

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
1600 Broadway, Suite 700
Denver, CO 80202-4967



Region VIII

January 16, 2013

Mr. John W. Suthers
Attorney General
State of Colorado
1525 Sherman Street, 7th Floor
Denver, Colorado 80203

Dear Attorney General Suthers:

We have reviewed your letter of September 26, 2012. This letter responds to the latest issues raised by your office concerning Medicaid Federal Financial Participation (“FFP”) for eligible Medicaid individuals residing in Colorado community corrections facilities. In your September 26th letter, you assert that, “participants in the State’s community corrections programs are not inmates of a public institution, and thus are eligible” for FFP. That letter provides extensive information regarding Colorado’s community corrections system, which is described as managing “offender populations that would otherwise be placed in secure facilities, such as county jails or state prisons.” We do not agree with your analysis that Medicaid FFP is available to pay for services furnished to individuals who are required as a result of a criminal conviction to reside in government-controlled correctional facilities. Although those facilities may be less restrictive than traditional prisons, they are still public correctional facilities.

As you know, the Medicaid statute, at 42 U.S.C.A. §1396d(a)(29)(A) specifically excepts from FFP “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); . . .” You correctly point out at page 4 of your letter, “A person who is an ‘inmate of a public institution’ is not eligible for Medicaid FFP under 42 C.F.R. §435.1009.” The regulation at 42.C.F.R. §435.1010 defines a “public institution” as “an institution that is the responsibility of a governmental unit or over which a governmental unit exercises administrative control.”

Colorado apparently takes the position that its community corrections facilities are not “public institutions” because the programs are contracted to private agencies and “are not under government control.” However, your letter describes community corrections programs as a “unique collaboration between state agencies, local officials, and organizations that provide community corrections services, with an emphasis on local control.” See September 26, 2012 letter, p. 1. In addition, the legislation authorizing the community corrections programs indicates that its purpose is to “establish and maintain community corrections programs which provide the courts, the department of corrections, and the state board of parole with more flexibility and a broader range of correctional options for offenders under the jurisdiction of such entities.” See C.R.S. § 17-27-101. Such statements clearly show that Colorado and its governmental

subdivisions are responsible for, and exercise administrative control of these community correctional programs. In fact, Colorado recognized as early as 2005 that Medicaid FFP was not available for criminal offenders in community corrections facilities through the Colorado Indigent Care Program (CICP). The Colorado Department of Health Care Policy and Financing's (HCPF) CICP rules were amended in 2005 to deny Medicaid eligibility for offenders in community corrections facilities. See 10 Colo. Code Regs. § 2505-10:8.904(F)(1)(b) (2012).

CMS regulations do allow Medicaid FFP for services provided to Medicaid eligible individuals in certain publicly operated community residences. Medicaid FFP is available for services in “[a] publicly operated community residence that serves no more than 16 residents.” However, the regulation specifically excludes from that definition community corrections facilities. See 42 C.F.R. §435.1010. It states that a “publicly operated community residence,” does not include “(3) Correctional or holding facilities for individuals who are prisoners, have been arrested or detained pending disposition of charges, or are held under court order as material witnesses or juveniles.” Id. Pursuant to this regulation, FFP is unavailable to pay for medical services for criminal offenders in Colorado community corrections facilities. Under the current Medicaid statute, regulations and policy, Colorado's community corrections facilities are public institutions for which Medicaid FFP is unavailable for care provided to Medicaid eligible individuals.

The Ninth Circuit Court of Appeals deferred to a similar statute and regulation in the Supplemental Security Income (“SSI”) program, stating that it was reasonably related to Congressional intent not to pay SSI for individuals in penal or correctional facilities. Department of Health and Human Services, State of Washington, et al., v. Chater, 163 F.3d 1129, 1136 (9th Cir. 1998). The SSI program, which is administered by the Social Security Administration, has a statute (42 U.S.C.A. §1382(e)(1)(A)) and regulation (20 C.F.R. §416.211(c)(5)(iii)) that define “public institution.” They are almost identical to the Medicaid statute and regulation that define a public institution. The Ninth Circuit noted that the definition of a public institution “reflects congressional intent to prevent the shift of public institutional programs, which are traditionally the responsibility of the State and local governments, to the Federal Government [citations omitted].” Id. at 1135. Accordingly, the Court held that juveniles residing in a privately operated detention center, pursuant to a contract with the State of Washington, were inmates of public institutions and not eligible for SSI payments.

You have raised the additional issue of whether a criminal offender residing in one of these facilities is an “inmate.” Your letter states that “based on the structure of the Colorado community corrections program, participants are not ‘inmates of a public institution’” However, Footnote 2 of your letter states that “inmate,” under Department of Corrections programs, means “any person who is sentenced to a term of imprisonment for a violation for the laws of this state, any other state, or the United States.” See C.R.S. §17-1-102(6.5). In the case of Romero v. The People of Colorado, 179 P.3d 984 (2007), the Colorado Supreme Court's treatment of a criminal offender sentenced to a community correctional facility comported with the Department of Corrections' definition of “inmate.” The Court held that a criminal offender whose sentence to a community correctional facility was revoked could be resentenced to a longer sentence than the original sentence if a hearing was first held. Id. at 987. We believe it may be unnecessary to address the definition of “inmate,” given our analysis that Colorado

community corrections facilities are public institutions. However, we are not persuaded that a criminal offender residing in a Colorado community corrections facility is not an "inmate," under the applicable Medicaid statute, regulations and policy.

According to your letter, HCPF has advised that "a significant number of community corrections participants are already otherwise [Medicaid] eligible under the 1115 Demonstration Waiver effective April 1, 2012, as well as under the Affordable Care Act after January 1, 2014." The enactment of the Affordable Care Act has not changed the applicable statutory and regulatory provisions discussed in this letter. At this point in time, unless there is a change in the applicable law and/or the interpretation of the applicable law, the payment exclusion also applies to individuals who become eligible for Medicaid through the expansion population if that individual meets the definition of an inmate of a public institution. The applicable law also makes Medicaid FFP unavailable through the Colorado section 1115 demonstration, Adults without Dependent Children, for services furnished to criminal offenders in community corrections facilities.

You have stated that the Colorado Department of Corrections "has concluded that its Eighth Amendment obligations do not include coverage of medical care for community corrections residents." Colorado requires criminal offenders in community corrections facilities to sign a waiver form acknowledging that they will not receive any health care benefits. See Colo. Dep't of Corr. Admin. Regulation 250-03 (9/1/11). At the same time, your letter states, "there is a strong argument in favor of allowing pregnant women residing in a community corrections program to receive Medicaid services." As we previously advised the Colorado Department of Health Care Policy and Financing, Medicaid FFP is available in the case of a criminal offender in a community corrections facility who is Medicaid eligible and who is admitted as a hospital inpatient for 24 hours. The hospital must be an accredited and licensed hospital and the admission cannot be to a hospital or hospital unit under the authority of any correction unit. See Letter from Richard Allen, Assoc. Reg'l Adm'r to Joan Henneberry, Exec. Dir., Colo. Dep't of Health Care Policy and Fin. (Aug. 16, 2010). When these conditions are met, Colorado can claim FFP for a Medicaid eligible pregnant woman's hospitalization and delivery.

We agree that prenatal care for pregnant women who are criminal offenders in community corrections facilities is a medical necessity. However, Medicaid FFP is not available to pay for medical services, except, as the statute provides, when the Medicaid eligible individual in a community corrections facility is admitted as an inpatient to a medical institution for a minimum of 24 hours. The "gap" referenced in your letter for prenatal and other necessary health care services for criminal offenders in community corrections facilities is an apparent result of the State's interpretation that the Eighth Amendment does not obligate it to provide such services to criminal offenders sentenced directly by the courts or indirectly through the Department of Corrections to community corrections facilities.

We understand Colorado's concern with paying for medical services for criminal offenders in community corrections facilities and that Medicaid FFP would make that easier. However, as discussed above, the applicable law does not permit CMS to acquiesce in, and approve Medicaid FFP for this purpose. We would appreciate it if you would continue to update us on this issue and the potential litigation that you have referenced in your letter. Although we disagree that the

Federal Government, through Medicaid FFP, is obligated to pay for medical services for criminal offenders in Colorado's community corrections facilities, we also believe that it is important to continue to discuss this matter.

Sincerely,



Richard Allen
Associate Regional Administrator
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Operations

Cc: Hon. Diana DeGette, United States Congresswoman, Colorado
Hon. Kathleen Sebelius, Secretary of Health and Human Services
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