

# UNDER THE MICROSCOPE

DECEMBER 1, 2011



## THE MEDICAID INMATE EXCEPTION TODAY AND TOMORROW

### TOPIC

In the US, many people with serious mental illnesses, substance use disorders or intellectual/developmental disabilities (ID/DD) live at or near poverty, and are eligible for or enrolled in Medicaid. Sometimes homeless and often untreated, many become involved with the criminal justice system. And when that happens, the trouble with Medicaid often begins. Contrary to law and CMS regulation, enrollment and benefits in Medicaid may be terminated illegally.

With implementation of the Affordable Care Act in 2014, the situation will become even more complicated for people we serve who are involved with the criminal justice system. Eligibility/enrollment and benefit definitions under the ACA's health insurance exchanges are not fully consistent with those under Medicaid. The ACA's definitions, however, represent an improvement over current statute and policy. Unless ACA and Medicaid eligibility/enrollment and benefit definitions are aligned, the discrepancy can create inequalities for justice-involved people with mental illnesses, substance use disorders or ID/DD. And the disparity can result in significant added costs and other burdens to counties responsible for service provision to individuals in the criminal justice system.

### ANALYSIS

People with mental illnesses, substance use disorders or ID/DD are at particular risk for becoming involved with the criminal justice system. As many as 80% of adults in jails and prisons have at least one substance use problem; figures for incarcerated youth are similar. While those with ID/DD are only 2 - 3% of the general population, they represent 4 - 10% of the prison population, with an even greater number of these persons in juvenile facilities and in jails. The prevalence of serious mental illnesses among people entering jails alone is estimated at a rate three to six times of that in the general population. In fact, correction facilities have become a *de facto* behavioral health care system. Given current Medicaid law and policy for justice-involved individuals, the majority of the costs of care for persons in jails are being borne by the Nation's counties.

Over time, the situation for justice-involved individuals could become even more challenging for counties. In 2014, Medicaid coverage, the most important funding source for behavioral health and ID/DD services for youth and adults, will expand to cover adults up to 133% of the poverty level. At the same time, state health insurance exchanges will be established to enable people not covered by private insurance, Medicare or Medicaid to purchase health insurance through "qualified health plans" (QHPs). States will have the further option to offer "standard health plans" (SHPs) to low income individuals between 133-200% of poverty who lack health coverage. Each of these facts has implications for justice-involved people with mental illnesses, substance use disorders or ID/DD.

It is important, first, to distinguish between how Medicaid and the ACA approach the concepts of eligibility/enrollment and benefits/payment for justice-involved individuals. Discrepancies between the two need to be aligned.

## Eligibility/Enrollment of Qualified Individuals

- ✓ Medicaid: Medicaid statute and regulation are silent about program enrollment by incarcerated individuals. Thus, nothing precludes these individuals from seeking participation in Medicaid as long as they meet basic residence, citizenship, and financial requirements. Eligibility and enrollment extend to individuals whether they are pre- or post-adjudication. However, many states *illegally terminate enrollment* for people who are incarcerated awaiting adjudication. Thus, once released from the criminal justice system, many individuals are forced to reenroll in Medicaid, a process that can take several months.
- ✓ Health Insurance Exchanges: Individuals awaiting adjudication are qualified to seek enrollment in either QHPs or SHPs. In contrast, those serving sentences in correction facilities following adjudication are deemed not qualified for participation.

## Receipt of Benefits

- ✓ Medicaid: The “inmate exception,” specifically *terminates benefits*—but not eligibility/enrollment—for individuals serving time in jail or prison following adjudication of their guilt. Virtually all states, however, actually terminate benefits when the person first enters the criminal justice prior to adjudication.
- ✓ Health Insurance Exchanges. Justice-involved individuals are specifically permitted both to enroll in and receive benefits from QHPs or SHPs up to the point of conviction.

From the foregoing, it is clear that a significant disparity exists between how justice-involved individuals are treated under Medicaid and how they will be covered under the ACA’s health insurance exchanges. A two-tier system of health care that disproportionately affects the most impoverished—and a significant number of individuals with mental illnesses, substance use disorders or ID/DD—is neither desirable nor legal.

That is why NACBHDD and NACo will use the new opportunities created by the ACA’s health insurance exchange and state plan provisions to seek needed change in the Medicaid process itself for people involved in the justice system.

We will continue to press for changes to protect justice-involved people with mental illnesses, substance use disorders or ID/DD, and to protect counties from excessive cost-shifts. We’re urging CMS to:

- Stop states from illegally terminating Medicaid eligibility/enrollment for people who are incarcerated pending disposition of charges.
- Revise the Medicaid definitions to ensure that persons incarcerated pending disposition of charges is not excluded from receipt of benefits.
- Encourage counties to develop and test models to help ensure that individuals with behavioral disorders or ID/DD can continue to receive needed care and medications throughout incarceration, whether pre- or post-adjudication, and can be helped with their return to the community.

NACBHDD and NACo will continue efforts to educate policymakers and HHS administrators at CMS and elsewhere about what changes are needed to Medicaid to better align coverage for justice-involved individuals. At the same time, we will continue to advocate strongly for appropriate diversion of persons with mental or substance use disorders, or ID/DD prior to entry into the criminal justice system.

## **ACTION STEPS**

While we continue to work to bring Medicaid and ACA into better alignment to benefit justice-involved people with behavioral disorders or ID/DD, here are some things you should be doing right now to have your county ready by 2014 when the ACA’s key provisions take effect:

- Divert: To the extent possible, prevent inappropriate incarcerations of persons with mental or substance use disorders, or ID/DD by diverting them into appropriate community-based services and supports.
- Know: Gather data on the number of individuals with behavioral disorders or ID/DD who are incarcerated pre-adjudication in your area. How many have had their Medicaid benefits terminated illegally? Of them, how many have been un-enrolled altogether? How long does it take for them to be re-enrolled?
- Track: Gather data on justice-involved individuals with behavioral disorders or ID/DD (e.g., average length of pre-adjudication incarceration; number released at adjudication; after adjudication, average length of stay in a corrections facility).

- Ensure Care: How many individuals must be re-enrolled in Medicaid after serving a sentence post-adjudication? How long does it take for benefits to be restarted after return to the community?
- Educate: If your State is un-enrolling Medicaid recipients with behavioral disorders or ID/DD when they enter the justice system, use local data you have gathered to demonstrate to your state and to CMS why un-enrolling these individuals is cost-inefficient, poor health policy, and a violation of the law.
- Innovate: Working with partners at the county and state levels, identify and implement ways to extend Medicaid benefits to justice-involved individuals with behavioral disorders or ID/DD so they don't lose benefits when incarcerated before adjudication. Be proactive; get to work now. Collaborate with your state to pay the federal share of Medicaid to ensure that actual benefits are not lost for people who have not yet been adjudicated. There's a wonderful model emerging in Utah that is doing just that. For more information about the model, contact NACBHDD.

Time is limited; Medicaid dollars are dwindling. The time to take action is now; 2014 is not very far away.