



August 12, 2015

Jennifer Kent
Director, California Department of Health Care Services
P.O. Box 997413, MS 4050
Sacramento, CA 95899-7413
VIA EMAIL: Jennifer.Kent@dhcs.ca.gov

Dear Ms. Kent,

The American Civil Liberties Union of California, National Health Law Program, Californians for Safety and Justice, and Community Oriented Correctional Health Services respectfully submit this letter to request that DHCS redetermine eligibility for Medi-Cal beneficiaries who are incarcerated in state prison for any other Medi-Cal program, including the Medi-Cal Inmate Eligibility Program (MCIEP), prior to terminating them from Medi-Cal. We also ask DHCS to issue guidance to counties directing them to follow this process for Medi-Cal beneficiaries incarcerated in county jails. Based on applicable federal and state law, individuals who are eligible for MCIEP should be enrolled into that Medi-Cal program, and should not be terminated, even if they are incarcerated for longer than one year.

Although recent legislation allows for suspension of benefits for up to one year, many individuals will lose their Medi-Cal status after the suspension period ends, even though they may otherwise remain eligible for Medi-Cal because the proper processes for determining eligibility are not being followed.

After providing relevant background, this letter sets forth the federal and state laws (including the SB 87 redetermination process and prohibition against policies inflicting a disparate impact on the basis of race and sex) that require DHCS and counties to perform a redetermination for MCIEP prior to termination of eligibility for incarcerated beneficiaries.

Suspension of Medi-Cal Benefits for Incarcerated Beneficiaries & the Medi-Cal Inmate Eligibility Program

Prior to 2008, California policy was that all individuals who are incarcerated in a jail or prison could not receive Medi-Cal benefits (which the State has interpreted to mean that eligibility for Medi-Cal is ended).¹ This policy partially changed with the enactment of SB 1147 (Calderon) in 2008 by requiring Medi-Cal eligibility to be suspended for a period of up to one year for juveniles (under the age of 21) who are incarcerated.²

In All County Welfare Director Letter (ACWDL) 10-06 on March 23, 2010, DHCS laid out the process for implementing SB 1147. Although the Letter affirms that a juvenile's Medi-Cal eligibility will be terminated if he/she remains incarcerated for over one year, DHCS clarified that eligibility review was necessary prior to termination "to ensure that the child is not eligible for Medi-Cal based on another program."³

¹ CAL. DEP'T OF HEALTH CARE SERVS. (HEREINAFTER DHCS), MEDI-CAL ELIGIBILITY PROCEDURES MANUAL, ARTICLE 6C, § 50273 (Revised Apr. 18, 2001).

² S.B. 1147, 2007-08 Sess., § 1 (Cal. 2008).

³ DHCS, ALL COUNTY WELFARE DIRECTOR LETTER (hereinafter ACWDL) 10-06, 7 (2010).

The Letter also states:

If suspension ends because a juvenile turns 21 years of age while he or she is incarcerated, eligibility must be terminated with proper notice only after an SB 87 redetermination, in accordance with current eligibility review requirements. This means that the county must determine the juvenile is not eligible under another Medi-Cal program before eligibility is terminated.⁴

DHCS therefore clarified that eligibility review is required prior to termination of an incarcerated juvenile's Medi-Cal eligibility. However, this process was implemented prior to the existence of the Medi-Cal Inmate Eligibility Program (described below), so at the time juveniles could not have been evaluated for continuing eligibility under this program.

In 2010, AB 1628 (Budget Committee) was enacted.⁵ This legislation authorized DHCS and counties to seek Medi-Cal reimbursement for the provision of inpatient hospital services to incarcerated adults who would otherwise be eligible for Medi-Cal but for their status as an inmate.⁶

On June 24, 2011, DHCS issued an ACWDL providing eligibility and other information about the Medi-Cal Inmate Eligibility Program (MCIEP), the program that would allow for the reimbursement process envisioned by AB 1628. This Letter states that an individual can be in MCIEP for up to 12 months, and if released prior to then, would be transferred to the Medi-Cal program for which they would be eligible if not for their incarceration.⁷

In 2013, DHCS issued ACWDL 13-18. Among other information, the Letter confirms that incarcerated people will be eligible for Medi-Cal based on the new eligibility criteria under Medi-Cal expansion.⁸ The Letter also indicates that counties should perform annual redeterminations as appropriate, indicating that MCIEP coverage can last so long as an individual remains eligible.⁹

Later in 2013, the state enacted AB 720 (Skinner)¹⁰ which expanded the suspension requirement of juvenile Medi-Cal beneficiaries to all incarcerated individuals, meaning all juvenile and adult Medi-Cal beneficiaries would have their eligibility suspended for up to one year when incarcerated.¹¹

ACWDL 14-26 provides guidance on implementation of AB 720's suspension requirements for adult Medi-Cal beneficiaries. In it, DHCS states "If otherwise eligible, suspension of Medi-Cal benefits should end...on the one year anniversary date the individual became an inmate. In this case, their suspension ends and their Medi-Cal is terminated."¹² However, the Letter also states that individuals who are in suspended status can be transferred to an MCIEP aid code if an application is

⁴ *Id.* at 8.

⁵ A.B. 1628, 2009-10 Sess. (Cal. 2010).

⁶ CAL. PENAL CODE § 5072.

⁷ DHCS, ACWDL 11-27, 5 (2011).

⁸ DHCS, ACWDL 13-18, 13 (2013).

⁹ *See id.* at 7.

¹⁰ A.B. 720, 2013-14 Sess. (Cal. 2013).

¹¹ CAL. PENAL CODE § 4011.11(c); CAL. WELF. & INST. CODE § 14011.10.

¹² DHCS, ACWDL 14-26, 3 (2014).

received.¹³ DHCS also reaffirmed that annual redetermination requirements apply for beneficiaries in the MCIEP aid code.¹⁴

In addition to explaining that annual redeterminations are required for MCIEP beneficiaries, this Letter spells out that MCIEP is available to all incarcerated individuals who are otherwise eligible for Medi-Cal, regardless of how long they have been incarcerated and whether or not they need inpatient hospitalization.

In summary, since 2008, the state has enacted legislation and DHCS has taken related administrative action creating and expanding a procedure for suspension of all beneficiaries' Medi-Cal benefits for up to one year of incarceration. The MCIEP was established along the same timeframe, allowing individuals incarcerated in state prison or county jail who are otherwise eligible to access Medi-Cal benefits for inpatient hospitalizations off of correctional grounds. Enrollment in MCIEP is available prior to the need for hospital admission and can be maintained so long as annual redetermination requirements are met.

Under Federal Law and Guidance, DHCS and Counties Should Redetermine Medi-Cal Eligibility, Including MCIEP, for Incarcerated Beneficiaries Prior to Terminating Eligibility

Federal regulations prohibit States from terminating Medicaid eligibility until a beneficiary is found to be ineligible.¹⁵ States are required to redetermine eligibility if they become aware of circumstances that may impact eligibility.¹⁶ CMS has stated that this principle also applies to beneficiaries upon incarceration.¹⁷ In a letter to Congressman Charles Rangel, the Secretary of Health and Human Services wrote, "States may not terminate incarcerated individuals from Medicaid until a redetermination has been conducted, including an *ex parte* review."¹⁸ Thus, incarcerated beneficiaries should remain enrolled so long as they are otherwise eligible.

While federal financial participation (FFP) generally may not be used to pay for health services provided to inmates of a public institution, including people incarcerated in jail or prison, FFP *may* pay for services for an otherwise Medicaid eligible individual hospitalized off of correctional grounds for a period of over 24 hours.¹⁹ The Centers for Medicare and Medicaid Services (CMS) has articulated that even though FFP is only narrowly available for incarcerated beneficiaries, Medicaid *eligibility* is not affected by incarceration. In a letter to all State Medicaid Directors, CMS stated, "...the payment exclusion under Medicaid that relates to individuals residing in a public institution or an IMD does not affect the eligibility of an individual for the Medicaid program. Individuals who meet the requirements for eligibility for Medicaid may be enrolled in the program before, during, and after the time in which they are held involuntarily in secure custody of a public institution or as a resident of an IMD."²⁰

¹³ *Id.* at 6-7.

¹⁴ *Id.* at 8.

¹⁵ 42 C.F.R. § 435.916(c); *id.* § 435.930(b) ("The [State Medicaid] agency must...continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible.")

¹⁶ *Id.* § 435.916(c).

¹⁷ Letter from Tommy G. Thompson, Sec'y, Dep't of Health & Human Servs., to Honorable Charles L. Rangel, U.S. Rep. for N.Y. 13th Cong. Dist. (October 1, 2001).

¹⁸ *Id.*

¹⁹ 42 U.S.C. § 1396d(a)(29)(A).

²⁰ Letter from Ctrs. for Medicare & Medicaid Servs., Ctr. for Medicaid & State Operations to State Medicaid Dirs., 1-2 (May 25, 2004).

Thus, CMS not only allows states to suspend Medicaid benefits when a person becomes incarcerated, they encourage states to establish suspension processes.²¹ Despite this, California's current practice is to terminate benefits due only to length of incarceration without redetermination for other Medi-Cal programs. Terminating Medicaid due solely to the fact a person is incarcerated violates these regulations and policy. If an incarcerated Medi-Cal beneficiary remains in jail or prison for over one year, DHCS is responsible for assuring that beneficiary is not terminated unless they are ineligible for other reasons.

This is especially true in light of MCIEP. In the case where incarcerated beneficiaries have their Medi-Cal coverage terminated after remaining incarcerated for over one year, the State violates federal law by not continuing eligibility in another Medi-Cal program that they are eligible for (assuming they continue to meet all eligibility requirements). MCIEP is a Medi-Cal program, as evidenced by its own name (*Medi-Cal Inmate Eligibility Program*), the sixteen aid codes available to beneficiaries under this program,²² and the requirement that MCIEP must comply with annual redeterminations. In the most recent ACWDL on the topic, DHCS clarified that individuals can be placed into MCIEP prior to need for hospitalization. This, coupled with the fact that annual redeterminations are a requirement, indicate that enrollment in MCIEP can last as long as an individual remains incarcerated and otherwise eligible.

As such, individuals who remain incarcerated past one year should not be automatically removed from Medi-Cal enrollment, but should be evaluated for eligibility for MCIEP (and all other Medi-Cal programs). If eligible, these individuals should remain in MCIEP until they are released or become ineligible. This would better comply with federal regulations requiring maintenance of enrollment for eligible beneficiaries and would comport with CMS guidance on eligibility of incarcerated beneficiaries. DHCS should adopt this practice to avoid a potential conflict with federal law.

Under State Law, DHCS and Counties Should Redetermine Medi-Cal Eligibility, Including MCIEP, for Incarcerated Beneficiaries Prior to Terminating Eligibility

As DHCS is well aware, SB 87 (Escutia) established a process for determining Medi-Cal eligibility for any Medi-Cal program before terminating a beneficiary's coverage.²³ SB 87 applies to all Medi-Cal beneficiaries.²⁴ Only when a county has facts clearly demonstrating that a beneficiary cannot be eligible due to an event, such as death or relocation out of state, can eligibility be terminated without a redetermination.²⁵ There is nothing in the SB 87 process that specifically excludes beneficiaries who have been incarcerated.

Penal Code 4011.11(c) further supports this. It states,

a county jail inmate who is currently enrolled in the Medi-Cal program shall remain eligible for, and shall not be terminated from, the program due to his or her detention unless required by federal law, he or she becomes otherwise ineligible, or the inmate's suspension of benefits has ended pursuant to Section 14011.10 of the Welfare and Institutions Code.²⁶

²¹ *Id.*

²² *See* DHCS, ACWDL 13-18, 5-6, 8-9, 13-14 (2013).

²³ S.B. 87 1999-2000 Sess. (Cal. 1998).

²⁴ CAL. WELF. & INST. CODE § 14005.37(a).

²⁵ *Id.* § 14005.39(a).

²⁶ CAL. PENAL CODE § 4011.11(c).

Neither this nor the Welfare and Institutions Code allows for automatic termination after the suspension ends. Rather, it prevents termination of benefits due to incarceration while the beneficiary is incarcerated. When the suspension ends due to incarceration for over one year, eligibility *may* be terminated due to reasons of detention, but it is not automatically required (though as explained above, termination due solely to incarceration appears to conflict with federal law). Thus, when suspension ends, the opportunity for termination arises, but is not mandated by state statute (nor should it be, as such a termination without redetermination of eligibility conflicts with federal regulations and SB 87 enacted state law protections). Because automatic termination is not required and there is no specific exemption in the redetermination process for incarcerated beneficiaries, an eligibility redetermination must occur prior to termination.

DHCS has clarified that MCIEP is open to any incarcerated individual who is otherwise eligible, regardless of whether they are in acute need of inpatient hospitalization.²⁷ MCIEP beneficiaries may also remain indefinitely in the program so long as annual redetermination requirements are satisfied.²⁸ Many beneficiaries in suspended status will qualify for MCIEP. Rather than automatic termination at the end of suspension, the state must evaluate eligibility for MCIEP, and if eligible, ensure eligibility continues in that Medi-Cal program.

According to DHCS guidance for the suspension of juveniles, termination of Medi-Cal eligibility is not to occur prior to performance of existing redetermination requirements.²⁹ AB 720 expanded the suspension process in place for juveniles so that adult beneficiaries' eligibility would also be suspended. It follows that adults should be afforded the same protection as juveniles when suspension ends, meaning they should be evaluated for eligibility for all Medi-Cal programs, including MCIEP, prior to termination of benefits.

In order to fully comply with federal and state law and previous DHCS guidance requiring redeterminations when suspension ends, DHCS and counties should end the practice of automatically terminating Medi-Cal eligibility for incarcerated beneficiaries. If suspension of eligibility is to end, DHCS and counties should evaluate whether the beneficiary is eligible for MCIEP or another program and, if so, ensure enrollment in such program.

Automatic Termination of Medi-Cal Benefits without Redetermination for MCIEP Imposes an Adverse Disparate Impact on the Basis of Race and Sex in Violation of State Law.

California law prohibits state agencies from discriminating on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability.³⁰ This not only prohibits intentional discrimination, but also policies that impose an unjustified disparate impact on a protected group, regardless of intent.³¹ Automatic termination of Medi-Cal benefits after one year of incarceration violates state law because it has a disproportionate impact on the basis of race and sex for no legitimate reason.

²⁷ DHCS, ACWDL 14-26, 9 (2014).

²⁸ *Id.* at 8; DHCS, ACWDL 13-18, 13 (2013).

²⁹ DHCS, ACWDL 10-06, 7-8 (2010).

³⁰ CAL. GOV'T CODE § 11135(a).

³¹ *See Guzz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 354 n.20 (2000) (facially neutral policy prohibited if it has "disproportionate adverse effect on members of the protected class" and bears "no manifest relationship" to legitimate requirements).

Bearing in mind that approximately 80 to 90 percent of individuals in prison are eligible for Medi-Cal,³² the termination policy disparately affects African-American Medi-Cal beneficiaries. According to a recent analysis of California Department of Corrections and Rehabilitation data, African Americans constitute 29 percent of the prison population, where whites are 23 percent.³³ This is disproportionate to the percentage of Medi-Cal beneficiaries in the community. According to DHCS, of the applicants who applied for Medi-Cal through Covered California through March 31, 2014, 47 percent of applicants found likely eligible for Medi-Cal were white, while only nine percent were black.³⁴ Pre-expansion estimates of the demographics of newly eligible Medi-Cal beneficiaries were similar to these percentages.³⁵ By another indicator, enrollees in the Low-Income Health Program (the precursor to Medi-Cal expansion) were 32 percent white, but only 13 percent African-American.³⁶ Automatically terminating coverage after one year of incarceration is half as likely to impact a white Medi-Cal beneficiary but 2.2 to 3.2 times more likely to impact an African-American beneficiary, thus constituting a disparate impact on the basis of race.³⁷

The policy also has a disparate impact on the basis of sex. Whereas men only make up 47 to 54 percent of Medi-Cal beneficiaries,³⁸ they constitute 95 percent of the prison population.³⁹ Incarcerated men are 1.8 to 2 times more likely to be negatively impacted than non-incarcerated Medi-Cal beneficiaries, while women beneficiaries are one-tenth as likely to be affected.

DHCS has not articulated, nor does it appear to have any legitimate reason for, automatically terminating benefits after one year of incarceration. DHCS policy allows individuals to remain in MCIEP indefinitely so long as they are otherwise eligible. The fact that incarcerated individuals can enroll into and maintain MCIEP coverage indefinitely contradicts any claim that the same procedure cannot be afforded to individuals who were Medi-Cal beneficiaries at the time they were incarcerated. Additionally, the policy violates state and federal law, strongly negating any claim of necessity or legitimacy. FFP would not be jeopardized because the federal government promotes policies that do not result in termination of eligibility. Finally, the mission of DHCS is to provide Californians with access to affordable, high-quality health care.⁴⁰ Automatically terminating eligibility for Medi-Cal, an insurance program for the state's neediest residents, is antithetical to the mission of DHCS.

³² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 14-752R, MEDICAID: INFORMATION ON INMATE ELIGIBILITY AND FEDERAL COSTS FOR ALLOWABLE SERVICES, 4 (2014).

³³ Ryken Grattet & Joseph Hayes, *Just the Facts: California's Changing Prison Population*, PUB. POL'Y INST. OF CAL. (Apr. 2015), http://www.ppic.org/main/publication_show.asp?i=702.

³⁴ DHCS, *Demographics: Medi-Cal Applicants via CoveredCa.com* (last modified Apr. 6, 2014), http://www.dhcs.ca.gov/dataandstats/Pages/Demo_MC-CovCa_Applicants.aspx.

³⁵ CAL. PAN-ETHNIC HEALTH NETWORK, *MEDI-CAL EXPANSION: WHAT'S AT STAKE FOR COMMUNITIES OF COLOR* (2013), http://cpehn.org/sites/default/files/resource_files/medi-cal-expansion-factsheet.pdf.

³⁶ UCLA CTR. FOR HEALTH POL'Y RESEARCH, *LOW INCOME HEALTH PROGRAM PERFORMANCE DASHBOARD: OVERALL LIHP REPORT*, 12 (2014), http://healthpolicy.ucla.edu/programs/health-economics/projects/coverage-initiative/Documents/Dashboard_AGGREGATE.pdf.

³⁷ See *Keith v. Volpe*, 858 F.2d 467, 484 (9th Cir. 1988) (finding that failure to permit a housing project had twice the adverse impact on minorities as it had on whites, establishing a racially discriminatory effect.)

³⁸ See *supra* notes 34, 36 at 10.

³⁹ CAL. DEPT. OF CORR. & REHAB., *WEEKLY REPORT OF POPULATION AS OF MIDNIGHT JULY 29, 2015*, 1 (July 29, 2015), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad150729.pdf.

⁴⁰ DHCS, *About the Department of Health Care Services*, (last modified Aug. 6, 2015), <http://www.dhcs.ca.gov/Pages/AboutUs.aspx>.

For these reasons, DHCS's policy of automatically terminating Medi-Cal eligibility for individuals who are incarcerated for over one year has an unlawful disparate impact on the basis of race and sex.

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DHCS and counties must end automatic termination of Medi-Cal eligibility for incarcerated beneficiaries after one year. Instead, DHCS should redetermine eligibility for any Medi-Cal program, including MCIEP, prior to terminating coverage for incarcerated individuals. This practice would improve health outcomes by reducing churn among Medi-Cal beneficiaries. It should reduce administrative burden by eliminating the need in many cases to submit and evaluate a new Medi-Cal application when individuals are released from incarceration. It may also have positive impacts on public safety, since incarcerated people will be more likely to maintain coverage and therefore will be more likely to access health services, including mental health and substance use disorder treatment after release.

We urge DHCS to make clear this policy directive through an All County Letter and incorporate and clarify this policy in its current Question and Answers to be provided to counties shortly. Our extensive comments and concerns regarding the draft Q&A have been submitted for your review and consideration. Finally, the Medi-Cal Eligibility Procedures Manual should be updated to reflect these legally required changes.

Thank you for your consideration. We are open to work with DHCS and other relevant stakeholders to ensure these protections are put in place. Please let us know if you have any questions.

Sincerely,



Kellen Russoniello
Staff Attorney
ACLU of San Diego and Imperial Counties
(619) 398-4489
krussoniello@aclusandiego.org



Steven Rosenberg
President
Community Oriented Correctional Health Services
(510) 595-7360
srosenberg@cochs.org



Kim Lewis
Managing Attorney
National Health Law Program
(310) 736-1653
lewis@healthlaw.org



Lenore Anderson
Executive Director
Californians for Safety and Justice
lenore@safeandjust.org

CC: Rene Mollow
Deputy Director, Health Care Benefits & Eligibility
California Department of Health Care Services
Rene.Mollow@dhcs.ca.gov

John Zapata
Medi-Cal Eligibility Division
California Department of Health Care Services
John.Zapata@dhcs.ca.gov