

July 1, 2009

Mr. Chris Underwood, Director
State Programs and Federal Financing
Department of Health Care Policy & Financing
1570 Grant Street
Denver, Colorado 80203-1818
Sent via email to: Chris.Underwood@state.co.us

Re: Medicaid eligibility for people in community corrections facilities

Dear Mr. Underwood:

Please accept this letter as our comment on the issue of Medicaid eligibility for people involved in community corrections.

By way of introduction, the Colorado Criminal Justice Reform Coalition is a non-profit organization engaged in public policy research, advocacy, and community organizing to promote alternatives to incarceration and effective re-entry policies and services for people leaving prison. In 2007, we released our newest publication, *Getting On After Getting Out: A Re-entry Guide for Colorado*. To date, we have distributed over 25,000 free copies to people in prison and on parole. In April 2008, all of the CCJRC staff members were recruited to participate in different task forces developed by the Colorado Commission on Criminal & Juvenile Justice to lend our ideas and expertise in developing strategies to reduce the high rate of recidivism in Colorado.

We have familiarity with the community corrections system and are extremely concerned about the lack of access to medical care for people involved in community corrections. We very much appreciate the attention this issue is receiving as well as the opportunity to share our opinion and rationale as to why we believe people involved in community corrections should not be automatically excluded from eligibility for Medicaid.

Medicaid/FFP eligibility considerations

It is our understanding that Section 1905(a)(A) of the Social Security Act and 42 CFR § 435.1009 excludes Federal Financial Participation (FFP) for medical care provided to inmates of a public institution, except when the inmate is a patient in a medical institution. Therefore, in evaluating whether FFP is prohibited, a two-prong determination is required. The first determination is that someone is an "inmate" and, if so, that the inmate is "living in a public institution." In order for FFP to be prohibited, both prongs of this test must be determined in the affirmative.

The Centers for Medicare and Medicaid Services (CMS) define an "inmate" as someone "serving time for a criminal offense or confined *involuntarily* in State or Federal prisons, jails, detention facilities, or other penal facilities."¹ This clarification specifically states that "[a]n individual who is

¹ Letter from Mr. Robert A. Streimer, Director, Disabled and Elderly Health Programs Group, Center for Medicaid and State Operations, Department of Health & Human Services, "Clarification of Medicaid Coverage Policy for Inmates of a Public Institution," December 12, 1997.

voluntarily residing in a public institution would not be considered an inmate, and the statutory prohibition of FFP would not apply.”² (emphasis added)

People involved in community corrections

Interpreting FFP/Medicaid eligibility for people in community corrections can be complicated because there are a number of different scenarios by which someone can be involved in community corrections.

- “Diversion” clients are those who have been sentenced to community corrections by a judge as an alternative to a prison sentence. Completion of community corrections can also be ordered by the court as a condition of probation.
- “Transition” clients refer to those people who are “stepping down” from prison but who have not been granted parole.
- Parolees can also be required to complete community corrections as a condition of parole, although this is a relatively rare occurrence.
- Finally, the Department of Corrections contracts with a few community corrections facilities for “return to custody” beds to place people whose parole has been revoked as a result of a technical violation of a condition of parole (i.e., not for commission of a new crime). If a parolee is being revoked for a technical violation and his/her underlying conviction was for a class 5 or class 6 nonviolent felony, the parole board does not have discretion and must refer someone for review by the community corrections facility. If approved, the parolee can be placed in community corrections for up to 180 days. If the parolee is being revoked for a technical violation and the underlying offense was for a class 2, class 3, or class 4 nonviolent felony, then the parole board has the discretion to revoke that person to prison or to a community corrections facility, if accepted.

Any referral to community corrections (whether by a court, the Department of Corrections, or the parole board) must be approved by the local community corrections board and the specific community corrections facility before an individual can be placed in community corrections.

Community corrections is a two-phased program. The first phase includes a residential phase where people live at the facility while engaging in activities outside of the facility, including but not limited to work, school, treatment, and recreation. As people progress, they are moved into the non-residential second phase of the program where they live in their own residence in the community and continue to be supervised by the community corrections facility and/or a probation or parole officer, depending on the circumstances.

Involvement in community corrections is voluntary and therefore clients are not “inmates”

Colorado Revised Statute § 18-1.3-301 authorizes a court, parole board, and Department of Corrections to place people in community corrections if approved by the governing community corrections board and community corrections facility. However, the referral to community corrections is with the consent of the prospective client. In other words, placement in community corrections involves the consent of referring agency (court, parole board, Department of Corrections), the governing community corrections board, the specific community corrections facility, and the client.

² *ibid.*

Transition clients have a “right of refusal” that is expressly stated both in statute and by administrative regulation of the Department of Corrections. Colorado Revised Statute § 18-1.3-301(j)(2)(b) states: “The executive director shall refer any other offender who has displayed acceptable institutional behavior to a community corrections program one hundred eighty days prior to such offender’s parole eligibility date, unless such offender has an active felony warrant or detainer or *has refused community placement.*” (emphasis added)

Pursuant to Department of Corrections Administrative Regulation 250-03, a person in prison who is eligible for referral to community corrections has the express right to waive the referral to community corrections. In doing so, the person in prison and the prison case manager are exempted from the procedures for submitting an application to community corrections.³

Attachment A of this administrative regulation, the “Community Corrections’ Placement Refusal/Waiver Form,” states: “I have been advised that I am eligible to be referred to a community corrections’ center and in compliance with CRS 18-1.3-301(j)(2)(a, b, and c) *I am exercising my right to refuse community placement* for the reason noted below.... Based on my refusal/waiver of community placement, I understand the Department of Corrections has no statutory responsibility to send a “COMMUNITY RELEASE” packet to a community corrections’ center on my behalf, until such time as the above reasons are resolved and I request the refusal/waiver to be removed.”⁴ (emphasis added)

In discussions with several community corrections facility directors, if a client indicates that s/he does not wish to remain in community corrections, generally every effort is made by the program staff to convince the client to remain in community corrections. If the program staff are not successful and a client insists that s/he no longer wishes to remain in community corrections, the directors feel they have no choice but to contact the appropriate authority (probation officer, parole officer, police/sheriff) and have the person immediately taken into custody awaiting a return to prison, a parole revocation hearing, or a court hearing, depending on the person’s circumstances. This practice indicates that the client’s right of refusal still exists even after initial consent was given by the client.

Because placement in community corrections involves the consent of the individual, this involvement in community corrections is not “involuntary”; therefore, people in community corrections do not meet the criteria for being considered “inmates.” Since people in community corrections are not “inmates” and do not meet the first prong of the test to determine FFP prohibition, then any blanket policy by Colorado that prohibits FFP/Medicaid eligibility to people in community corrections is an erroneous interpretation of federal law.

Clients on nonresidential status in community corrections are neither inmates nor living in a public institution

It is our understanding that people in community corrections on nonresidential status have also been denied Medicaid based on a determination by a technician that they were prohibited from eligibility. This interpretation fails to understand the placement process for community corrections. For people in community corrections on non-residential status, they are neither “inmates” nor “living in a public

³ Department of Corrections, Administrative Regulation 250-03(IV)(B)(1)(May 19, 2009). Available at <https://exdoc.state.co.us/secure/comboweb/weblets/index.php/regulations/home>

⁴ *ibid.* Attachment A.

institution”; therefore, a blanket policy prohibiting Medicaid eligibility is an inaccurate interpretation of federal law.

Medical care gap for people in community corrections

People in community corrections find themselves in a no-win situation with regard to accessing medical care. None of the referring agencies (courts, parole board, or Department of Corrections) assumes responsibility for providing medical care to people involved in community corrections. Community corrections facilities require clients to sign a document that the client will assume responsibility for all medical care expenses. Unless people have employment that either offers medical benefits or provides enough income to afford private insurance, community corrections clients have no way to access affordable medical care.⁵

Eligibility for Colorado Indigent Care Program for people involve in community corrections

Colorado regulation states that the Colorado Indigent Care Program (CICP) is not available to “individuals who are being held or confined *involuntarily* under governmental control in State or federal prisons, jails, detention facilities or other penal facilities.”⁶ (emphasis added) For the same reasons cited above, people in community corrections are not being held or confined “involuntarily” and therefore should not be prohibited from access to CICP if they meet other eligibility criteria.

Conclusion

CCJRC is of the position that people are voluntarily involved in community corrections, both on residential and non-residential status, regardless of the specific criminal justice agency that referred them. **Therefore, people involved in community corrections do not meet the federal definition of an “inmate” for purposes of exclusion from FFP/Medicaid eligibility.** Additionally, people on nonresidential status are not living “in a public institution.”

Since the two-prong test requires someone to be both an “inmate” and “living in a public institution” to be prohibited from eligibility for FFP/Medicaid, the current Colorado policy of excluding people in community corrections from FFP/Medicaid eligibility is inappropriate.

Because there are multiple scenarios by which someone could come to be involved in community corrections, CCJRC strongly suggests that any revision of Colorado policy be explicit to provide clear guidance. CCJRC prepared the following chart that identifies the multiple scenarios by which someone could be in community corrections and our rationale as to why we think people in that category should be eligible for Medicaid or CICP.

It has been reported to us that oftentimes individual clients in community corrections have been inconsistently determined to be prohibited from eligibility depending on an individual technician’s interpretation of governing rules, regulations, and statutes. Greater clarity in Colorado policy would help ameliorate these inconsistencies.

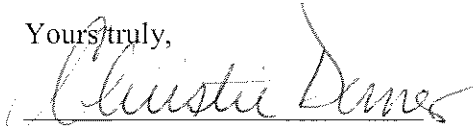
⁵ When we wrote the re-entry guide, we included a very specific warning to people with medical needs who were considering applying for community corrections to make sure they were aware of the medical black hole they might face. For many with serious medical needs or conditions that require continuity of medical care, the decision to be in community corrections could threaten their lives. This is a horrible Catch-22 situation to put people in.


⁶ 10 COLO.CODE REGS. § 2505-10(F)(1)(b)(2008).

Criminal Justice Status	Eligibility	CCJRC rationale for why someone should be deemed Medicaid or CICIP eligible
Probation	Currently eligible- both Medicaid or CICIP	
Community corrections- <i>Condition of probation</i> (residential)	Inconsistently determined to be eligible for Medicaid or CICIP	Participation in community corrections is voluntary and therefore they are not “inmates.”
Community corrections- <i>Condition of probation</i> (nonresidential)	Inconsistently determined to be eligible for Medicaid or CICIP	Individuals are not living in the community corrections facility and therefore are not living in a “public institution”; in addition, participation in community corrections is voluntary and therefore they are not “inmates.”
Parole	Currently eligible – both Medicaid/FFP and CICIP	
Community corrections- <i>Condition of parole</i> (both residential and nonresidential)	Currently eligible-both Medicaid/FFP and CICIP	
Community corrections- <i>diversion</i> (residential)	Inconsistently determined to be eligible for Medicaid or CICIP	Participation in community corrections is voluntary and therefore they are not “inmates.”
Community corrections- <i>diversion</i> (nonresidential)	Inconsistently determined to be eligible for Medicaid or CICIP	Individuals are not living in the community corrections facility and therefore are not living in a “public institution”; in addition, participation in community corrections is voluntary and therefore they are not “inmates.”
Community corrections- <i>transition</i> (residential)	Inconsistently determined to be eligible for Medicaid or CICIP	Participation in community corrections is voluntary and therefore they are not “inmates.”
Community corrections- <i>transition</i> (nonresidential)	Inconsistently determined to be eligible for Medicaid or CICIP	Individuals are not living in the community corrections facility and therefore are not living in a “public institution”; in addition, participation in community corrections is voluntary and therefore they are not “inmates.”
Community corrections- <i>DOC return to custody</i> - residential (whether mandatory or discretionary referral by parole board)	Unknown	Participation in community corrections is voluntary and therefore they are not “inmates.”

Thank you very much for your consideration of our position. We welcome the opportunity to participate in any discussion on these issues. If you have any questions or would like additional information, please feel free to contact us.

Yours truly,


Christie Donner
Executive Director


Carol Peebles
Re-entry Coordinator

cc: Ms. Joan Henneberry, Executive Director, CDHPF
Ms. Christine Murphy, Governor's Office
Ms. Judi Carey, Coordinator, Medical Services Board, CDHPF
Mr. Richard Allen, Associate Regional Administrator, DHHS, CMS