay special attention?*

A29. Hospitals and other medical institutions must meet all Medicaid requirements when serving patients who would otherwise be in correctional institutions as described above. This will be discussed in more detail in an upcoming companion CMS Survey and Certification memorandum.

Q30. Compliance: *Will states be able to take time to bring their claiming into compliance based on this guidance?*

A30. This guidance is intended to provide further clarification of policy. States that find that they are out of compliance with this guidance should contact their regional offices, including Medicaid Survey and Certification contacts, as soon as they are aware so that agreement can be reached on a path forward.