

January 18, 2024

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare and Medicaid Services

Dear Secretary Becerra and Administrator Brooks-LaSure,

The undersigned aging, disability, healthcare access, and civil rights organizations write to ask you to rectify an injustice in Medicare access for people leaving incarceration. Due to Medicare's overly broad coverage exclusion for people "in custody," many older adults and people with disabilities who have a history of involvement with the criminal legal system and are living in the community are unable to access health care services, in turn affecting health, earnings, and recidivism. The Medicare limitation is inconsistent with the Centers for Medicare and Medicaid (CMS) longstanding policy for Medicaid, as well as the Federally-facilitated Marketplace (FFM) policy. **We request that you change Medicare's custody definition to ensure access to health insurance coverage – and thereby health care services – for older adults and people with disabilities who are not subject to institutional confinement.**

We appreciate HHS's focus on health equity, including improving access to health care for people leaving incarceration. As the percentage of older adults who are incarcerated increases, the number of people eligible for Medicare when leaving incarceration will also rise.¹ We are particularly grateful to CMS for establishing a Medicare special enrollment period (SEP) for individuals who are released from incarceration and alleviating the significant financial burden associated with late enrollment penalties.² However, because Medicare's custody definition extends to people living in the community, such as those required to reside in halfway houses or under supervised release, not everyone who is otherwise eligible for Medicare can access the SEP or coverage. Narrowing the Medicare custody definition and exclusion would also maximize the benefit of the SEP.

¹ Over 3% of those living in state or federal correctional facilities are 65 years or older and 3.6% are individuals between 60 and 64 years of age. By 2030, over 400,000 people age 55+ will be incarcerated making up 30% of the population in prisons. E. Ann Carson, *Prisoners in 2019*, U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics 15 (Oct. 2020), <https://www.bjs.gov/content/pub/pdf/p19.pdf>; U.S. Dep't of Health & Human Services, Office of the Assistant Secretary for Planning and Evaluation (ASPE), *Aging, Reentry, and Health Coverage: Barriers to Medicare and Medicaid for Older Reentrants* (March 2018), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files/185306/Reentry.pdf.

² Centers for Medicare & Medicaid Services (CMS), *Medicare Program; Implementing Certain Provisions of the Consolidated Appropriations Act, 2021 and Other Revisions to Medicare Enrollment and Eligibility Rules*, 87 Fed. Reg. 66454, 66462-66 (Nov. 3, 2022).

The Medicare Custody Exclusion

Medicare prohibits payment for services for which it has no legal obligation to pay. 42 U.S.C. § 1395y(a)(2). Under this authority, CMS excludes individuals who are “in custody under a penal authority” from receiving Medicare reimbursed services, based on the assumption that the correctional entity is responsible for their health services.³ The reach of this exclusion, however, goes far beyond those who are in confinement and presumably receiving health care *in a* correctional setting. According to Medicare regulations:

Individuals who are in custody include, but are not limited to, individuals who are under arrest, incarcerated, imprisoned, escaped from confinement, under supervised release, on medical furlough, required to reside in mental health facilities, required to reside in halfway houses, required to live under home detention, or confined completely or partially in any way under a penal statute or rule.

42 C.F.R. § 411.4(b).⁴

CMS adopted this broad definition in 2008 based on federal case law, unrelated to Medicare or health care, that has found that “custody” is not limited to those who are physically confined.⁵ Thus, according to Medicare policy, “individuals on parole, probation, bail, or supervised release may be ‘in custody’” for purposes of the Medicare exclusion,⁶ even if they live outside of a correctional facility and receive no correctional health services. The Social Security Administration (SSA) has confirmed that beneficiaries on home confinement “must pay for all of his or her food, clothing, shelter, and medical care expenses.”⁷ In contrast to Medicare, however, SSA does not suspend Social Security benefits for people on home confinement because the individual must pay for their own basic living needs.

Medicare’s custody definition is also inconsistent with the policy for Medicaid and the FFM. In 2016, CMS issued guidance clarifying longstanding Medicaid policy that individuals who are on parole or probation or have been released to the community pending trial are not considered

³ CMS, *Medicare Benefit Policy Manual, Chapter 16 – General Exclusions from Coverage* § 50.3.3(3) (Rev. 198, Nov. 6, 2014), <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/bp102c16.pdf>; Medicare Learning Network, *Beneficiaries in Custody Under a Penal Authority*, ICN 908084, Centers for Medicare & Medicaid Services 3 (Mar. 2018), <https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/Downloads/Items-Services-Furnished-to-Beneficiaries-in-Custody-Under-Penal-Authority-Fact-Sheet-ICN908084.pdf> [hereinafter *MLN Fact Sheet ICN 908084*].

⁴ See also *MLN Fact Sheet ICN 908084*, *supra* note 1, at 3.

⁵ *Changes to the Hospital Inpatient Prospective Payment System and Fiscal Year 2008 Rates*, 72 Fed. Reg. 47130, 47405 (Aug. 22, 2007) (“custody” definition adopted from habeas corpus protections, which are likely based on the broadest definition of “custody” to extend the greatest protections possible); CMS, *Medicare Benefit Policy Manual, Chapter 16 – General Exclusions from Coverage*, *supra* note 1, § 50.3.3(3).

⁶ CMS, *Medicare Benefit Policy Manual, Chapter 16 – General Exclusions from Coverage*, *supra* note 1, § 50.3.3(3).

⁷ Social Security Administration, *POMS: GN 02607.840 Retirement, Survivors, and Disability Insurance (Title II) Reinstatement Policies for Prisoners* (Sept. 19, 2014), <https://secure.ssa.gov/poms.nsf/lnx/0202607840>.

inmates, and therefore are eligible for Medicaid and Qualified Health Plan reimbursed services.⁸ CMS noted that the key consideration in determining an individual’s “custody” status is the individual’s “legal ability to exercise personal freedom.”⁹ Just as Medicaid coverage “can be crucial to ensuring a successful transition following incarceration,”¹⁰ so too is Medicare coverage for older adults and people with disabilities.

Finally, it is also notable that this regulatory custody definition is inconsistent with Medicare Part D policy. Under Part D policy, an individual is incarcerated, and therefore ineligible for Part D, if they are “in the custody of a penal authority and confined to a correctional facility, such as a jail or prison, or a mental health institution as a result of a criminal offense.”¹¹ This definition, which allows for enrollment in and payment to private plans for Part D coverage, reflects the on-the-ground reality that people outside of institutions but still under some degree of custodial control are responsible for their own health care costs and the limitations of 42 U.S.C. § 1395y(a)(2) are not and should not be applicable.¹²

Medicare’s Overly Broad Custody Exclusion Prevents Access to Coverage and Care

The Medicare custody definition prevents many older individuals returning to the community from being able to access Medicare providers because of conditions connected with their release, and those who do not qualify for Medicaid could face significant health care costs, needing to either pay out-of-pocket or find other insurance.¹³ This harms individuals who have to delay or forgo treatment, or who cannot access specialists. For example, advocates have

⁸ CMS, *SHO # 16-007 Re: To Facilitate Successful Re-entry for Individuals Transitioning from Incarceration to Their Communities*, Q2 and Q3 (April 28, 2016), <https://www.medicaid.gov/sites/default/files/Federal-Policy-Guidance/Downloads/sho16007.pdf> [hereinafter *SHO #16-007*]; Centers for Medicare & Medicaid Services, *Incarceration and the Marketplace: Frequently Asked Questions* (May 3, 2016), <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/Incarceration-and-the-Marketplace-FAQs-05-03-2016.pdf>.

⁹ *SHO #16-007*, *supra* note 9, at Q1.

¹⁰ *Id.* at 1.

¹¹ CMS, *Medicare Prescription Drug Benefit Manual, Ch. 3 - Eligibility, Enrollment and Disenrollment*, § 10-Definitions (last updated Aug. 15, 2023), <https://www.cms.gov/files/document/cy-2024-pdp-enrollment-and-disenrollment-guidance.pdf> (“Incarceration – This term refers to the status of an individual who is in the custody of a penal authority and confined to a correctional facility, such as a jail or prison, or a mental health institution as a result of a criminal offense. Such individuals reside outside of the service area for the purposes of Part D plan eligibility, even if the correctional facility is located within the plan’s service area. Individuals who are confined to Institutions for Mental Disease (IMDs), such as state hospitals, psychiatric hospitals, or the psychiatric unit of a hospital, as a result of violations of the penal code, are incarcerated as CMS defines the term for the purpose of Part D plan eligibility. The place of residence for these confined individuals is therefore excluded from the service area of a Part D plan on that basis.”)

¹² 42 CFR § 423.30 (Describing Part D eligibility and enrollment); 42 CFR § 423.4 (Defining a plan service area: “Service area (Service area does not include facilities in which individuals are incarcerated.)”).

¹³ Georgia Burke et al., *Reducing Barriers to Reentry for Older Adults Leaving Incarceration*, Justice in Aging 7 (May 2022), <https://justiceinaging.org/wp-content/uploads/2022/05/Reducing-Barriers-to-Reentry-for-Older-Adults-Leaving-Incarceration.pdf>.

shared that older adults leaving incarceration have had to delay critical treatment like chemotherapy and cardiac surgery because their Medicare coverage upon reentry was still held in suspense.

The broad Medicare custody exclusion has a significant impact on the ability of individuals with substance use disorders to access health care. Drug overdose death is the leading cause of death after release from prison, and studies suggest that recently incarcerated people are 10-40 times more likely to die from an overdose than the general public.¹⁴ Approximately 65% of the United States prison population has an active substance use disorder and another 20% were under the influence of alcohol or drugs at the time of their crime.¹⁵ When these individuals are released from the correctional facility, it is critical that they have insurance to pay for care so that they can continue substance use disorder and any other treatment they received while incarcerated or initiate medically necessary treatment. We commend CMS for its work over the past several years to improve access to substance use disorder treatment, including developing strong coverage and payment policies for opioid treatment programs, office-based substance use disorder treatment, addiction counselors, and intensive outpatient treatment. Older adults and people with disabilities who have been released from incarceration deserve access to these lifesaving benefits.

Moreover, because Medicare's custody definition differs from Medicaid's and the FFM's, older adults and people with disabilities leaving incarceration may be confused by their health coverage eligibility and have difficulty enrolling in the appropriate coverage. Individuals who are dually eligible for Medicare and another type of coverage will be disproportionately burdened and may need to switch providers upon completing parole or other circumstances that exclude them from Medicare but not other coverage types. As such, now is an ideal time to resolve this custody limitation to alleviate confusion as to when an individual becomes eligible for enrollment.

Amending Medicare's Custody Definition Will Streamline Access to Coverage and Advance Health Equity

We request that CMS amend 42 C.F.R. § 411.4(b) to allow Medicare coverage for older adults and people with disabilities who are living in the community after incarceration or other history with the criminal legal system. This narrower custody definition should exclude people

¹⁴ See Daniel M. Hartung et al., *Fatal and Nonfatal Opioid Overdose Risk Following Release from Prison: A Retrospective Cohort Study Using Linked Administrative Data*, *Journal of Substance Use Addiction Treatment* (Apr. 2023), <https://www.sciencedirect.com/science/article/abs/pii/S2949875923000218?via%3Dihub>; Elizabeth N. Waddell et al., *Reducing Overdose After Release from Incarceration (ROAR): Study Protocol for an Intervention to Reduce Risk of Fatal and Non-Fatal Opioid Overdose Among Women After Release from Prison*, *Health Justice* (Dec. 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7349469/>; Shabbar I. Ranapurwala et al., *Opioid Overdose Mortality Among Former North Carolina Inmates: 2000-2015*, *Am. J. Public Health* (Sept. 2018), <https://ajph.aphapublications.org/doi/10.2105/AJPH.2018.304514>.

¹⁵ *Criminal Justice Drug Facts*, National Institute on Drug Abuse (June 1, 2020), <https://www.drugabuse.gov/publications/drugfacts/criminal-justice>.

who are on parole, probation; released pending trial; living in a halfway house; or on home detention. Changing the Medicare definition to harmonize with the Medicaid and Marketplace definitions would improve access to care and prevent confusion among providers, people eligible for Medicare, and those who are working to connect them to needed health services. It would also relieve Medicaid programs from costs for services that Medicare would otherwise cover if an individual was allowed to enroll and use their benefits.

In addition to coming into better alignment with the Biden-Harris administration's health equity and access goals, clarifying that the Medicare custody exclusion does not apply to people who are under community supervision will also promote the administration's goals of successful reentry and community integration for people in the criminal legal system. Research has shown that health coverage and access to care, including for those with unaddressed substance use and mental health conditions, has a positive impact on recidivism. For example, a study examining the impact of the Medicaid expansion on arrest rates found that Medicaid expansion produced a 20-32% decrease in overall arrest rates in the first three years, with the largest negative differences (25-41%) for drug arrests.¹⁶ Another study found increased access to Medicaid after incarceration led to lower re-incarceration rates, higher employment rates, and higher earnings.¹⁷ Thus, ensuring people who are eligible for Medicare and under community supervision can enroll in and use Medicare coverage will also decrease the likelihood of re-arrest and re/incarceration.

Conclusion

We look forward to working with you to advance this urgent cause on behalf of older adults and people with disabilities with a history of involvement in the criminal legal system. Please contact Natalie Kean, Director of Federal Health Advocacy at Justice in Aging (nkean@justiceinaging.org) and Deborah Steinberg, Senior Health Policy Attorney at Legal Action Center (dsteinberg@lac.org) with any questions.

Sincerely,

Addiction Policy Forum
Addiction Professionals of North Carolina
Aging Services Collaborative of Santa Clara County
AIDS Foundation Chicago
Allies for Independence
American Association For The Treatment Of Opioid Dependence
American Diabetes Association
American Geriatrics Society

¹⁶ Simes JT, Jahn JL. *The consequences of Medicaid expansion under the Affordable Care Act for police arrests*. PLoS One. 2022 Jan 12;17(1):e0261512. doi: 10.1371/journal.pone.0261512. PMID: 35020737; PMCID: PMC8754343. <https://pubmed.ncbi.nlm.nih.gov/35020737/>.

¹⁷ Badaracco N, Burns M, and Dauge L. *The effects of Medicaid Coverage on Post-Incarceration Employment and Recidivism*. Health Services Research, Vol 56, S2 (Sept.2021). <https://doi.org/10.1111/1475-6773.13752>.

American Psychological Association Services
American Society of Addiction Medicine
Association of Asian Pacific Community Health Organizations (AAPCHO)
Autistic Self Advocacy Network
California Association of Area Agencies on Aging
California Elder Justice Coalition
California Foundation for Independent Living Centers
California PACE Association (CalPACE)
California Pan-Ethnic Health Network
Center for Justice and Human Dignity
Center for Medicare Advocacy
Community Access Center
Community Catalyst
Community Servings
CURE California
Disability Policy Consortium
Disability Rights California
Disability Rights Education and Defense Fund (DREDF)
Diverse Elders Coalition
Family Voices NJ
Florida Health Justice Project
Gerontological Society of America
Health & Medicine Policy Research Group
Hepatitis B Foundation
Housing Works
Illinois Aging Together
Justice Impact Alliance
Justice in Aging
Legal Action Center
Medicare Rights Center
NASTAD
National Alliance on Mental Illness
National Association for Behavioral Healthcare
National Association of Addiction Treatment Providers
National Association of Certified Professional Midwives
National Association of Social Workers (NASW)
National Center for Advocacy and Recovery, Inc.
National Center for Parent Leadership, Advocacy, and Community Empowerment (National PLACE)
National Consumer Voice for Quality Long-Term Care
National Council on Aging

National Disability Rights Network (NDRN)
National Health Law Program
NETWORK Lobby for Catholic Social Justice
New Jersey Association of Mental Health and Addiction Agencies
Preferred Behavioral Health Group
Public Justice Center
Pyramid Healthcare, Inc.
Service Employees International Union
Silicon Valley Independent Living Center
SPAN Parent Advocacy Network
StoptheDrugWar.org
Technical Assistance Collaborative, Inc.
The AIDS Institute
The Kennedy Forum
The Leukemia & Lymphoma Society
Treatment Communities of America
Triple Track Treatment
United Way of Greater Los Angeles
Vivent Health
Western Center on Law and Poverty