



## COLORADO DEPARTMENT OF HEALTH CARE POLICY & FINANCING

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Bill Ritter, Jr., Governor • Joan Henneberry, Executive Director

December 23, 2009

Richard C. Allen  
Associate Regional Administrator  
Division of Medicaid & Children's Health Operations  
Centers for Medicare and Medicaid Services  
1600 Broadway, Suite 700  
Denver, Colorado 80202

Re: Individuals Receiving Services in a Correctional Care Medical Facility are Eligible for Health Care Services Funded with Federal Financial Participation

Dear Mr. Allen:

This letter is a continuation of the correspondence related to the July 31, 2008 and May 29, 2009 letter from the Department of Health Care Policy and Financing (the "Department") regarding "Suspension of Medicaid Eligibility for Incarcerated Persons." This letter and the accompanying attachment focus on explaining why individuals receiving services in the Correctional Care Medical Facility ("CCMF") of Denver Health Medical Center ("Denver Health"), which is a unit designed exclusively to treat inpatient referrals from the Denver county detention facility, can be deemed eligible for health care services funded with Federal Financial Participation ("FFP").

In the July 31, 2008 letter, the Department inquired as to whether "an individual be considered an inmate if they are in an inpatient hospital setting that is a locked acute forensic medicine inpatient care unit specifically designed for those incarcerated, awaiting criminal proceedings, or awaiting penal dispositions?" Centers for Medicare and Medicaid Services ("CMS") responded on December 2, 2008 that "an individual would be considered an inmate if he or she is residing in this setting involuntary because the setting is acting on behalf of a law enforcement public institution or incarceration. Therefore there is no Federal Financial Participation (FFP) available."

Based solely on this conclusion by CMS, the Department denied payment to hospital claims submitted by Denver Health for individuals who received inpatient services in the CCMF. Denver Health is pursuing an administrative appeal of this denial in the Colorado Office of Administrative Courts. During this appeal, counsel for Denver Health has given the Department a position statement supporting its argument that the CCMF is an integral part of the hospital. It essentially argues that the foregoing CMS conclusion regarding the CCMF is not supported by federal regulations because it focuses on the "inmate" status of the person receiving inpatient services, rather than the "hospital" nature of the institution at which these services were provided.

In reviewing the position statement, the Department agrees with this conclusion. It believes that Denver Health makes a very strong argument that the decision to deny payment for these claims will be reversed, either by an administrative law judge or directly by the Department. This is because any reasonable interpretation of the CCMF can only result in the view that the unit properly should be deemed to be part of Denver Health. For example, claims and costs associated with individuals treated in the CCMF appear as allowable costs on the Medicare/Medicaid Cost Report filed by Denver Health, indicating that the unit clearly is a part of the hospital, and is not part of a correctional institution and/or a stand-alone detention facility.

Accordingly, the Department requests that CMS review the attached position statement and provide additional clarification to the information provided in the December 2, 2008 CMS response.

If you have any additional questions or concerns regarding this issue, please contact Chris Underwood, Director of State Program and Federal Financing at 303-866-4766 and we will be happy to accommodate this request. Mr. Underwood has taken the lead on researching the suspension of Medicaid eligibility for incarcerated persons for the Department and is available to meet with your staff to help address our questions.

Once again, thank you for your attention to this issue.

Sincerely,

/s/

Joan Henneberry  
Executive Director

Attachments

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Sharon E. Caulfield  
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November 17, 2009

**Via Facsimile and U.S. Mail**  
**(303) 866-5671**

Josh Urquhart, Esq.  
Assistant Attorney General  
1525 Sherman Street  
Seventh Floor  
Denver, CO 80203

Re: Position Statement: Mandatory Settlement Conference, Denver Health v. State Department of Health Care Policy and Financing, Case # SR 20090022, Appeals of cases 109682591, 109883793

Dear Mr. Urquhart:

This letter is submitted to reflect the communications offered by our client Denver Health and Hospital Authority (“Denver Health”) at the parties’ October 25, 2009 settlement conference with regard to Denver Health’s position on the appeal of the denial of Medicaid payments for the above-referenced services. Counsel for the City and County of Denver has reviewed this letter and concurs in its content. For privacy purposes, we will refer to the patient in these cases as patient “DM.”<sup>1</sup>

**Summary of Position.**

This appeal arises from the denial of Medicaid payment for services provided by Denver Health to Patient DM, a Medicaid-eligible person brought to the Denver Health and Hospital Authority for medically necessary inpatient health care treatment. The basis for denial of the claims is that in each instance the patient was in the “custody of sheriff’s department” at the time of admission. Denver Health submits that this is not a proper basis for Medicaid payment denial.

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<sup>1</sup> By separate pleading, Denver Health has voluntarily dismissed the third case originally consolidated with this appeal.

As shown on the attached affidavit of Kelly O'Brien, M.D., patient DM was brought to Denver Health by personnel of the Sheriff's Department of the City and County of Denver. Denver Health acknowledges that DM was an inmate of a public institution after his discharge from Denver Health, and in one of the cases, was also an inmate of a public institution prior to his admission to Denver Health.<sup>2</sup>

Applicable federal law, however, does not authorize denial of Medicaid payments based upon the status of "custody of sheriff's department." Instead, as more fully described below, a patient in a medical institution such as Denver Health is eligible for Medicaid for inpatient services rendered, regardless of incarceration or custody before or after the admission to the medical institution. Denver Health therefore has appealed the cases of Patient DM and seeks to clarify the application of Medicaid law and regulations to the inpatient services it has provided to DM as well as to the other patients in the custody of the Denver Sheriff who are brought to Denver Health's medical institution for treatment.

Medicaid Law and Regulations regarding Inmates.

Title 42 of the United States Code, at §1396d(a), as is applicable here (the "prisoner payment statute," attached), defines the "Medical Assistance" payable under the Medicaid program to include

*all or part of the cost of the following care and services . . . for individuals . . . who are – [in an eligible class of persons] but whose income and resources are insufficient to meet all of such cost –*

*(1) inpatient hospital services . . .*

*except . . . such term does not include*

*(A) any such payments 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) . . . .*

Thus in brief, federal law specifies that inpatient hospital services are payable under the Medicaid program for an inmate of a "public institution" who is a patient in a "medical institution." Denial of payment for services on the grounds that a person is in "custody of sheriff's department," therefore, is erroneous.

The regulations that support the prisoner payment statute likewise do not support denial of payment for inpatient hospital services provided to inmates who are served in a "medical institution." Instead, the definitions found at 42 C.F.R. §435.1010 (attached) support the

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<sup>2</sup> In case number 109618678, DM was transported to Denver Health's emergency department by Denver Sheriffs after being involved in a head-on motor vehicle accident. In the other case, DM was transported to Denver Health from the Denver jail, and returned to the jail upon discharge from Denver Health.

statutory program that **allows** payment for inpatient hospital services provided to inmates, when such services are provided in a medical institution.

Specifically, the regulatory definitions provided in section 435.1010 continue to reflect the distinction between services provided to a person who is an inmate of a public institution and services provided to an inmate who leaves a public institution to be admitted to a medical institution.

First, the term *inmate of a public institution* means a “person who is living in a public institution.”

Second, a *public institution* means “an institution that is the responsibility of a governmental unit or over which a governmental unit exercises administrative control. The term ‘public institution’ does not include – (a) a medical institution as defined in this section . . . .”

Thus, according to the applicable regulations, eligibility for Medicaid benefits is not based simply upon whether a person is an inmate. Rather, eligibility for Medicaid benefits is based upon whether the person is an “inmate of a public institution.” A ‘public institution’ does not include . . . a medical institution.’ Therefore, a person (even an inmate) who is admitted to a medical institution is no longer an ‘inmate of a public institution’ – s/he is an inmate of a medical institution. Medicaid payments are available for inpatient hospital services provided to such a person.

Further, it is not relevant whether the inmate remains under the administrative control of a governmental unit during his or her admission to a medical institution. A “person who is living in a public institution” is a person living in quarters “over which a governmental unit exercises administrative control.” An inmate may live, however, in a place that is **not** a *public institution* if the place is any type of *medical institution* that meets the definition of section 435.1010. That definition does not include a criterion relating to administrative control. Rather, the definition simply states that a medical institution is an institution that:

- (a) Is organized to provide medical care, including nursing and convalescent care;
- (b) 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;
- (c) Is authorized under State law to provide medical care; and
- (d) Is staffed by professional personnel who are responsible to the institution for professional medical and nursing services. The services must include adequate and continual medical care and supervision by a physician; registered nurse or licensed practical nurse supervision and services and nurses’ aid services,

sufficient to meet nursing care needs; and a physician's guidance on the professional aspects of operating the institution.

As shown on the attached affidavit of Dr. O'Brien<sup>3</sup> (and as will be proved at the hearing before the Office of Administrative Courts), Denver Health qualifies as a *medical institution* under the definition provided in 42 C.F.R. §435.1010. The affidavit provides more specific information about the evidence that shows that Denver Health qualifies as a medical institution, even in its Correctional Care Medical Facility (CCMF). To summarize here, Denver Health's CCMF is an integral part of a facility that: a) is organized to provide medical care to the public, in a manner that includes patients who are admitted from many jurisdictions and backgrounds, b) offers care that is integrated across the care continuum as is customary for an acute care hospital; c) is a licensed hospital under Colorado state law; and d) is staffed by Denver Health's regular and academic medical staff to provide adequate and continual medical care by a physician as well as proper nursing services, all under the administrative supervision of a qualified medical director, Kelly O'Brien, MD. These criteria from 42 CFR §435.1010 are provided to both the inmates admitted through the Denver Sheriff's office as well as to members of the general public, and exceed those that are generally provided by prison affiliated clinics around the United States. Denver Health is therefore a *medical institution* whose services are compensable by the Medicaid program under applicable law.

#### Applicable Interpretive Guidance.

We have been provided with a letter dated December 2, 2008 from Richard C. Allen, Association Regional Administrator, Region VIII, Centers for Medicare and Medicaid Services, which purports to provide clarification on Federal Medicaid policy regarding eligible individuals that become incarcerated. Mr. Allen states that his "responses are based [on] 42 CFR 435.110 [sic, should be 1010] and Health Care Financing Administration Letter dated December 12, 1997." The letter, however, neither provides clarification nor is based upon such law and guidance. Rather, the letter misstates applicable federal law and regulations, because it focuses on the status of the person receiving services, rather than the nature of the institution at which the services are provided.

Because of this fundamental flaw in reasoning, Mr. Allen's letter is internally inconsistent and an inaccurate reflection of the prisoner payment statute and regulations. First, the letter states that "an individual would be considered an inmate if he or she is residing in [a locked acute forensic medicine inpatient care unit] involuntarily because the setting is acting on behalf of a law enforcement public institution for incarceration." On the other hand, "If the inmate becomes an inpatient of a nursing facility or a hospital, FFP [Federal Financial Participation in Medicaid payments] is available for that individual under the exception of the inmate provision." Later, the letter states that the authority for payment for services "depends

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<sup>3</sup> The submission of Dr. O'Brien's affidavit with this settlement position statement is not intended to waive the right to present the testimony of Dr. O'Brien or any other witness at the hearing on this matter, nor to limit the scope of the testimony Dr. O'Brien may offer at that time.

upon whether the facility is acting on behalf of a public institution for incarceration and carries out enforcement duties.” The author asks for “additional information about these facilities: location, organizational structure, funding, etc.” The letter’s author also indicates that it would be relevant to know “whether individuals go to these facilities voluntarily or whether they are placed in these facilities by law enforcement personnel.” There is no provision of 42 USC §1396d(a)(1) or 42 CFR §1010, however, that provides standards for CMS to determine the voluntary nature of a patient’s incarceration or admission to a medical institution, or whether a medical institution carries out enforcement duties. These criteria are therefore irrelevant to the proper interpretation of the regulations.

The December 12, 1997 guidance letter from the Health Care Financing Administration (now CMS) largely avoids this logical flaw. To deny payment for medical services to a Medicaid-eligible inmate, the guidance letter states, “[T]wo criteria must be met. First the individual must be an inmate; and second, the facility in which the individual is residing must be a public institution.” After determining the criteria by which a person may be identified as an ‘inmate,’ the guidance letter acknowledges:

... FFP is permitted when an inmate becomes a patient in a medical institution. This occurs when the inmate is admitted as an inpatient in a hospital . . . . Accordingly FFP is available for any Medicaid covered services provided to an ‘inmate’ while an inpatient in these facilities . . . .

A January 17, 2002 decision of the Department of Health and Human Services Departmental Appeals Board (“DAB”) upholds this reasoning and acknowledges that the inpatient hospital services provided to an inmate in a medical facility are payable by Medicaid. In Decision No. 1809, the DAB considered whether Medicaid payments could be made for inpatient hospital services provided to patients who are otherwise confined to an Institution for Mental Diseases (“IMD”). The court determined that the Medicaid statutes did not authorize payments for inpatient hospital services provided to patients confined to an IMD, *in contrast to inmates in the penal system, for whom such services are payable*. The court reasoned as follows:

... it can be inferred from the fact that the Act and regulations authorize Medicaid payment for an individual who is on conditional release or convalescent leave from an IMD that there are no other circumstances in which Medicaid may pay for medical services furnished to someone who remained a patient in an IMD. In contrast, *the Act expressly provides for Medicaid payments when an inmate is a patient in a medical institution*. Indeed the fact that the Act contains a specific exception for inmates of a public institution when they are transferred to a medical institution, but contains no such exception for IMD patients transferred to another institution for medical services, supports CMS’s interpretation of the [IMD provisions of the] Act. [Emphasis added.]

The availability of Medicaid payments for inmates who receive inpatient hospital services has likewise been recognized in two audits performed by the OIG of the Department of

Health and Human Services. In a letter issued June 7, 2004 summarizing a "Four-State Review of Medicaid Payments for Incarcerated Beneficiaries (A-04-02-06002)," CMS Administrator Mark McClellan relied upon the above-quoted language from the December 12, 1997 advisory letter in his recitation of "Applicable Law and Regulations." He then stated that "CMS allows Medicaid payments for inpatient services for incarcerated beneficiaries who are not in a prison setting." (See also DHHS Office of Inspector General, October 2002, A-07-02-03020, Review of Medicaid Payments for Outpatient Services and Prescription Drugs Provided to Incarcerated Recipients in the State of Missouri.)

Conclusion.

In sum, section 1396d of the federal Medicaid act states that inpatient hospital services are payable by the Medicaid program when an inmate of a public institution has been transferred to a medical institution for such care. This statutory mandate has been recognized by CMS and its predecessor agencies since at least 1997. No change in the law or regulatory environment has occurred that would authorize a deviation from this payment policy. The denial of Denver Health's Medicaid claims for inpatient hospital services on the grounds that a patient is in the custody of the sheriff's department therefore has no basis in applicable law.

Denver Health will provide the factual basis for the determination that it is a medical institution as defined in the Medicaid statute when it participates in the March 25, 2010 hearing before the Office of Administrative Courts. At that time, Denver Health expects that the Office of Administrative Courts will overturn the denial of the cases under appeal, and clear the way for future payments for the inpatient hospital services provided to Medicaid eligible inmates of the Denver jail, when they are admitted to Denver Health.

We invite the Department of Health Care Policy and Financing to review the above-described legal background and to enter into a constructive engagement with Denver Health, the City and County of Denver, and CMS to reach Medicaid inpatient hospital services payment methodologies that are consistent with applicable laws and regulations.

Very truly yours,

CAPLAN AND EARNEST LLC



Sharon E. Caulfield

SEC:sec

Enclosures: Affidavit of Dr. Kelly O'Brien



Josh Urquhart, Esq.  
November 17, 2009  
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CAPLAN AND EARNEST LLC  
Attorneys at Law

cc: Peg Burnette, CFO, Denver Health  
Scott Hoye, Assistant General Counsel, Denver Health  
Deb Knapp, Assistant City Attorney, Denver

4826-1687-6037, v. 6

AFFIDAVIT OF KELLY O'BRIEN, M.D.

STATE OF COLORADO )  
 ) ss.  
CITY AND COUNTY OF DENVER )

I, Kelly O'Brien, M.D., state that I am over the age of 18 years and am competent to provide this Affidavit. I make the statements in this Affidavit based upon my personal knowledge.

1. I am a medical doctor whose position is the Chief of the Division of Correctional Care for the Denver Health and Hospital Authority ("DHHA" or "Denver Health"). I have held this position since 2008, and have been with the Division since 1999. I coordinate with the medical teams caring for inpatients who are provided hospital services after admission to the DHHA's Correctional Care Medical Facility ("CCMF").

2. I am familiar with the medical history of the patient whose care is the subject of the Medicaid payment appeal before the Office of Administrative Courts as Case # SR 20090022 (consisting of the appeals of DHHA claims 109682591 and 109883793). My familiarity arises from review of medical records in the possession of Denver Health and Hospital Authority, which are maintained in the ordinary course of business of the DHHA as part of the ordinary operations of the CCMF.

3. In case number 109618678, the patient DM was brought to DHHA's emergency department after sustaining injuries in a vehicular accident, and was subsequently admitted to the CCMF. In case number 109682591, DM was returned to Denver Health's CCMF from the Denver jail for medical care associated with the injuries sustained in the vehicular accident. In both instances of care, DM was discharged from the CCMF to the custody of the City and County of Denver jail.

4. The patient in DHHA claims 109682591 and 109883793 was provided medically necessary inpatient hospital services during his admission to the CCMF.

5. I have been informed that under applicable Medicaid regulations (42 C.F.R. § 436.1010), a medical institution is defined as an institution that:

(a) Is organized to provide medical care, including nursing and convalescent care;

(b) 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;

(c) Is authorized under State law to provide medical care; and

(d) Is staffed by professional personnel who are responsible to the institution for professional medical and nursing services. The services must include adequate and continual medical care and supervision by a physician; registered nurse or licensed practical nurse supervision and services and nurses' aid services, sufficient to meet nursing care needs; and a physician's guidance on the professional aspects of operating the institution.

6. As a result of my position as the Medical Coordinator of DHHA's CCMF, I can confirm that the CCMF meets all of the regulatory criteria described above. Specifically, the CCMF:

(a) *Is organized to provide medical care, including nursing and convalescent care, because it*

(1) is a patient ward of Denver Health, an acute care hospital and integrated health care delivery provider,

(2) follows all policies and procedures applicable to the Denver Health medical staff, employee policies, and other directives regarding patient care in the same fashion as is applicable to the general Denver Health patient population,

(3) is budgeted through the budget allocations process applicable to all other Denver Health departments, and receives all support services through Denver Health, and

(4) receives no financial, operational, or administrative support from the Denver Sheriff's department except payment for services, billing status information, and security for patients who require it.

(b) *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, because it*

(1) is staffed with physicians, nurses and other health care professionals without discrimination based upon prisoner or detainee status;

(2) offers to CCMF patients the full range of diagnostic, therapeutic and surgical services available to all patients of Denver Health,

during which the CCMF patients are mingled with Denver Health's other patient populations,

(3) complies with all accreditation and certification standards applicable to Denver Health's operations, and

(4) is not directed by the Denver Sheriff's department or any third party to provide variations in care standards from the standards applied to Denver Health's general patient population.

(c) *Is authorized under State law to provide medical care, because it operates under the license granted to the Denver Health and Hospital Authority by the Colorado Department of Health and Environment and provides such services at Denver Health's licensed location at 666 Bannock Street, Denver, Colorado, and not at the Denver jail.*

(d) *Is staffed by professional personnel who are responsible to DIIHA for professional medical and nursing services, because*

(1) the medical and other professional staff of the CCMF are all employed by Denver Health or engaged in programs of graduate medical education operated by Denver Health,

(2) the physicians who provide services within the CCMF are members of the Denver Health medical staff or are residents engaged in graduate medical education, whose medical staff status is indistinguishable from all other similarly-situated members of the Denver Health medical staff

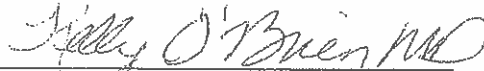
(3) there is no distinction in the oversight provided by the Denver Health medical staff to the services offered in the CCMF and the services offered to the general population of Denver Health,

(4) there is no distinction in the policies and procedures applicable to and enforced with regard to the Denver Health employees who provide services within the CCMF or to CCMF patients who are treated elsewhere within Denver Health, and the policies and procedures applied to Denver Health employees who do not typically work with the CCMF population,

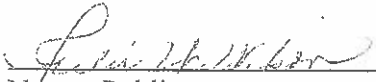
(5) the services of the CCMF include adequate and continual medical care and supervision by a physician; the provision of registered nurse or licensed practical nurse supervision and services, as well as nurses' aid services that are sufficient to meet nursing care needs, and

(6) as the Chief of the Division of Correctional Care, I am responsible to provide a physician's guidance on the professional aspects of operating the CCMF.

FURTHER AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
Kelly O'Brien M.D.

Subscribed and sworn to before me this 16 day of November, 2009, by Kelly O'Brien, M.D. Witness my hand and official seal.

  
\_\_\_\_\_  
Notary Public

My Commission Expires: 11/13/2010

4852-7292-1861, v. 4

