



Addressing the Needs of Justice-Involved People During the COVID-19 Pandemic: An 1135 Waiver Approach

Daniel Mistak, MS, MA, JD

dmistak@cochs.org

COVID-19 represents a grave and disproportionate threat to incarcerated people. The COVID-19 pandemic is laying bare an essential truth of our health care system: The health of justice-involved individuals is deeply intertwined with the health of the broader community. Circulation of the virus in jails and prisons will drive the overall epidemic curve upwards and have catastrophic consequences on justice-involved individuals and broader population health. The needs of justice-involved people and the urgency of reducing the growth of the pandemic will require addressing barriers to care inside and outside the walls. Correctional facilities across the country are identifying ways to reduce the number of incarcerated individuals in order to avoid the coming tsunami. These practices are essential to good management of the health of the entire population. As state health and corrections officials act swiftly to mitigate the spread of COVID-19, 1135 Medicaid waivers could provide an opportunity to address the needs of the justice-involved population and promote public health.

Hospitals and corrections face daunting challenges during this crisis

Approaches are needed that promote public health and reduce burdens on health care providers and correctional systems. Few, if any, correctional facilities are capable of handling the volume of individuals with COVID-19 related symptoms. Correctional facilities typically send high-acuity patients to local hospitals, where Medicaid pays for in-patient hospitalizations for low-income inmates. Hospital capacity is widely expected to be extremely strained, and these pressures are raising concerns that as providers confront allocating limited resources among extremely ill patients, justice-involved people may be disadvantaged.¹ Before this crisis, correctional staff were required to accompany the patient during their stay at the hospital. Following such protocols now would quickly overburden justice

¹ <https://www.nytimes.com/interactive/2020/03/17/upshot/hospital-bed-shortages-coronavirus.html>

and health staff. In order to alleviate the pressure on the hospital system and the correctional staff, a solution is required that would simultaneously reduce the pressures on both systems. Emergency actions taken by state and local governments must contemplate how to plan for high acuity needs of incarcerated patients who become ill, and the staffing resources to care for those who remain incarcerated. 1135 Medicaid waivers, which during emergencies enable providers not to comply with some federal regulatory requirements, provide a mechanism for addressing some of these challenges.

Medicaid guidance describes limits on possible solutions

By law, Medicaid does not finance services for people who are incarcerated, with the exception of inpatient hospital stays that exceed twenty-four hours. However, federal guidance places limits on the institutions that qualify for Medicaid coverage of these services. The rationale from CMS was to ensure that our health system did not blindly import the punitive and isolating features of incarceration. To avoid creation of hospitals, nursing facilities or other medical institutions operated primarily or exclusively to serve inmates, CMS, in 2016, provided guidance that classified these institutions as ‘correctional institutions,’ thus excluding them from Medicaid coverage.² While CMS’ rationale is appropriate for creating a health-centered care system, locked facilities that serve justice-involved individuals in this time of crisis would reduce the burden on hospital staff and remove the need for one-to-one correctional officer support. Further, these facilities would be able to operate in close relationship to health care systems and improve the standard of care for justice-involved individuals.

Additionally, federal guidance aims to avoid creating prison units within the hospital systems. To that end, the federal guidance aims to ensure that “[f]or hospitals, the individuals are admitted to specific medical units based not on their status as inmates of a correctional institution, but rather based on their treatment needs and plan of care and generally are placed in units also serving other individuals with similar treatment needs and plans of care[.]”³ In addition, when justice-involved individuals are served in skilled nursing facilities or intermediate care facilities for individuals with intellectual disabilities, an individual must retain the right to privacy, the right to choose visitors, the right to move freely, and many other rights that would negate the opportunity to bill Medicaid for life-saving

² <https://www.medicaid.gov/sites/default/files/Federal-Policy-Guidance/Downloads/sho16007.pdf>

³ <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-16-21.pdf>

services.⁴ These aims protect the rights of Medicaid beneficiaries as consumers; however, in times of crisis, these aims will lead to negative health outcomes in the face of an over-burdened health system. By allowing facilities to aggregate justice-involved individuals in specialized units, the burden on correctional staff can be reduced by lowering the necessary correctional-staff-to-patient ratio.

By disallowing facilities that serve only justice-involved individuals and disallowing units that aggregate individuals based on justice status, States will not be able to create justice-involved-specific facilities that are responsive to the growing needs of justice-involved individuals who will need care. Suspending these requirements during the emergency, will empower States and local jurisdictions to work with their local health systems to create facilities that meet the standards of care requirements of the Medicaid program while serving justice-involved individuals in units created to meet this unique moment.

Using 1135 waivers, states can develop specific approaches to health care services for people who are involved in the justice system

Policymakers have specific tools available to them during a National Emergency declared by the president. Under section 1135 of the Social Security Act, the Health and Human Services Secretary may temporarily waive certain Medicare, Medicaid and CHIP requirements at the request of states including conditions of participation and certification requirements, licensure requirements, within certain parameters; as well as preapproval and timeliness requirements. These unique, temporary measures are taken to ensure the availability of health care services for Medicaid, Medicare and CHIP beneficiaries and to enable providers that do not comply with some programmatic requirements to get paid for services that are provided in good faith. States are developing 1135 waivers now; the Centers for Medicare & Medicaid Services approved the first state 1135 request this week.⁵

COCHS suggests that as states contemplate requesting 1135 waivers that the state request waiving guidance offered in SHO #16-007 and S&C 16-21-ALL. Specifically:

- Allowing for facilities to be created that specifically serve individuals from correctional institutions at the same standard of care of other Medicaid beneficiaries;
- Allowing for aggregation of individuals in units designed specifically for individuals based upon their justice involvement.

⁴ *Id.*

⁵ <https://www.medicaid.gov/state-resource-center/downloads/fl-section-1135-appvl.pdf>

By waiving these and other portions of the guidance, emergency facilities could be created that would serve justice involved individuals whose care needs exceed the ability of correctional facilities —thereby, reducing the burden on local budgets, reducing the need for one-to-one correctional staff management, and creating avenues for novel deployment of local, state, and federal resources.

Beyond the opportunities available through 1135 waivers, states should continue to identify opportunities for meeting the needs of justice-involved individuals through 1115 waivers and legislative actions that respond to this unique time in our nation's history. As always, COCHS will continue to identify novel policy approaches to support justice-involved communities and the agencies that serve them.