



COLORADO DEPARTMENT OF HEALTH CARE POLICY & FINANCING

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John W. Hickenlooper, Governor • Susan E. Birch MBA, BSN, RN, Executive Director

May 1, 2012

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: Eligibility of Individuals Residing in Colorado Community Corrections Facilities for Health Care Services Funded with Federal Financial Participation

Dear Mr. Allen:

This letter continues the correspondence from November 6, 2009 concerning the above-captioned matter. The Department of Health Care Policy and Financing (the "Department") has not received an official response from the Centers for Medicare and Medicaid Services ("CMS") with respect to the Department's conclusion that an individual residing in a community correction program residence is not an inmate of a public institution. The Colorado Lawyers Committee submitted additional information involving the Colorado Indigent Care Program to the attention of Secretary Sebelius on January 14, 2010. In addition, Congresswoman Diana DeGette submitted related requests in January 12, 2010 and June 23, 2010.

CMS responded to Congresswoman DeGette's initial letter on March 29, 2010 but – we believe – incorrectly stated that these individuals are residing in "public" institutions and could be "reporting to a corrections facility for an overnight stay." The response was conclusory in nature, and it did not contain any legal analysis. In addition, the letter implied that our CMS Regional Office would continue to work with our Department on this issue.

The Department is not aware of any formal response to date that contains a legal analysis contradicting the Department's original position, as set forth in our November 6, 2009 letter and in the Department's interactions with our CMS Regional Office. Therefore, the Department plans to implement a formal policy (including any necessary changes to state regulations) that allows individuals residing in community correction program residences to be determined to be Medicaid eligible when they are categorically and financially eligible.

The Department expects that many of these individuals will be eligible through the Department's 1115 Demonstration Wavier effective April 1, 2012, as well as through the Affordable Care Act effective January 1, 2014, both of which expand Medicaid eligibility to Adults without Dependent Children. Individuals who are covered under these programs and who are on a waitlist through the Department's 1115 Demonstration Wavier will become eligible for the Colorado Indigent Care Program until January 1, 2014 when the Affordable Care Act takes effect.

Re: Eligibility of Individuals Residing in Colorado Community Corrections Facilities

May 1, 2012

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If CMS has a sufficient legal analysis explaining why the Department should not proceed as described above, we request that you notify us prior to July 31, 2012 so policy action can be delayed. If you have any additional questions or concerns regarding this issue, please contact Chris Underwood, Provider Operations Division Director, at 303-866-4766 and he will be happy to accommodate this request.

Sincerely,

A handwritten signature in blue ink, appearing to read "Susan Birch", written in a cursive style.

Susan E. Birch MBA, BSN, RN
Executive Director

DIANA DEGETTE
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Congress of the United States
House of Representatives
Washington, DC 20515-4329

June 23, 2010

Secretary Kathleen Sebelius
U.S. Department of Health and Human Services
200 Independence Ave., SW
Washington D.C. 20201

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SUBCOMMITTEE ON OVERSIGHT AND
INVESTIGATION
SUBCOMMITTEE ON COMMERCE, TRADE
AND CONSUMER PROTECTION
COMMITTEE ON NATURAL
RESOURCES
SUBCOMMITTEE ON NATIONAL PARKS,
FORESTS AND PUBLIC LANDS
SUBCOMMITTEE ON INSULAR AFFAIRS,
OCEANS AND WILDLIFE

**Re: Availability of Federal Financial Participation for Colorado's Private
Community Corrections Residents**

Dear Secretary Sebelius:

Thank you for your response dated March 29, 2010, to my letter regarding the availability of Federal financial participation for Colorado's private community corrections. There are significant questions that remain unanswered and I write to request your continued attention to this issue.

In particular, I wanted to draw your attention to the fact that by HHS definition, Colorado's Community Corrections ("CC") are in fact private institutions. I also believe that the classification of the participants is not relevant to the central question being raised. For these reasons and others I expand upon below, I believe that Federal financial participation (FFP) for medical care should be available for all participants (both residents and non-residents) in Community Corrections programs.

In your March 2010 letter you rely on the 1997 and 1998 guidance stating that that public institutions include placements obtained through private contractors. However, the letters focus on private prisons being the contracted agency that qualify as a public institution, and that being run by a private company does not get an institution out from under a "public" classification. Colorado's CCs are not prison facilities, do not contract with the prison facilities or the Colorado Department of Corrections, which runs our prisons, nor in fact are they run by any governmental agency. As described below, Colorado's community corrections programs are unique and may be the only program of its kind in the nation. The State, specifically Colorado's Office of Health Care Policy and Finance, agrees with this analysis. As a result, the Department of Health and Human Services' analysis is confusing, and I hope you can clarify where in the 1997 and 1998 guidance it excludes FFP for the participants of our unique community corrections programs.

It is easy to assume that because Colorado's private community corrections programs appear to be related to the corrections system that they are "public institutions," thereby

disqualifying the residents from FFP. However, significant distinctions exist between our community corrections programs and the type of privatized prisons with which you may be familiar. Colorado's private community corrections programs differ in key aspects from most other states' half-way houses and other privately-contracted public institutions.

Practically speaking, the individuals who sleep at Colorado community corrections facilities are called "residents." The only physical tie the residents have to these private programs is that they sleep there most nights (unless they are sleeping at home because they have home passes) from anywhere from three to six months. At the expiration of their resident status, they sleep in their own homes. While they sleep at these facilities, they must work outside of the facilities to pay rent to the facilities, court costs, and restitution back to their victims. Unlike a prison, there is no paid work inside the facility. The "residents" are never in handcuffs. There are no locks on the doors and no safety towers. There are no guards and there is no fencing to maintain a privacy or safety perimeter. The employees and counselors that work at the CC's are not state employees, and they have no authority to arrest them if they do not return, or prevent a resident from leaving.

Colorado's community correction programs and participants are not related to the state Department of Corrections in any administrative sense. A separate state department oversees the community corrections policies, and no government agency actually administers the programs (discussed below).

Of the 35 residential community corrections facilities in Colorado, approximately three are non-medical institutions that are an organizational part of a governmental unit (most often a county), and therefore likely meet the definition of public institution. However, most community corrections facilities are operated by private, usually nonprofit organizations that contract with local community corrections boards, which receive funds from the Department of Public Safety (not the Department of Corrections), Office of Community Corrections. No governmental unit exercises final administrative control of Colorado's community correction facilities, including either ownership or control of the physical facilities and grounds used to house participants. These private organizations are responsible for the day-to-day operations of each facility, including the hiring and firing of employees. They, therefore, do not meet the definition of public institution, and FFP should be available for both residents and non-residents.

As you know, under federal law, two factors determine whether an otherwise eligible individual is excluded from FFP: the individual cannot be 1) an inmate or 2) residing involuntarily in a public institution. Therefore, even if you believe all or some of the community corrections participants are inmates, they would still be eligible for FFP funds if he/she is residing in a private institution. The letters you referred to make it clear upon further analysis that the participants in most Colorado CC's programs reside in private institutions, and therefore eligible for FFP. The 1997 and 1998 letters define a public institution as a facility under the responsibility of a governmental unit, or over which a governmental unit exercises administrative control. (Page 2 of both letters.) The letters list the following factors for determining whether a facility is governmentally controlled:

1. Actually an organizational part of a governmental unit, or

2. When a governmental unit exercises final administrative control, including ownership and control of the physical facilities and grounds used to house inmates, or

3. When a governmental unit is responsible for the ongoing daily activities of a facility, for example, when facility staff members are government employees or when a governmental unit, board, or officer has final authority to hire and fire employees.

As described above, Colorado's community corrections programs do not meet any of the above factors. They are not organizationally a part of a governmental unit, a governmental unit does not exercise final administrative control of the facilities, and a governmental unit is not responsible for the ongoing daily activities of the facilities.

I believe this issue can be resolved short of a protracted legal battle. The solution is to clarify that if an institution is run similar to Colorado's community corrections programs, then in fact it is a private institution and eligible for FFP. Please feel free to contact my Senior Health Policy Advisor, Heather Foster, at (202) 225-4431 if you have additional questions. I look forward to your continued assistance in resolving this matter.

Sincerely,

A handwritten signature in cursive script that reads "Diana DeGette".

Diana DeGette
Member of Congress



THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

March 29, 2010

The Honorable Diana DeGette
House of Representatives
Washington, DC 20515-3806

Dear Representative DeGette:

Thank you for your letter seeking formal guidance from the Centers for Medicare & Medicaid Services (CMS) concerning Federal financial participation (FFP) for medical care provided to individuals participating in Colorado's community corrections programs. You indicated that in these programs, some or all individuals are incarcerated in community residential corrections placements.

Prior to and since the inception of the Medicaid program, the responsibility for health care for inmates of public institutions has resided with the States. The Social Security Act excludes FFP for medical care provided to inmates of a public institution, except when the inmate is admitted as a patient in a medical institution. In guidance issued in 1997 and 1998, CMS (formerly the Health Care Financing Administration) clarified that public institutions include residential placements other than traditional prisons, including placements obtained through private contractors. This guidance remains in effect today; however, we remain available to engage in a dialogue with States about the need to update this policy and further clarify issues such as the one included in your letter.

To the extent that the individuals in question are not residing in community residential corrections placements, but are participating voluntarily in non-residential programs (in some cases while on probation or home release), FFP may be available for covered medical services. This would not include any periods when the individuals are reporting to a corrections facility for an overnight stay.

CMS is committed to working in partnership with States to ensure that Medicaid-eligible individuals receive covered services under the Medicaid statute, and we will continue to do so for your State through our Central and Regional Offices. The CMS Denver Regional Office is aware of your letter, and we are sending them a copy of this response.

Please do not hesitate to contact me if you have additional comments or would like to discuss this issue further.

Sincerely,

A handwritten signature in black ink that reads "Kathleen Sebelius". The signature is written in a cursive style with a large initial "K".

Kathleen Sebelius

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Congress of the United States
House of Representatives
Washington, DC 20515-4329

January 12, 2010

Secretary Kathleen Sebelius
U.S. Department of Health and Human Services
200 Independence Ave., SW
Washington D.C. 20201

CHIEF DEPUTY WHIP
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AND CONSUMER PROTECTION
COMMITTEE ON NATURAL
RESOURCES
SUBCOMMITTEE ON NATIONAL PARKS,
FORESTS AND PUBLIC LANDS
SUBCOMMITTEE ON INSULAR AFFAIRS,
OCEANS AND WILDLIFE

Dear Secretary Sebelius:

I am writing to request formal guidance from the Center for Medicare and Medicaid Services (CMS) about whether individuals participating in Colorado's community corrections programs are eligible to receive partially federally-funded health care services through the Colorado Indigent Care Program (CICP). The Colorado Department of Health Care Policy and Financing (HCPF) has been waiting for guidance from the Denver Regional Office of the Centers for Medicare and Medicaid Services (Denver CMS) before instituting a new policy, and Denver CMS is waiting for guidance from the Center for Medicare and Medicaid Services. It is my hope that with your assistance this matter can quickly be resolved so that medically indigent individuals who are working to become productive, non-offending members of their community will be able to access needed health care services.

In 2005, HCPF changed a rule, intending to mirror federal law, barring individuals participating in community corrections from receiving indigent medical care on the grounds that the federal prohibition against funding inmates of public institutions applied to community corrections facilities. In August, 2009 HCPF reversed its policy and declared that most participants in community corrections programs should in fact be permitted to access health care services through the CICP on the basis that "offenders" residing at a private (for-profit or not-for-profit) community corrections facility are not "inmates" at a "public institution."

The community corrections programs in Colorado consist of 59 different facilities that serve as a viable alternative to imprisonment and provide a variety of services to approximately 4,500 offenders, including drug and alcohol education, life skills training, and more. Community corrections facilities are not prisons and most are not public institutions. There are 35 residential community corrections facilities and 24 non-residential facilities in Colorado. Individuals are classified as "offenders" as they are not locked up or in prison, nor do these facilities have any legal authority under the program to physically keep participants from leaving. Furthermore, only three of the 35 residential facilities meet the definition of a public institution—most are operated by private, not-for-profit organizations that contract with local community corrections boards.

In the absence of a response from CMS permitting HCPF to move forward with the new policy, community corrections participants continue to be excluded from access to needed

medical care. Most are medically indigent and unable to afford emergency or basic medical care, yet would ordinarily qualify for publicly funded health care services through the CICIP. Many go untreated until they are out of community corrections and can access Medicaid or CICIP, by which point their conditions have become more acute and more costly. Some individuals actually opt for a prison sentence instead of participating in the community corrections program or re-offend because they recognize that the state is required to fund their medical needs while in prison.

Please evaluate this policy and provide guidance to the Denver CMS as soon as possible so that medically indigent participants in community corrections programs can finally receive needed medical care. If you or your staff need any additional information from my office, please contact Heather Foster, my Senior Health Policy Advisor, at (202) 225-4431 or heather.foster@mail.house.gov. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink that reads "Diana DeGette". The signature is written in a cursive, flowing style.

Diana DeGette
Member of Congress



COLORADO DEPARTMENT OF HEALTH CARE POLICY & FINANCING

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

November 6, 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 Residing in Colorado Community Corrections Facilities 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 May 26, 2009 letter from the Department of Health Care Policy and Financing (Department) regarding "Suspension of Medicaid Eligibility for Incarcerated Persons." This letter focuses on providing an explanation as to why most participants in the State's community corrections programs should not be considered inmates of a public institution, and thus potentially should be eligible for services (specifically including Medicaid) funded with Federal Financial Participation ("FFP").

Background

In Colorado, community corrections programs are a unique collaboration between state agencies, local officials and (predominately private) community corrections providers, with an emphasis on local control. The community corrections program was established in 1974 as a viable alternative to incarceration in prison and to provide a variety of services to offenders. These services generally include case management, life skills training, drug and alcohol education, money management assistance, and educational and vocational guidance. The term "community corrections" is one that is often confusing. In the broadest sense, it is the supervision or treatment of criminal offenders in non-secure settings. They manage offender populations that would otherwise be placed in secure facilities, such as county jails or state prisons.

As will be elaborated further, community corrections residential facilities are not private prisons, nor do they operate as private prisons: (1) individuals residing in community corrections are not physically locked-up or confined; (2) generally speaking, law enforcement officers or peace officers are not employed as staff at community corrections, and are not contracted to work at the residential facilities; and (3) the facilities are not funded by the Department of Corrections.

The Colorado Department of Public Safety (specifically the Department of Criminal Justice/DCJ) has the responsibility to audit and monitor community corrections programs to ensure compliance with state standards and contracts, federal grant requirement and established operating standards. These operating standards establish minimum objective criteria that describe how programs should deal with issues related to public safety, offender management and best practices in offender rehabilitation. Services are designed to promote productive reintegration of offenders back into the community, which include:

- Services for offenders sentenced to community corrections in lieu of prison (diversion clients);
- Services for offenders who are transitioning from prison prior to parole (transition clients);
- Services for parolees released by the Colorado Board of Parole (condition of parole clients);
- Short-term stabilization services for offenders on probation (condition of probation clients);
- Services for adults adjudicated as juveniles and paroling from the juvenile system as adults (condition of juvenile parole clients); and
- Specialized treatment for offenders with a history of substance abuse and mental illness.

Local community corrections boards are responsible for establishing programs within their judicial district. Local community corrections boards vary by size, membership, philosophy and degree of program control. Citizen board members are typically appointed by locally elected officials. The primary responsibility of the local community corrections boards is to screen and accept or reject any offenders referred to programs in their communities. Diversion offenders who are not approved for placement in the local community corrections program return to the sentencing judge for an alternative sentencing, which is most likely the Department of Corrections. In addition, local community corrections boards may institute guidelines for the operation of the programs that go above and beyond the DCJ's requirements, enforce their local guidelines, and monitor program compliance with state and local standards. Many boards provide an array of critical services designed to assist programs to better serve the needs of the offenders. None of the community corrections programs are exactly the same and the diverse nature of the programs are part of the system's strength.

Currently there are 22 local community corrections boards throughout Colorado and 35 separate residential facilities offering community corrections programs. In five communities, units of local government operate the programs. The remaining programs are directly operated by private agencies, either as for-profit or not-for-profit facilities. The not-for-profit facilities operate under a 501(c)(3) tax exempt status. Two of the not-for-profit facilities that specialize in the treatment of substance abuse receive financial and facility support from the University of Colorado Hospital, but they are not owned or operated directly by the hospital or the State.

Local community corrections boards authorize community corrections programs to manage two main types of offenders.

- “Diversion clients” are directly sentenced to community corrections programs by the courts or, in rare instances, have been sentenced as a condition of a probation placement for up to 30 days. In such cases, community corrections programs serves as the step right before, or alternative to, prison. One measure of success in the management of diversion clients is whether they can permanently demonstrate that they do not require time in prison to become safe and productive members of society.
- “Transition clients” have been in a Colorado prison facility, are still under the supervision of the Colorado Department of Corrections, and are preparing for a gradual return to society by participating in a community corrections program. These offenders include parolees and offenders that must participate in an intensive supervision program. In such cases, the community corrections program serves as the step down from prison, and the offenders’ transition back to the community. One measure of success in the management of these clients is whether they remain crime-free, both during and after their transition from institutional life to freedom.

An offender must receive a referral from either the State judicial branch (diversion) or the Department of Corrections (transition) to participate in one of the community corrections program. Referrals for direct sentence (diversion) offenders are made from local judicial districts to local community corrections boards. Referrals for transition, parole or offenders that need an intensive supervision program upon release from prison are made by the Division of Criminal Justice in the Department of Corrections. Condition of Parole offenders are referred from the parole board as a condition of the offender’s period of parole. Please see an attachment to this letter which depicts the funding and referral process for community corrections programs.

Placement of Individuals in Community Corrections

The placement of individuals in community corrections is fairly complex. Community correction programs consist of residential and nonresidential phases. During the residential phase, offenders are expected to find employment, but are required to reside at the facility. The purpose of the residential phase of community corrections programs is to provide offenders with the knowledge and skills necessary to be emotionally, cognitively, behaviorally and financially prepared for their reintegration back into the community. Residential programs strive to accomplish this rehabilitative task by a variety of means. Through assessment-driven individual treatment plans, programs attempt to match offender risks and needs with the most appropriate treatment modality. Offenders are assisted in obtaining regular employment and encouraged to participate in educational and vocational services. Community corrections program staff monitor the payment of restitution, court fines, court ordered child support and useful community service requirements. Further, program staff carefully monitors offenders in the community to enhance offender accountability and to address public safety concerns.

Once a diversion offender is successfully discharged from the residential phase of community corrections, the remainder of the sentence is typically completed under different types and levels of non-residential supervision. Most community corrections offenders progress through the system to become "nonresidential clients" or "day reporting clients." Typically, these offenders have "graduated" from the more structured part of their programs and are permitted to live with some independence. They check in as often as every day, provide urine samples to detect any substance abuse, and are subject to monitoring at their jobs and elsewhere. Many diversion nonresidential offenders continue classes begun while they were in residence at the community corrections program.

The nonresidential phase of community corrections is designed to assist in the transition and stabilization of residential Diversion offenders back into the community with a gradual decrease in supervision. These offenders have conducted themselves well in a highly-structured residential setting. They have obtained a suitable independent living arrangement, managed their finances appropriately and have progressed in treatment. Offenders in nonresidential placement are required to meet with case management staff, retain employment, participate in mandatory treatment, honor their financial responsibilities and remain drug and alcohol free.

Transition clients from the Department of Corrections generally progress to nonresidential status by way of the Intensive Supervision Program (ISP inmate) until they are paroled by the parole board. These offenders still receive services from the community corrections facilities, but they are also supervised by ISP parole officers.

The two facilities that specialize in the treatment of substance abuse provide an intensive residential treatment program for individuals with serious substance abuse problems. The treatment programs are structured to accommodate persons with disorders related to prolonged substance abuse. Additionally, intensive residential treatment programs treat individuals who lack a positive support system, experience substantial denial and exhibit an inability to sustain independent functioning outside of a controlled environment. The purpose of residential treatment program is to provide a brief and intensive treatment intervention is aimed at increasing positive coping and relapse prevention skills and identifying negative thinking errors that have resulted in prior substance abuse and criminal behavior. Intensive residential programs last 45 days and offenders do not leave the facility for the duration of the program. It is important to note that these programs are being phased out, and will revert back to a longer program.

You may find more information on the State's community corrections programs at <http://dcj.state.co.us/occ/>. Further, we have attached a listing of the programs by location and ownership.

Legal Analysis

We understand that a person who is an “inmate of a public institution” is not eligible for Medicaid Federal Financial Participation (“FFP”) under 42 CFR § 435.1010. When determining whether a person incarcerated at a Colorado community corrections facility falls into this category, this presents a two-prong test: (1) whether the person is an “inmate,” and (2) whether the facility is a “public institution.”

Based on the foregoing description of the community corrections program, we believe that a participating offender residing in either a for-profit or a not-for-profit facility should not be considered an “inmate of a public institution” for the purpose of determining whether the State will be entitled to FFP for any Medicaid expenditures. This is for two separate reasons.

First, we urge you to consider our view that such an offender should not be considered an “inmate,” regardless of whether he or she is residing in a public or private community corrections program. Such a ruling would ease the administration burden of the Department and allow these offenders to access to Medicaid benefits assuming they meet the relevant eligibility criteria.

As an initial matter, it is clear under Colorado law these individuals are classified as “offenders,” and not “inmates.” *See, e.g.,* C.R.S. § 17-27-102. They are not locked up or in prison, and the personnel operating community corrections programs do not have law enforcement duties, nor the legal authority to physically keep program participants from leaving the facilities. The Colorado Supreme Court has expressly distinguished between incarceration and confinement in a community corrections facility, calling the latter “not as harsh.” *People ex rel. VanMeveren v. Dist. Ct.*, 575 P.2d 4 (1978); *see also People v. Wilhite*, 817 P.2d 1017, 1019 (Colo. 1991).

This “offender” (not “inmate”) classification makes good practical sense in this context. Medicaid providers are unaware of an offenders living arrangement when he or she is participating in a community corrections program. Since some programs are residential and others are non-residential programs, they cannot determine if they can bill for outpatient services (and other services not classified as inpatient hospital services) when the offender is Medicaid-eligible. Without the ability to make a Medicaid payment for all offenders participating in community correction programs, the Department will need to established specific eligibility criteria to determine if offenders are involuntarily residing in a public-owned facility. In addition, that information will need to be entered into the State’s eligibility state, Colorado Benefits Management System (“CBMS”), so the client’s Medicaid eligibility can be temporarily suspended while residing involuntarily residing in a public-owned facility, which will prevent providers from billing for services. The only way to prohibit Medicaid payments, and thus limit FFP, to providers for this population are expensive changes to CBMS to provide notification when no Medicaid payment is available even though the client may retain their Medicaid eligibly while residing in a community corrections program.

Additionally, as you are no doubt aware, Colorado does not have an eligibility category that would apply to many of these inmates, since most would be considered to be residing in a household without dependent children. We note, however, that there is a strong public policy argument in favor of allowing pregnant women residing in a community corrections program to receive Medicaid services and would like to consider including other individuals under a Medicaid expansion through an 1115 Waiver for adults without dependent children in the household planned for 2011.

Notwithstanding the foregoing, even if your office cannot concur with our view that providers may receive Medicaid payments for all qualifying medical services provided to all community corrections offenders, we nonetheless believe FFP should be available with respect to the vast majority of these individuals. This is because private community corrections facilities do *not* constitute “public institutions” for the purposes of determining if a Medicaid payment is available when medical services are rendered. We note in this regard that at least 28 (and possibly 30) of the state’s 35 community corrections institutions are not owned or operated by any governmental entity.

We have been able to locate two sources that provide some guidance on the issue of whether a private institution will nonetheless be classified as a “public institution” for Medicaid purposes. First, according to CMS regulations, a facility is a “public institution” only if it is “the responsibility of a governmental unit or over which a governmental unit exercises administrative control.” *See* 42 C.F.R. § 435.1010.

In addition to the CMS regulation, the 1997 Clarification memo from CMS (then called the Health Care Financing Administration) observes that administrative control exists where “an organizational part of a governmental unit or when a governmental unit exercises final administrative control, including ownership and control of the physical facilities and grounds used to house inmates.” *See* 1997 Clarification memo. It also will be present when “a governmental unit is responsible for the ongoing daily activities of a facility, for example, when facility staff members are government employees or when a government unit, board or officer has final authority to hire and fire employees.” *Id.*¹

Based on these criteria, the state’s private (for-profit or not-for-profit) community corrections facilities should not be deemed to be “public institutions” for Medicaid eligibility purposes.

Furthermore, the state standards governing community corrections programs show that, according to the factors set forth above, programs contracted to private agencies are not under government control. *See* Colorado Community Corrections Standards (the “CCCS”) (available at <http://dcj.state.co.us/occ/pdf/2007%20Community%20Corrections%20Standards.pdf>). These

¹ This guidance is similar to that provided by the SSA in POMS § SI 00520.001(C)(2)(a), stating that a strong indication of governmental control exists when a government (1) appoints an institution’s board of trustees, (2) appoints the institution’s administrator, (3) assumes the obligation to appropriate funds to make up the institution’s operating deficits, (4) receives payment on behalf of the institution, or (5) holds the operating certificate or license. *Id.*

standards apply to contracts with community corrections programs and form the basis of overseeing these contracts. They also illustrate that each program is responsible for its own day-to-day operations.

For example, the facilities used by private community corrections programs are controlled by the private organizations that are under contract to provide the programs. *See, e.g.*, CCCS § 5-5010 *et seq.* (providing standards for fire alarms, health and sanitation that programs must comply with). In addition, neither a private facility's administrator nor board of trustees will be appointed by any governmental unit – to the contrary, they presumably will be selected like any other employee, trustee or director of a private entity. *See, e.g.*, CCCS § 1-1010(b)(1) (discussing legal status of public and private facilities). Also, the employees of a private-owned community corrections facility are hired and/or fired by institution itself, and there is no indication in the CCCS guidelines that government will have any direct or indirect authority in making these personnel decisions. *See, e.g.*, CCCS § 2-050 (requiring that information from personnel files be available to the local community corrections board and/or state oversight agencies *only for the purpose of verifying compliance with standards or contractual requirements*). Furthermore, there is no indication in the CCCS that the state will assume any obligation to appropriate funds to make up any operating deficit. *Id.* at § 1-1040 (discussing fiscal affairs). Similarly, there is no governmental entity that will receive payment on behalf of a private institution. *Id.* Finally, the facility itself will hold the requisite license, and not any state agency. *Id.* at 1-010(b).

In summary, there is no final administrative control exerted by any governmental unit over a private community corrections facility – although the CCCS prescribes that the facility must formulate and implement a number of policies and procedures governing personnel, management, security, *etc.*, no government entity will participate in this process, and with a few exceptions, there is not even any requirement that the policies or procedures be formally approved. *See, e.g.*, CCCS § 3-010. Moreover, with respect to the ongoing daily activities of a private-owned community corrections facility, there is no government involvement in devising or enacting the foregoing policies and procedures governing operations (and even *ex post* approval is rarely required). This is consistent with judicial opinions addressing similar types of programs, which generally tend to view such private-owned facilities as something other than a “public institution.” *See, e.g., Dixon v. Stanton*, 466 F. Supp. 335, 339 (D.C. Ind. 1979).

Therefore, if CMS cannot concur with the Department's preferred view that an individual participating in any community correction program is not an inmate of a public institution, then based the foregoing analysis, we believe that it is clear that privately-operated community corrections program facilities should not be classified as “public institutions” for the purpose of determining the eligibility for FFP for offenders residing there.

The Department requests that CMS respond to the Department's analysis so a formal policy can be properly developed and implemented. We reiterate that there is a strong public policy argument in favor of increasing the eligibility of community corrections participants in FFP-funded programs, consistent with federal law. For example, pregnant women residing in a

community corrections program should be allowed to receive Medicaid services, and we would like to consider including other individuals under a Medicaid expansion through an 1115 Waiver for adults without dependent children in the household planned for 2011.

If you have any additional questions or concerns regarding this issue, or would like additional information about Colorado's community corrections programs, 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

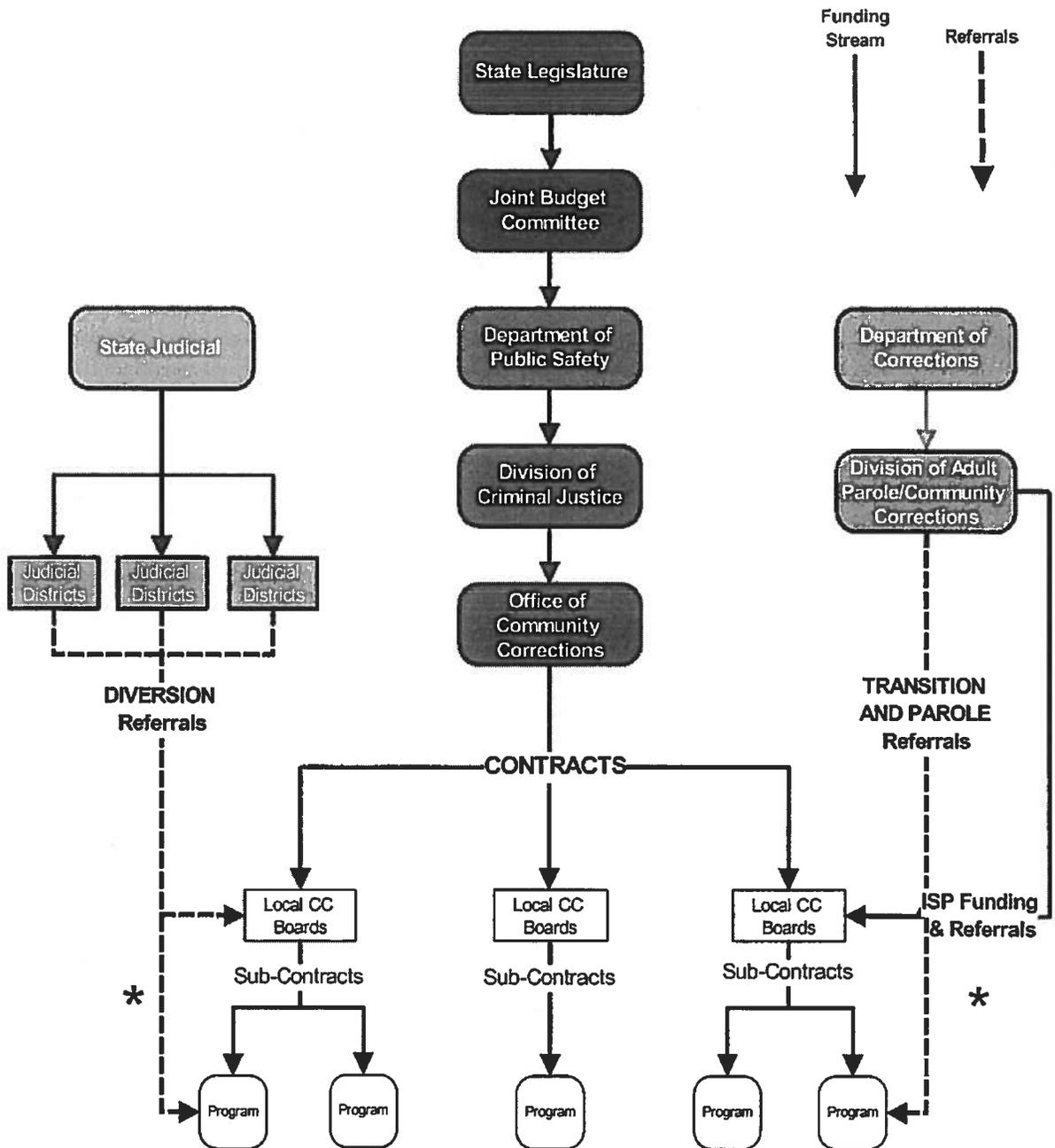
Table 1
Community Corrections Program Ownership in Colorado

<i>Program Name</i>	<i>Program Location</i>	<i>Program Ownership/Sponsorship</i>
Arapahoe County Treatment Center	Sheridan	501(c)(3)
ComCor, Inc.	Colorado Springs	501(c)(3)
Crossroads-Turning Points	Pueblo	501(c)(3)
Hilltop House	Durango	501(c)(3)
ICCS Jefferson	Lakewood	501(c)(3)
ICCS Weld	Greeley	501(c)(3)
Peer I	Denver	University-sponsored not-for profit
San Luis Valley Community Corrections	Alamosa	501(c)(3)
The Haven	Denver	University-sponsored not-for profit
Garfield County Community Corrections	Rifle	County-owned
Gateway: Through the Rockies ¹	Colorado Springs	County-owned
Larimer County Community Corrections	Ft. Collins	County-owned
Mesa County Community Corrections	Grand Junction	County-owned
Phase I ²	Denver	County-owned
Advantage Treatment Center	Sterling	For-profit ownership
Arapahoe County Residential Center	Englewood	For-profit ownership
CMI-Boulder	Boulder	For-profit ownership
CMI-Centennial	Centennial	For-profit ownership
CMI-Columbine	Denver	For-profit ownership
CMI-Dahlia	Denver	For-profit ownership
CMI-Fox	Denver	For-profit ownership
CMI-Longmont	Longmont	For-profit ownership
CMI-Ulster	Denver	For-profit ownership
Community Alternatives of El Paso	Colorado Springs	For-profit ownership
Correctional Alternative Placement	Craig	For-profit ownership
Independence House-Federal	Denver	For-profit ownership
Independence house-Fillmore	Denver	For-profit ownership
Independence House-Pecos	Denver	For-profit ownership
Minnequa Community Corrections	Pueblo	For-profit ownership
Phoenix Center	Henderson	For-profit ownership
Pueblo Community Corrections	Pueblo	For-profit ownership
Time to Change-Adams	Welby	For-profit ownership
Time to Change-Commerce City	Commerce City	For-profit ownership
Tooley Hall	Denver	For-profit ownership
Williams Street Center	Denver	For-profit ownership

¹ Small, jail-based program with no residential beds

² Jail-based program with no residential beds and special mission

Figure 2
COLORADO COMMUNITY CORRECTIONS
Funding and Referral System



* Some referrals are made directly to programs where boards have developed automatic acceptance criteria