



CMS Establishes Guardrails for Section 1115 Demonstrations for Justice-Involved Individuals in California Waiver

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Ensuring that people who are in carceral settings are enrolled in Medicaid and connected with services upon release is key to reducing health disparities and advancing health equity. Many people who are or have been incarcerated have significant behavioral and physical health needs, and are much more likely to have disabilities and chronic conditions, including a serious mental illness or substance use disorder.¹ Additionally, people of color - particularly Black, Native American, and Hispanic people - are vastly overrepresented in penal settings.²

Since Medicaid's inception, the program has not covered services for any adult who is an "inmate of a public institution," as federal law excludes federal financial participation (FFP) for such services.³ This prohibition is colloquially known as the "inmate exclusion,"⁴ and has been identified as a barrier to connecting individuals to services upon reentry.⁵

¹ Laura M. Maruschak et al., Bureau of Justice Statistics, *Disabilities Reported by Prisoners: Survey of Prison Inmates*, 2016 (March 2021), <https://bjs.ojp.gov/library/publications/disabilities-reported-prisoners-survey-prison-inmates-2016>.

² E. Ann Carson, Bureau of Justice Statistics, *Prisoners in 2021* (Dec. 2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/p21st.pdf>.

³ 42 U.S.C. § 1396d(a)(31)(A); 42 C.F.R. §§ 441.13(a)(1), 435.1009(a)(1).

⁴ Specifically, the implementing regulations clarify that a person who is living in "an institution that is the responsibility of a governmental unit or over which a governmental unit exercises administrative control." 42 C.F.R. § 435.1010. This exclusion applies to anyone held in a secure facility, even as a pretrial detainee. While this exclusion is broad, it does not apply to individuals on parole, probation, or otherwise "under supervision"; individuals on home release; and individuals living voluntarily in a detention center, jail, or county penal facility after their case has been adjudicated or while other living arrangements are being made for them (e.g. transfer to a community residence). CMS, State Health Official Letter (Apr. 28, 2016), <https://www.medicaid.gov/federal-policy-guidance/downloads/sho16007.pdf>

⁵ See, e.g., Gabrielle d la Gueronniere and Deborah Reid, *Utilizing Medicaid to Strengthen Access to Opioid and Other Substance Use Disorder Care Throughout the Criminal Legal*

CMS recently granted a first-of-its-kind section 1115 “reentry demonstration” in California, through which CMS has created a temporary, limited carve-out to the “inmate exclusion.”⁶ Under the terms of the demonstration, California will be able to collect federal Medicaid matching funds for a specific set of “reentry services” provided to individuals in prisons, jails, and youth correctional facilities.

While this approval marks a major change in Medicaid’s role in funding services in carceral settings, the approval contains at least five essential guardrails. While CMS has not yet issued any formal guidance on these demonstrations, CMS has indicated that the requirements included in the California approval letter provides a roadmap for how it will address pending and future requests for reentry demonstrations.

California “Reentry Demonstration Initiative” Amendment

California asked CMS for permission to obtain federal Medicaid funds for services provided in prison and jails, via a Section 1115 demonstration.⁷

CMS agreed, but imposed five important guardrails:

1. **Time limitations:** Federal Medicaid funding will only be available for 90 days prior to release, thus targeting the funding towards preparation for reentry. funding will not be available outside of this set number of days.⁸

System (Feb. 8, 2022), <https://www.lac.org/resource/utilizing-medicaid-to-strengthen-access-to-opioid-and-other-substance-use-disorder-care-throughout-the-criminal-legal-system>.

⁶ CMS, Approval Letter for California Advancing and Innovating Medi-Cal (CalAIM) Reentry Demonstration Initiative Amendment (Jan. 26, 2023) [Hereinafter “California Reentry Demonstration”], <https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/ca-calaim-ca1.pdf>.

⁷ Though CMS has approved this waiver, Section 1115 is not an appropriate vehicle for these demonstrations. The Secretary cannot waive requirements contained in sections 1396b through 1396w-6. Notably, the “inmate exclusion” is contained in 42 U.S.C. § 1396d(a)(31). See National Health Law Program, *Comments Re: California Section 1115 Demonstration Five-Year Renewal and Amendment Request: CalAIM Demonstration* (Aug. 12, 2021), <https://healthlaw.org/resource/nhelp-comments-on-california-section-1115-demonstration-five-year-renewal-and-amendment-request-calaim-demonstration/>.

⁸ CMS is permitting California to obtain FFP for 90 days prior to release, but is requiring the state to evaluate the “extended coverage period” between 30 days and 90 days to determine if those 60 additional days of coverage improve certain metrics, such as uptake and continuation of medication assisted treatment and other behavioral health services. California Reentry Demonstration at 5.

2. **Service limitations:** Funding is only available for a specific set of “reentry services,” targeted to the needs of those who are leaving prisons, jails, and youth correctional facilities. In California, these services include:
 - a. Reentry case management services;
 - b. Physical and behavioral health clinical consultation services provided through telehealth or in-person, as needed, to diagnose health conditions, provide treatment, as appropriate, and support pre-release case managers’ development of a post-release treatment plan and discharge planning;
 - c. Laboratory and radiology services;
 - d. Medications and medication administration;
 - e. Medication-Assisted Treatment (MAT), including all Food and Drug Administration-approved medications, including coverage for counseling; and
 - f. Services provided by community health workers with lived experience;
 - g. Upon release:
 - i. 30-day supply of medications
 - ii. Durable medical equipment.⁹
3. **Eligibility Requirements:** Not all incarcerated adults will be eligible for participation in the demonstration. Instead, services are targeted towards those with the highest need, including but not limited to individuals with certain disabilities, chronic health conditions, substance use disorder, and those within the 12-month post-partum period, and those with chronic conditions or significant non-chronic conditions.¹⁰ All individuals in youth correctional facilities will be eligible.
4. **Suspension, not termination, of Medicaid upon incarceration:** The state will be prohibited from terminating Medicaid eligibility upon incarceration. For years, CMS has encouraged states not to terminate Medicaid eligibility upon incarceration, but has never mandated it.¹¹ This demonstration represents the first time CMS has imposed restrictions upon a state’s ability to terminate Medicaid for incarcerated individuals.¹²
5. **Non-supplementation of state costs related to incarceration:** CMS has limited state’s ability to use such demonstrations to shift costs to the federal government, thus reducing any incentive for states to use such demonstrations to expand carceral settings. CMS stated that because “the reentry demonstration initiative is

⁹ California Reentry Demonstration at 70-71.

¹⁰ *Id.* at 70.

¹¹ See, e.g. CMS, State Health Official Letter 6-8 (Apr. 28, 2016),

<https://www.medicaid.gov/federal-policy-guidance/downloads/sho16007.pdf>.

¹² Although termination has never been prohibited for adults, termination is statutorily prohibited for certain juveniles. 42 U.S.C. § 1396(a)(84). Advocates have argued that these statutory protections be extended to adults. See Andrew Hayes and Cathren Cohen, Nat’l Health Law Program, *Juvenile Justice Laws Provide Model for Improving Health Care Access for Individuals Leaving Incarceration* (May 27, 2021), <https://healthlaw.org/juvenile-justice-laws-provide-model-for-improving-health-care-access-for-individuals-leaving-incarceration/>.

not intended to shift current carceral health care costs to the Medicaid program,” any new federal investment must be additive to the array of services and resources available to this population.¹³ Specifically, to the extent that the demonstration allows for new federal funding for services that the state already was covering prior to the demonstration, the state must reinvest all those new federal dollars in services intended to support this population. CMS included a list of allowable reinvestments. The state must submit a “reinvestment plan within 120 of approval.”¹⁴ Because prisons and jails are not a therapeutic environment, particularly for individuals with behavioral health conditions and disabilities, careful monitoring of this guardrail will be essential.

California did not request limits on the age of participants in the demonstration, and CMS declined to propose any limits.¹⁵ CMS also did not require services to be provided by community-based providers, which could be a strategy used to ensure that the demonstration does not result in increased investment in institutional services. CMS is allowing either community-based or correctional-facility based providers to provide reentry services.¹⁶

Future Implications

Currently, there are 14 similar requests pending at the federal level. These states include: Arizona, the District of Columbia, Kentucky, Massachusetts, Montana, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Utah, Vermont, and Washington. The requests range widely in scope, from Kentucky’s extremely broad request for funding for a large array of treatment for entire periods of incarceration to New Jersey’s targeted request for four behavioral health care management visits from community-based providers prior to release.¹⁷

¹³ California Reentry Demonstration at 9.

¹⁴ *Id.* at 77-78.

¹⁵ The inmate exclusion applies to children in both adult prisons and jails and in juvenile facilities. However, the Consolidated Appropriations Act of 2023 made major changes to the application of this exclusion to “eligible juveniles,” effective January 1, 2025. States will be required to provide Early and Periodic Screening, Diagnostic and Treatment services to youth 30 days prior to their release, and may, at state option, provide these services “pending disposition of charges.” Consolidated Appropriations Act of 2023 §§ 5121, 5122, Pub. L. No. 117-328 (Dec. 29, 2022). CMS has not yet clarified how these two statutory provisions will intersect with future requests for reentry demonstrations applicable to children, and whether CMS intends to allow states to use Section 1115 authority for services that are statutorily mandated.

¹⁶ California Reentry Demonstration at 71-72.

¹⁷ Kentucky 1115 SUD Demonstration Proposed Amendment (Nov. 24, 2020), <https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/ky-health-demo-pa4.pdf>; New Jersey FamilyCare Comprehensive Demonstration Renewal Proposal (Feb. 28,

The Support Act of 2018 required the Secretary of Health and Human Services to issue a State Medicaid Director letter regarding demonstrations under section 1115 to improve care transitions for individuals leaving carceral settings.¹⁸ The guidance was due October 24, 2019, but has yet to be issued. Such guidance should describe any additional parameters CMS intends to impose and add clarity to these guardrails.

However, as noted above, CMS has indicated that the requirements included in the California approval letter provides a roadmap for how it will address pending and future requests for reentry demonstrations. Thus, we can expect CMS to approve other states' requests to the extent that such requests are consistent with the requirements imposed on California's.

2022), <https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/nj-1115-ext-req-pa.pdf>.

¹⁸ Support Act of 2018 § 5032, Pub. Law 115-271 (Oct. 24, 2018).