youth law center

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July 17, 2009

Mr. Steven Rosenberg, President
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Dear Mr. Rosenberg:

You have asked our opinion about the December 27, 1997 Health Care Financing (HCFA) letter regarding Clarification of Medicaid Coverage Policy for Inmates of a Public Institution with respect to its application of 42 CFR § 435.1010 to juveniles. We are concerned that the letter reflects an inaccurate understanding of the juvenile justice system and the legal status of minors. As a result it creates confusion when States attempt to reconcile the letter with the federal regulation and can lead to denial of covered services for Medicaid-eligible children.

42 CFR § 435.1010 excludes from the definition of "inmate" any individual who "is in a public institution for a temporary period pending other arrangements appropriate to his needs." This provision describes youth who live in juvenile detention facilities while juvenile probation professionals and the juvenile court assess the youth's needs, develop a plan, and make arrangements to meet those needs. However, without any analysis of juvenile law or the juvenile justice system, the 1997 letter states "there is no difference between juveniles and adults in the application of this [inmate payment exception] policy. The letter also provides the following example of circumstances where FFP (federal financial participation) is not available: "Individuals (including juveniles) who are being held involuntarily in detention." These statements fail to take into consideration the legal status of children and the differences between the juvenile justice system and the criminal justice system.

Children are always in some form of custody, and if a child is removed from her family the state has a parens patriae obligation to provide for the child's welfare and make appropriate arrangements for her safety and care before discharging her from a public facility. *Schall v. Martin*, 467 U.S. 253, 265 (1984), *see also*, *Reno v. Flores*, 507 U.S. 292, 302 – 303 (1993). Unlike the criminal justice system, the juvenile system is designed to rehabilitate youth and to meet their individual needs, consistent with concerns for public safety. *Kent v. United States*, 383 U.S. 541, 554 (1966) ("The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment.") *See also, McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1970) (referring to juvenile court as an intimate, informal protective proceeding.) These rehabilitative objectives are reflected in the federal Juvenile Justice and Delinquency Prevention Act, which

provides funding for treatment and rehabilitation, 42 U.S.C. § 5603, and in state juvenile justice statutes that provide individually-based care, treatment, and guidance for youth adjudicated delinquent. *E.g.,* Calif. Welf & Inst. Code § 202, 705 ILCS 405/5-101, N.M.S.A. § 32A-2-2, Texas Family Code § 51.01.

To meet these objectives juvenile justice systems evaluate youth and develop an appropriate plan. *See e.g.,* Calif. Welf. & Inst. Code § 706 (Probation officials conduct a social study, which along with other evidence, allows the juvenile court to develop an appropriate disposition order); 705 ILCS 405/5-101(1)(c) (Illinois provides an individualized assessment of each alleged and adjudicated delinquent juvenile, in order to rehabilitate and to prevent further delinquent behavior through the development of competency in the juvenile offender); 705 ILCS 405/5-101((2)(f) (Illinois bases probation treatment planning upon individual case management plans.) For youth who cannot remain at home this process takes place during detention, and the youth remains in custody until appropriate arrangements can be made and the disposition plan can be carried out.

By failing to recognize the differences between the juvenile justice and adult criminal systems the 1997 letter creates implementation difficulties and leads to inconsistent applications. It also appears to restrict FFP for services that are covered by federal law. The use of terms such as "held involuntarily" and "living voluntarily in a detention center" create confusion when they are applied uniformly to children and adults even though the legal status of children is different from that of adults.

As you know, sub-regulatory statements of an agency, such as the 1997 letter, do not have the effect of law and are not controlling over regulations that have been promulgated pursuant to the Administrative Procedures Act. *Christensen v. Harris County,* 529 U.S. 576, 587 (2000). The Centers for Medicare and Medicaid Services (CMS) could clear up the confusion created by the 1997 letter by issuing clarifying guidance that is consistent with the operation of the juvenile justice system and the legal status of the youth the system serves.

Please let us know if we can provide you with any additional information.

Very truly yours,

Alice Bussiere
Sue Burrell
Staff Attorneys