

# United States Senate

WASHINGTON, DC 20510

January 20, 2016

Andy Slavitt  
Acting Administrator  
Centers for Medicare and Medicaid Services  
200 Independence Avenue, SW  
Washington, DC 20201

Dear Acting Administrator Slavitt:

It is our understanding that the Centers for Medicare and Medicaid Services (CMS) will be issuing new sub-regulatory guidance to clarify the current Medicaid coverage policy for inmates of a public institution (Section 1905 (a)(29)(A) of the Social Security Act). The current provision shifts mandatory costs from the federal government onto states and localities while also creating a gap in health care coverage that could undermine public health. We strongly support the reexamination of this provision and urge you to revise the inmate exclusion policy to provide reimbursement of medical services for pretrial Medicaid beneficiaries.

According to the most recent CMS guidance, which is nearly 20 years old, federal Medicaid dollars cannot be used to pay for services provided to individuals in public institutions, including jails and juvenile detention centers. This federal prohibition sought to ensure that federal Medicaid funds are not used to finance care that is the responsibility of state and local authorities.<sup>1</sup> The only exception, is the “inmate exclusion,” which applies when an individual in custody is admitted to a medical institution for more than 24 hours. In this circumstance, federal Medicaid dollars can be used to finance the inmate’s inpatient care at the medical institution.<sup>2</sup>

Pretrial inmates are individuals who have been arrested but have not yet been tried or convicted of a crime. Under the law, they are presumed innocent until convicted. Due to the high cost of bond, some who are arrested remain in jail – pending the disposition of their arrest – simply because of an inability to pay. In fact, more than 730,000 people are held in county jails each day, two-thirds of these inmates are pending disposition.<sup>3</sup> Additionally, this population tends to be most in need of immediate medical services, which can be a major financial burden for localities.

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<sup>1</sup> GAO. Medicaid: Information on Inmate Eligibility and Federal Costs for Allowable Services. 5 Sept 2015. <http://gao.gov/products/GAO-14-752R>

<sup>2</sup> "Clarification of Medicaid Coverage Policy for Inmates of Public Institutions." Letter to Division for Medicaid and State Operations. 12 Dec. 1997.

<sup>3</sup> Regenstein, M., Christie-Maples, J., Medicaid coverage for individuals in jail pending disposition: opportunities for improved health and health care at lower costs. 2012. <http://www.cochs.org/files/GWU/MedicaidCoverage.pdf>

As you know, the Affordable Care Act (ACA) expanded health insurance coverage to millions of people and simultaneously created new opportunities for counties to improve continuity of care between the criminal justice and public health systems. For example, the ACA provides that incarcerated individuals pending disposition are qualified to enroll in and receive health services from a health plan participating in state health insurance exchanges. This change aligns with private market policies that allow individuals with health coverage to receive similar benefits as they await trial. All individuals, including those with Medicaid coverage, who can afford to post bond and return to the community remain eligible for and can receive health services. Thus, without further clarification from CMS, Medicaid beneficiaries that remain in jail pending trial, for a crime they may not have committed, are the only class of pretrial inmates barred from coverage for critical health services.<sup>4</sup>

The current CMS policy leads to gaps in health coverage for pretrial detainees, which results in gaps in treatment. This is especially problematic when it comes to chronic health conditions, such as mental illness, many communicable diseases, and substance use disorders, because successful treatment requires continuity of care. Research shows that populations in jail are three to four times more likely to suffer from serious mental illnesses than the general population. Up to three-quarters of the inmate population has a substance use disorder, and nearly 80 percent of jail detainees and inmates have other chronic health problems, such as diabetes, heart conditions, hypertension, and asthma.<sup>4,5</sup> Losing coverage and access to services interrupts care and endangers patients. It is also inefficient. For example, a pretrial inmate in Hennepin County, Minnesota, was to receive a prosthetic leg from his physician prior to his arrest. However, because the individual was financially unable to post bond, he remained in jail, and Medicaid refused to pay for his prosthesis. The county eventually identified alternative funding (\$9,000 total) and delivered the leg, after an unnecessary, inequitable delay.<sup>6,7</sup>

Not only does the current CMS policy break the continuum of care, it also shifts costs to local governments.<sup>8</sup> State and local correctional facilities are required to provide health care services to inmates in accordance with the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>9</sup> These healthcare services are increasingly costly, and are becoming unsustainable for some localities. For example, in Middlesex County, Massachusetts, where nearly half of the jail inmates are pretrial, health care costs in 2015 alone totaled \$3 million, including over \$1.2 million for inpatient and outpatient hospitalizations. Simply ensuring that detainees have access to medication to treat their mental health conditions cost the Middlesex Sheriff's Office \$105,000 over a 16-month period.<sup>10</sup> The current policy fails to utilize Medicaid dollars already allocated for the care of beneficiaries who under any other circumstance could continue receiving this subsidized care until convicted. In fact, allowing pretrial individuals to continue receiving benefits under Medicaid could have saved Hennepin County in Minnesota over \$6 million in 2015.<sup>6,7</sup> Extending federal Medicaid matching benefits to pretrial detainees would help reduce this financial burden while ensuring that pretrial Medicaid beneficiaries experience the continuum of care needed to treat their conditions.

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<sup>4</sup> Somers, S., et al. Medicaid Expansion: Considerations for States Regarding newly Eligible jail-Involved Individuals. March 2014. Health Affairs.33 (3):455-456. <http://www.chcs.org/resource/medicaid-expansion-considerations-for-states-regarding-newly-eligible-jail-involved-individuals/>

<sup>5</sup> Minton, T., Zeng, Z., Jail Inmates at Midyear 2014. U.S. Department of Justice. June 2015. <http://www.bjs.gov/content/pub/pdf/jim14.pdf>

<sup>6</sup> Information provided to Senator Al Franken's office by Hennepin County Sheriff's Office. December 15, 2015

<sup>7</sup> Information provided to Senator Al Franken's office by Hennepin County Human Services and Public Health. December 15, 2015

<sup>8</sup> Ortiz, N. County Jails at a Crossroads: An Examination of the Jail Population and Pre-trial Release. National Association of Counties (NACO). 2015. <http://www.naco.org/resources/county-jails-crossroads>

<sup>9</sup> e.g., *Estelle, et al. v. Gamble*, 429 U.S. 97 (1976), *Brown, et al. v. Plata, et al.*, 131 S. Ct. 1910 (2011).

<sup>10</sup> Information provided to Senator Edward J. Markey's office by the Middlesex Sheriff's office. January 11, 2016

The ACA establishes that incarcerated individuals pending trial are qualified to enroll in and receive health care services. Because of the ACA, states including Ohio and Illinois have made great strides in enrolling qualified individuals in Medicaid coverage.<sup>11,12</sup> Nevertheless, current CMS policy excludes a single population from receiving Medicaid benefits: Medicaid beneficiaries who are in detention but have not yet been convicted of a crime. In light of the significant needs of this population, we encourage CMS to expand the inmate exemption and allow reimbursement for healthcare services provided to Medicaid beneficiaries awaiting trial while in jail.

Thank you, and we look forward to further engagement with CMS on this important issue.

Sincerely,



Al Franken  
United States Senator



Edward J. Markey  
United States Senator



Sherrod Brown  
United States Senator



Richard J. Durbin  
United States Senator

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<sup>11</sup> Information provided to Senator Durbin's office by Cook County Sherriff's Office. January 15, 2016.

<sup>12</sup> Information provided to Senator Brown's office by Cuyahoga County Sherriff's office. January 14, 2016.