

LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

MODEL MEDICAID REENTRY SECTION 1115 DEMONSTRATION WAIVER ACT

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SECTION I. SHORT TITLE.

This Act may be referred to as the “Model Medicaid Reentry Section 1115 Demonstration Waiver Act,” “the Act,” or “Model Act.”

SECTION II. LEGISLATIVE FINDINGS AND PURPOSE.

(a) Legislative findings.—The [legislature]¹ finds that:

- (1) Each year, more than 600,000 individuals are released from state and federal prisons, including [x] individuals from [state]. Additionally, nine million individuals cycle through local jails each year.²
- (2) A 2020 issue brief from the Commonwealth Fund, a non-profit organization that promotes a healthcare system that “achieves better access, improved quality, and greater efficiency, particularly for society's most vulnerable. . . .,” found that incarcerated individuals have higher rates of mental illness and chronic physical conditions, including hypertension, tuberculosis, human immunodeficiency virus, hepatitis B and C, and sexually transmitted diseases, than the general population.³
- (3) A recent Bureau of Justice Statistics (BJS), U.S. Department of Justice report found that 44 percent of individuals in jails and 37 percent of individuals in state and federal prisons had a mental health disorder previously diagnosed by a professional before incarceration.⁴
- (4) The most current data from BJS indicate that 58 percent of state prisoners and 63 percent of sentenced individuals in jails met the criteria for “drug dependence” or

¹ This Act contains certain bracketed words and phrases (e.g., “[legislature]”). Brackets indicate instances where state lawmakers may need to insert state-specific terminology or facts.

² *Incarceration & Reentry*, OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (last visited February 19, 2024), <https://aspe.hhs.gov/topics/human-services/incarceration-reentry-0>.

³ Natasha Camhi, Dan Mistak, and Vikki Wachino, *Medicaid’s Evolving Role in Advancing the Health of People Involved in the Justice System*, THE COMMONWEALTH FUND (Nov. 2020), <https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/medicaid-role-health-people-involved-justice-system>.

⁴ JENNIFER BRONSON, PH.D. & MARCUS BERZOFSKY, DR. P.H., BUREAU OF JUST. STAT., INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011-12, 3, (2017), <https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf>.

“abuse.” In comparison, around five percent of the general population age 18 or older met the criteria for “drug dependence” or “abuse.”⁵

- (5) Reentry into the community after leaving a correctional facility can be stressful, as formerly incarcerated individuals try to obtain housing, reintegrate into the community, find employment, and access healthcare services.⁶
- (6) There is a strong association between incarceration and increased rates of premature death from infectious diseases, chronic lower respiratory disease, substance use, and suicide.⁷
- (7) Formerly incarcerated individuals face an especially high risk of death within the first two weeks after release.⁸ In particular, the chance of a released individual experiencing a fatal overdose within the first two weeks after release is markedly elevated.⁹
- (8) Providing incarcerated individuals with access to support services, including employment, peer supports, and healthcare services, prior to release helps to improve an individual’s transition into the community and continuity of care upon reentry.¹⁰
- (9) Providing eligible incarcerated individuals with Medicaid benefits prior to release can reduce the number of emergency department visits and inpatient hospitalizations among recently incarcerated Medicaid beneficiaries through the increased receipt of preventive and routine physical and behavioral health care after release.¹¹

(b) Purpose.—The purpose of this Act is to:

⁵ U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., DRUG USE, DEPENDENCE, AND ABUSE AMONG STATE PRISONERS AND JAIL INMATES, 2007-2009 1 (2020), <https://bjs.ojp.gov/content/pub/pdf/dudaspi0709.pdf>.

⁶ See Ingrid A. Binswanger, et al., *Release from Prison — A High Risk of Death for Former Inmates*, 356 NEW ENG. J. MED. 157 (Feb. 2007), <https://doi.org/10.1056/NEJMsa064115>.

⁷ See Sandhya Kajepta, et al., *Association Between County Jail Incarceration and Cause-specific County Mortality in the USA, 1987–2017: A Retrospective, Longitudinal Study*, 6 LANCET PUB. HEALTH 240 (Feb. 2021), [https://doi.org/10.1016/S2468-2667\(20\)30283-8](https://doi.org/10.1016/S2468-2667(20)30283-8).

⁸ Binswanger, *supra* note 6, at 161.

⁹ See Daniel M. Hartung, et al., *Fatal and Non-Fatal Opioid Overdose Risk Following Release from Prison: A Retrospective Cohort Study Using Linked Administrative Data*, 147 J. OF SUBSTANCE USE AND TREATMENT 208971 (Apr. 2023), <https://doi.org/10.1016/j.josat.2023.208971>.

¹⁰ Letter from Daniel Tsai, Deputy Administrator and Director, Center for Medicaid and CHIP Services, Centers for Medicare and Medicaid Services to State Medicaid Directors 11 (April 2023), <https://www.medicare.gov/sites/default/files/2023-12/smd23003.pdf>.

¹¹ *Id.*

- (1) Require the [state department of health and human services] to apply for a Medicaid reentry Section 1115 demonstration waiver to allow [state Medicaid program] to cover pre-release services for a Medicaid eligible incarcerated individual for up to 90 days prior to the individual's expected release date.
- (2) Require the [state department of health and human services] to conduct comprehensive monitoring and evaluation of the Medicaid reentry demonstration, if the waiver is approved.

Commentary

Formerly incarcerated individuals with physical and mental health conditions can have difficulty successfully reentering their communities upon release due to a variety of obstacles, including economic hardship and the stigma associated with a history of incarceration. Formerly incarcerated individuals without access to post-release affordable healthcare services will often not have access to necessary medical care, including substance use disorder (SUD) treatment and, thus, are more likely to end up in the emergency department and/or hospitalized. During the first two weeks after release, a formerly incarcerated individual is particularly vulnerable to an adverse health event, including overdose.¹² A study of individuals released from the Washington State Department of Corrections found that the risk of death among formerly incarcerated individuals during the first two weeks after release was 12.7 times greater than that of the general population in the state.¹³ Additionally, within the first two weeks after release, formerly incarcerated individuals are 129 times more likely to experience a fatal overdose than the general population.¹⁴ The high rate of overdose in the immediate post-release period may be partially due to the inability of formerly incarcerated individuals to access medication for addiction treatment (MAT) post release.¹⁵ MAT for opioid use disorder includes three U.S. Food and Drug Administration approved medications: buprenorphine, methadone, and extended release naltrexone.¹⁶ Racial disparities in incarceration further exacerbate health disparities for Black individuals, Indigenous individuals, and other people of color upon reentry into their communities.¹⁷ Similar exacerbated health disparities are exhibited in individuals of the lesbian, gay, bisexual, transgender, and queer community upon release due to them being disproportionately represented in correctional systems.¹⁸ The sharply elevated risk of mortality

¹² Binswanger, *supra* note 6.

¹³ *Id.*, at 161.

¹⁴ *Id.*

¹⁵ U.S. DEPT. OF HEALTH AND HUM. SERV. OFF. OF THE ASSISTANT SEC'Y FOR PLANNING AND EVALUATION, HEALTH CARE TRANSITIONS FOR INDIVIDUALS RETURNING TO THE COMMUNITY FROM A PUBLIC INSTITUTION: PROMISING PRACTICES IDENTIFIED BY THE MEDICAID REENTRY STAKEHOLDER GROUP (Jan. 2023), <https://aspe.hhs.gov/sites/default/files/documents/d48e8a9fdd499029542f0a30aa78bfd1/health-care-reentry-transitions.pdf>. [hereinafter STAKEHOLDER REPORT].

¹⁶ *Information about Medication-assisted Treatment (MAT)*, U.S. FOOD AND DRUG ADMINISTRATION (May 23, 2023), <https://www.fda.gov/drugs/information-drug-class/information-about-medication-assisted-treatment-mat>.

¹⁷ Letter from Daniel Tsai, *supra* note 10, at 4.

¹⁸ *Id.*

among the recently incarcerated suggests that the current reentry process is not meeting the needs of these individuals.

One way to improve the health outcomes of the formerly incarcerated is to assist those individuals in establishing connections with community providers prior to release. According to the U.S. Department of Health and Human Services (HHS), “[i]mproving health care transitions and addressing social determinants of health – from case management to medication-assisted treatment – for individuals after they have been released from carceral settings increases the likelihood that they may continue to receive crucial SUD, mental health, and other health care treatment during this vital period.”¹⁹ Moreover, addressing the underlying health needs of formerly incarcerated individuals not only saves lives but also helps to enhance their ability to succeed during reentry and lowers their risk of recidivism, which increases the overall public health and safety of our communities.²⁰

This Act uses the term “incarcerated individual” rather than “inmate” because LAPP’s working group found the former term to be less stigmatizing. LAPP’s working group members debated about using the term “returning citizen” to describe a formerly incarcerated individual but decided that the term would exclude Medicaid eligible non-citizens, such as lawful, permanent residents.

This Act requires a state department of health and human services or equivalent to submit an application for a Medicaid reentry Section 1115 demonstration waiver so that the state can cover pre-release services for a Medicaid eligible incarcerated individual for up to 90 days prior to the individual’s expected release date. The goal is to assist Medicaid eligible incarcerated individuals with establishing connections with community providers prior to release to better ensure that their healthcare needs are met during the reentry process.

SECTION III. DEFINITIONS.

[States may already have definitions in place for some or all of the following terms. In such case, states may use the existing definitions in place of those listed below.]

For purposes of this Act, unless the context clearly indicates otherwise, the words and phrases listed below have the meanings given to them in this section:²¹

- (a) Medications for addiction treatment.—“Medications for addiction treatment” means medications approved by the U.S. Food and Drug Administration for treating substance use disorder, including opioid use disorder and/or alcohol use disorder.

¹⁹ *HHS Releases New Guidance to Encourage States to Apply for New Medicaid Reentry Section 1115 Demonstration Opportunity to Increase Health Care for People Leaving Carceral Facilities*, U.S. DEPT. OF HEALTH AND HUM. SERV. (Apr. 2023) <https://www.hhs.gov/about/news/2023/04/17/hhs-releases-guidance-to-encourage-states-to-apply-for-medicare-reentry-section-1115-demonstration-opportunity-to-increase-health-care.html>.

²⁰ Letter from Daniel Tsai, *supra* note 10, at 4.

²¹ Where a definition is based on, adapted from, or directly pulled from, language from enacted statute, proposed legislation, or other research material, the footnote referenced at the end of the definition provides that source.

- (b) Qualified incarcerated individual.—“Qualified incarcerated individual ” means an incarcerated individual who meets the eligibility requirements for [state Medicaid program].
- (c) Section 1115 demonstration waiver.—“Section 1115 demonstration waiver” means a waiver authorized under 42 U.S.C. § 1315 that allows the United States Secretary of Health and Human Services to approve experimental, pilot, or demonstration programs that promote the objectives of Medicaid and Children’s Health Insurance Program.²²

Commentary

The terms defined in this section may already be defined under state law, and states are free to use those definitions in lieu of the definitions provided in this section. However, the definitions included in this section may have been revised to better fit the needs and circumstances of this Act.

SECTION IV. MEDICAID REENTRY SECTION 1115 DEMONSTRATION WAIVER APPLICATION.

- (a) Submission of application.— Within ninety (90) days after the effective date of this Act, the [state department of health and human services], in consultation with the [state department of corrections], shall apply for a Section 1115 demonstration waiver, under 42 U.S.C. § 1315, with the Centers for Medicare and Medicaid Services to offer a program to provide Medicaid benefits to a qualified incarcerated individual for ninety (90) days immediately before the day on which the qualified incarcerated individual is expected to be released by the department of corrections.
- (b) Pre-release benefits.—The application shall propose a Medicaid reentry program that includes at least the following pre-release benefits:
 - (1) Case management to assess and address physical and behavioral health needs and health-related social needs, which can include access to community health workers and peer support workers;
 - (2) Medication for addiction treatment services for all types of substance use disorders as clinically appropriate, with accompanying counseling;

²² *Section 1115 Demonstrations*, MEDICAID.GOV (last visited February 19, 2024), <https://www.medicaid.gov/medicaid/section-1115-demonstrations/index.html>.

- (3) A thirty (30) day supply of all prescription medications that have been prescribed for the beneficiary at the time of release, provided to the beneficiary immediately upon release from the correctional facility;
 - (4) Family planning services; and
 - (5) Screening for common conditions within the incarcerated population, including high blood pressure, diabetes, tuberculosis, hepatitis B and C, and human immunodeficiency virus.
- (c) Eligibility.— The application shall propose a Medicaid reentry program that allows all Medicaid eligible incarcerated individuals to receive pre-release benefits.

Commentary

Section 1115 of the Social Security Act²³ gives the secretary of the U.S. Department of Health and Human Services (HHS) the authority to approve state submitted “experimental, pilot, or demonstration projects” that are likely to “assist in promoting the objectives of the Medicaid program.”²⁴ These demonstrations provide states with the flexibility to design and improve their Medicaid programs through the implementation of state-specific policies that differ from what is required by federal statute.²⁵ A state may use a Section 1115 demonstration waiver to make changes to Medicaid eligibility, benefits, or provider payments. HHS can waive almost any aspect of Medicaid law,²⁶ with the exception of citizenship requirements and requirements established by other federal agencies, to the extent necessary to carry out the demonstration project.²⁷ The Centers for Medicare and Medicaid Services (CMS) conducts a case-by-case review of each Section 1115 demonstration waiver submitted to determine whether the proposed project’s objectives align with those of Medicaid.²⁸ Additionally, all demonstrations must be “budget neutral” to the federal government, which means that federal Medicaid expenditures under the waiver cannot exceed what they would be in absence of the waiver.²⁹ CMS regulations require a state to consult with any federally-recognized tribes in the state prior to submitting a Section 1115 demonstration waiver that “has or would have a direct effect on Indians, tribes, on Indian health programs, or on urban Indian health organizations.”³⁰

In 2018, Congress passed the Substance Use Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities (SUPPORT) Act.³¹ Section 5032 of the

²³ 42 U.S.C. §1315.

²⁴ *About Section 1115 Demonstrations*, MEDICAID.GOV (last visited Feb. 14, 2024), <https://www.medicaid.gov/medicaid/section-1115-demonstrations/about-section-1115-demonstrations/index.html>.

²⁵ *Id.*

²⁶ 42 U.S.C. § 1396, *et seq.*

²⁷ *Section 1115 research and demonstration waivers*, MEDICAID AND CHIP PAYMENT AND ACCESS COMMISSION (last visited Feb. 14, 2024), <https://www.macpac.gov/subtopic/section-1115-research-and-demonstration-waivers/>.

²⁸ *About Section 1115 Demonstrations*, *supra* note 24.

²⁹ *Id.*

³⁰ 42 C.F.R. 431.408(b)

³¹ Pub. L. No. 115-271 (2018).

SUPPORT Act requires HHS, through CMS’s administrator, to issue sub-regulatory stakeholder-identified best practices guidance that identify Section 1115 demonstration waiver opportunities to improve healthcare transitions for soon-to-be released incarcerated individuals who are eligible for Medicaid.³² Federal agencies often release sub-regulatory guidance to announce policies or provide interpretive commentary on a law or regulation; sub-regulatory guidance is generally not subject to enforcement activities because they have not been issued through the formal rule making process.³³ Individuals who are incarcerated in a public institution may be eligible for and enrolled in Medicaid, but federal law prohibits Medicaid funds from being used to pay for services for such individuals while they are incarcerated, except for when they are inpatients in a medical institution.³⁴ This provision, known as the “inmate exclusion policy,” has been in place since the establishment of Medicaid in 1965. In 2016, CMS issued guidance encouraging states to suspend, rather than terminate, Medicaid eligibility for incarcerated individuals.³⁵ Suspending, rather than terminating eligibility maintains enrollment for Medicaid-eligible individuals who become incarcerated and allows for timely reinstatement of coverage when the individual is released, while complying with the inmate exclusion policy.³⁶ States can submit a Section 1115 demonstration waiver to allow it to be exempt from the inmate exclusion policy so that it can provide pre-release services to a Medicaid eligible incarcerated individual for a set period while the incarcerated individual prepares for reentry into the community. This helps facilitate the incarcerated individual’s connection to community-based care providers prior to release, which should reduce gaps in care during the reentry period and support care continuity.

CMS expects that demonstration applications for the Reentry Section 1115 Demonstration Opportunity will address the following goals:

- Increase coverage, continuity of coverage, and appropriate service uptake through assessment of eligibility and availability of coverage for benefits in carceral settings just prior to release;
- Improve access to services prior to release and improve transitions and continuity of care into the community upon release and during reentry;
- Improve coordination and communication between correctional systems, Medicaid systems, managed care plans, and community-based providers;
- Increase additional investments in health care and related services, aimed at improving the quality of care for beneficiaries in carceral settings and in the community to maximize successful reentry post-release;
- Improve connections between carceral settings and community services upon release to address physical health, behavioral health, and health-related social needs (HRSN);
- Reduce all-cause deaths in the near-term post-release; and

³² *Id.*

³³ See Hannah L. Cross, *The Return of Subregulatory Guidance Reliance*, NAT’L L. REV. (Sept. 2021), <https://www.natlawreview.com/article/return-subregulatory-guidance-reliance>.

³⁴ 42 U.S.C. 1396d (a)(31)(A).

³⁵ Letter from Daniel Tsai, *supra* note 10, at 9.

³⁶ *Id.*

- Reduce number of emergency department visits and inpatient hospitalizations among recently incarcerated Medicaid beneficiaries through increased receipt of preventive and routine physical and behavioral health care.³⁷

As mandated by Section 5032 of the SUPPORT Act, HHS convened a stakeholder group to develop best practices for states to ease healthcare related transitions for incarcerated individuals and develop a report to Congress.³⁸ In January 2023, the HHS stakeholder workgroup released a report containing their recommendations.³⁹ Since the release of the HHS workgroup report, HHS has approved the Medicaid reentry Section 1115 demonstration waivers submitted by California, Montana,⁴⁰ and Washington.⁴¹ In their report, the HHS stakeholders recommended that states submitting a Section 1115 waiver consider the length of time during which pre-release Medicaid reimbursement for healthcare services is allowable.⁴² Such waivers typically include a 30-day pre-release period, but a number of states have applied for demonstrations with pre-release periods longer than 30 days.⁴³ One state (New Hampshire) has applied for a 45-day pre-release period, two states (Kentucky and New Jersey) have applied for a 60-day pre-release period, and eight states (California, Hawaii, Illinois, Massachusetts, North Carolina, Oregon, Vermont, and Washington) have applied for a 90-day pre-release period.⁴⁴ Some of the HHS stakeholders believed that a 30-day pre-release period may be an insufficient length of time for coordinating and transitioning care, especially for individuals with SUD.⁴⁵ These HHS stakeholders, based on their experience providing care for individuals with SUD, advised that a 90-day pre-release coverage period would be more appropriate. Based on this recommendation, the drafters of the Model Act chose to require a state's Medicaid reentry Section 1115 demonstration waiver provide Medicaid benefits to a qualified incarcerated individual for a 90-day pre-release period. LAPP's working group supports the 90-day pre-release period, but also recognizes that correctional facilities are often understaffed and underfunded. Thus, a 90-day pre-release period is ideal, but states have the flexibility to establish a shorter timeframe. One of LAPP's working group members also suggested a phase-in option for states in which they can choose to implement certain benefits over a period of 30 to 90 days as opposed to implementing all benefits by a fixed date.

³⁷ *Id.* at 11-12.

³⁸ See STAKEHOLDER REPORT, *supra* note 15.

³⁹ *Id.*

⁴⁰ Letter from Daniel Tsai, Deputy Administrator and Director, Center for Medicaid and CHIP Services, Centers for Medicare and Medicaid Services, to Michael Randol, Montana Medicaid Director (Feb. 26, 2024), <https://www.medicaid.gov/sites/default/files/2024-02/mt-heart-cms-amendment-approval-20240226.pdf>.

⁴¹ See *Justice Involved Initiative*, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, (last visited February 19, 2024), <https://www.dhcs.ca.gov/CalAIM/Justice-Involved-Initiative/Pages/home.aspx>; and *Reentry from a Carceral Setting*, WASHINGTON STATE HEALTH CARE AUTHORITY (last visited February 19, 2024), <https://www.hca.wa.gov/about-hca/programs-and-initiatives/medicaid-transformation-project-mtp/reentry-carceral-setting>.

⁴² STAKEHOLDER REPORT, *supra* note 15, at 32.

⁴³ *Id.*

⁴⁴ *Medicaid Waiver Tracker: Approved and Pending Section 1115 Waivers by State*, KAISER FAMILY FOUNDATION (last updated March 1, 2024), <https://www.kff.org/medicaid/issue-brief/medicaid-waiver-tracker-approved-and-pending-section-1115-waivers-by-state/>. (Table 1; sorted by expanded eligibility for justice-involved individuals).

⁴⁵ STAKEHOLDER REPORT, *supra* note 15, at 32.

In addition to establishing the length of the pre-release period, a state must consider the scope of covered Medicaid pre-release benefits. The Medicaid reentry Section 1115 demonstration waivers that have been submitted vary in the scope of pre-release benefits offered, with some states limiting the benefits to a specific set of services, while others propose providing incarcerated individuals with the full set of Medicaid state plan benefits.⁴⁶ Fifteen states (Arizona, California, Hawaii, Illinois, Kentucky, Massachusetts, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Washington, and West Virginia) offer a limited package of benefits, which include services such as case management, behavioral health services, lab work, and medication, including MAT.⁴⁷ Three states (Rhode Island, Utah, and Vermont) propose offering eligible incarcerated individuals their full Medicaid plan benefits.⁴⁸

As part of the Reentry Section 1115 Demonstration Opportunity, CMS does not expect to approve a state's proposal unless the pre-release benefit package includes at least: 1) case management to assess and address physical and behavioral health needs and [health related social needs] HRSN; 2) MAT services for all types of SUD as clinically appropriate, with accompanying counseling; and 3) a 30-day supply of all prescription medications that have been prescribed for the beneficiary at the time of release, provided to the beneficiary immediately upon release from the correctional facility.⁴⁹

In addition to providing eligible incarcerated individuals with case management, MAT, and prescription medications in a pre-release benefit package, CMS encourages states to cover other pre-release services, such as family planning services and screening for common conditions within the incarcerated population, including high blood pressure, diabetes, hepatitis B and C, and human immunodeficiency virus.⁵⁰ Multiple stakeholders in the HHS workgroup recommended that a Medicaid reentry Section 1115 demonstration waiver cover the full set of a state's Medicaid plan benefits.⁵¹

LAPPA's working group chose to specify a minimum set of pre-release benefits that must be included in a state's Medicaid reentry program. The required minimum set of pre-release benefits listed in subsection (b) are reflective of the benefits recommended by CMS and the HHS workgroup. States have the flexibility to add pre-release benefits beyond what the Act minimally requires. Additional pre-release benefits that a state could offer include housing support services, laboratory and radiology services, and Medicaid program enrollment education.⁵² One of LAPPA's working group members suggested removing the phrase "with accompanying counseling" from the requirement in subsection (b)(2) to provide MAT as a pre-release benefit

⁴⁶ *Id.*

⁴⁷ *Medicaid Waiver Tracker*, *supra* note 44.

⁴⁸ *Id.*

⁴⁹ Letter from Daniel Tsai, *supra* note 10, at 17.

⁵⁰ *Id.* at 18.

⁵¹ STAKEHOLDER REPORT, *supra* note 15, at 32.

⁵² Eliza Mette, *Revisiting Pending Medicaid 1115 Re-Entry Demonstration Waivers and Where They Stand*, PCG HEALTH POLICY NEWS (Jan. 26, 2024), <https://pcghealthpolicy.com/2024/01/26/revisiting-pending-medicaid-1115-re-entry-demonstration-waivers-and-where-they-stand/>.

because the counseling requirement could cause a barrier to implementation. The working group member recommended making counseling optional. However, because CMS specifically stated that it would not likely approve a state’s proposal unless the pre-release benefit package included “MAT services for all types of SUD as clinically appropriate, with accompanying counseling,” the working group chose to keep the counseling requirement.⁵³ Another member of LAPP’s working group suggested that the Model Act address the mechanics of dispensing methadone, extended release buprenorphine, and naltrexone as a pre-release benefit, but the group decided that specific details surrounding the dispensing of MAT are better left to regulation or subregulatory guidance.

Finally, as part of a Medicaid reentry Section 1115 demonstration waiver, a state must determine which population(s) should be eligible for pre-release benefits. Nine states (Hawaii, Illinois, Kentucky, Massachusetts, North Carolina, Oregon, Rhode Island, Vermont, and Washington) propose allowing any Medicaid eligible incarcerated individual to receive pre-release benefits.⁵⁴ In contrast, nine states (Arizona, California, Montana, New Hampshire, New Jersey, New Mexico, New York, Utah, and West Virginia) propose only allowing Medicaid eligible incarcerated individuals who demonstrate a specific healthcare need, such as SUD, mental illness, or a chronic physical condition, to receive pre-release benefits.⁵⁵ Multiple stakeholders in the HHS workgroup expressed concerns about limiting pre-release benefits to incarcerated individuals with certain conditions because many individuals in correctional facilities may exhibit behavioral health symptoms without having a proper diagnosis.⁵⁶ This could leave incarcerated individuals who could benefit from such services ineligible. Based on the concern identified by the HHS workgroup, the Model Act working group chose to require a state’s Medicaid reentry program to cover all Medicaid eligible incarcerated individuals.

The language in this section is based on H.B. 5313 from Rhode Island.⁵⁷ A similar bill has also been proposed in the Iowa General Assembly.⁵⁸

SECTION V. ANNUAL REPORT.

(a) Annual report.— If the waiver described in Section IV is approved, the [state department of health and human services] shall report to the governor, the house of representatives committee on finance and committee on [health and human services], and the senate committee on finance and committee on [health and human services] each year while the waiver is in effect regarding:

(1) The number of qualified incarcerated individuals served under the program;

⁵³ Letter from Daniel Tsai, *supra* note 10, at 17.

⁵⁴ *Medicaid Waiver Tracker*, *supra* note 44.

⁵⁵ *Id.*

⁵⁶ STAKEHOLDER REPORT, *supra* note 15, at 32.

⁵⁷ H.B. 5313, 2023 Gen. Assemb., Jan. Sess. (R.I. 2023).

⁵⁸ H.F. 2236, 90th Gen. Assemb., 2024 Sess. (Iowa 2024).

- (2) The cost of the program; and
- (3) The effectiveness of the program, including:
 - (A) Any reduction in the number of emergency room visits or hospitalizations by formerly incarcerated inmates after release from a correctional facility;
 - (B) Any reduction in the number of formerly incarcerated inmates receiving inpatient treatment after release from a correctional facility;
 - (C) Any reduction in overdose rates and deaths of formerly incarcerated inmates after release from a correctional facility;
 - (D) Any reduction in recidivism after release from a correctional facility;
 - (E) Any increase in the rate of the use of medication for addiction treatment after release from a correctional facility; and
 - (F) Any other costs or benefits as a result of the program.

Commentary

If a Section 1115 demonstration waiver is approved by HHS, a state can then implement the experimental program within its Medicaid programs for a limited duration. HHS has approved Section 1115 waivers for an initial five-year period.⁵⁹ During the approval period, states should conduct comprehensive monitoring and evaluation in their programs. As part of California's Medicaid reentry program, its department of health care services (DHCS) is required to track claims and encounter data to monitor the number of services that a formerly incarcerated individual, who was eligible for pre-release services, received in the post-release period.⁶⁰ DHCS plans to track the number and types of physical and behavioral health services and medications that a formerly incarcerated individual receives in the post-release period.⁶¹

The language in this section is based on H.B. 5313 from Rhode Island.⁶²

SECTION VI. RULES AND REGULATIONS.

The department shall promulgate such rules and regulations as are necessary to effectuate this Act.

⁵⁹ *About Section 1115 Demonstrations, supra* note 24.

⁶⁰ CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, POLICY AND OPERATIONAL GUIDE FOR PLANNING AND IMPLEMENTING THE CALAIM JUSTICE-INVOLVED INITIATIVE (Oct. 20, 2023): 176-77.
<https://www.dhcs.ca.gov/provgovpart/pharmacy/Documents/CalAIM-JI-Policy-and-Operations-Guide-FINAL-October-2023-updated.pdf>.

⁶¹ *Id.*

⁶² H.B. 5313, 2023 Gen. Assemb., Jan. Sess. (R.I. 2023).

SECTION VII. SEVERABILITY.

If any provision of this Act or application thereof to any individual or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provisions or applications, and to this end, the provisions of this Act are severable.

SECTION VIII. EFFECTIVE DATE.

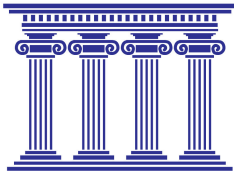
This Act shall be effective on [specific date or reference to normal state method of determination of the effective date].

ABOUT THE LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

The Legislative Analysis and Public Policy Association (LAPPA) is a 501(c)(3) nonprofit organization whose mission is to conduct legal and legislative research and analysis and draft legislation on effective law and policy in the areas of public safety and health, substance use disorders, and the criminal justice system.

LAPPA produces cutting edge model laws and up-to-the-minute comparative analyses, publications, educational brochures, and other tools that can be used by national, state, and local criminal justice and substance use disorder practitioners who want the latest comprehensive information on law and policy. Examples of topics on which LAPPA has assisted stakeholders include naloxone laws, treatment in emergency settings, alternatives to incarceration for those with substance use disorders, medication for addiction treatment in correctional settings, and syringe services programs.

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