

May 5, 2006

The Honorable Sherri Bevan Walsh  
Summit County Prosecuting Attorney  
53 University Avenue, 7th Floor  
Akron, Ohio 44308-1680

SYLLABUS:

2006-019

1. An alcohol, drug addiction and mental health services board (ADAMH board) established pursuant to R.C. Chapter 340, or a provider with which the ADAMH board contracts, may only access Medicaid funding when authorized by statute and rule, including R.C. 5111.023, R.C. 5111.025, 14 Ohio Admin. Code Chapter 5101:3-27, and 14 Ohio Admin. Code Chapter 5101:3-30. Neither an ADAMH board nor a provider with which the board contracts may access Medicaid funding for services provided to an individual who is not eligible for Medicaid. The determination as to whether a particular individual meets all Medicaid eligibility requirements is made, in the first instance, by the county department of job and family services, except with regard to the Ohio breast and cervical cancer project, where eligibility is determined by the Ohio Department of Health or its designated local agencies or subgrantees.
2. The provisions of division (G) of rule 5101:1-39-04 of the Ohio Administrative Code (12 Ohio Admin. Code 5101:1-39-04) stating that “[a] person is not considered to be an inmate of a public facility until he has resided therein for a full calendar month” are not applicable to inmates of penal institutions governed by division (H) of rule 5101:1-39-04. Rather, pursuant to division (H) of rule 5101:1-39-04, a person is considered an inmate of a penal institution “if he is incarcerated under process of the penal system” (whether the offense is a misdemeanor, a felony, or a delinquent act), and is totally excluded from Medicaid coverage (whether during the period before trial or other disposition of the charges or after conviction), regardless of whether the person resides in the penal institution for a full calendar month.



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May 5, 2006

OPINION NO. 2006-019

The Honorable Sherri Bevan Walsh  
Summit County Prosecuting Attorney  
53 University Avenue, 7th Floor  
Akron, Ohio 44308-1680

Dear Prosecutor Walsh:

We have received your request for a formal opinion concerning the billing of Medicaid for services provided to clients who are incarcerated. You have described the matter at issue as follows:

Our local Alcohol, Drug Addiction and Mental Health Services Board (ADM Board) contracts with Community Support Services (CSS) to provide mental health services. At times, the client is in counseling and then becomes incarcerated at the County Jail. An issue has arisen as to whether ADM/CSS can bill Medicaid for reimbursement for services provided to the inmate while in the jail. It is our reading of the law that a client does not become an inmate for Medicaid purposes until the person has resided in the jail for 30 days. (OAC §5101:1-39-04) Thus, we believe that ADM/CSS can bill for services provided during the first 30 days of incarceration. However, considering the severity of the consequences of reading the law incorrectly,<sup>1</sup> our client has requested that we ask your office to issue an opinion on this issue. (Footnote added.)

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<sup>1</sup> R.C. 5111.03 prohibits a provider of services or goods contracting with the Ohio Department of Job and Family Services pursuant to the Medicaid program from, by deception, obtaining or attempting to obtain payments to which the provider is not entitled pursuant to the provider agreement or federal or state rules, or willfully receiving payments to which the provider is not entitled, and establishes various consequences, including monetary penalties and, upon conviction or entry of a civil or criminal judgment under R.C. 109.85 (Medicaid investigations), the termination of the provider agreement and termination of reimbursement for up to five years. R.C. 5111.03(A)-(C). There are procedures by which the Department may recover overpayments made to a Medicaid provider. R.C. 5111.061. A provider who, without intent, receives excess payments is liable for interest until repayment is made. R.C. 5111.03(D).

Although your question asks about the ability of the ADAMH board or provider to bill Medicaid, we note that your basic concern is not about the billing but about the receipt of payment for services rendered. In essence, your question asks if an ADAMH board, or provider with which the ADAMH board contracts, may access Medicaid funding for services provided to individuals who reside in penal institutions.

For the reasons discussed below, we conclude that an alcohol, drug addiction and mental health services board (ADAMH board) established pursuant to R.C. Chapter 340, or a provider with which the ADAMH board contracts, may only access Medicaid funding when authorized by statute and rule, including R.C. 5111.023, R.C. 5111.025, 14 Ohio Admin. Code Chapter 5101:3-27, and 14 Ohio Admin. Code Chapter 5101:3-30. Neither an ADAMH board nor a provider with which the board contracts may access Medicaid funding for services provided to an individual who is not eligible for Medicaid. The determination as to whether a particular individual meets all Medicaid eligibility requirements is made, in the first instance, by the county department of job and family services, except with regard to the Ohio breast and cervical cancer project, where eligibility is determined by the Ohio Department of Health or its designated local agencies or subgrantees.

We conclude, further, that the provisions of division (G) of rule 5101:1-39-04 of the Ohio Administrative Code (12 Ohio Admin. Code 5101:1-39-04) stating that “[a] person is not considered to be an inmate of a public facility until he has resided therein for a full calendar month” are not applicable to inmates of penal institutions governed by division (H) of rule 5101:1-39-04. Rather, pursuant to division (H) of rule 5101:1-39-04, a person is considered an inmate of a penal institution “if he is incarcerated under process of the penal system” (whether the offense is a misdemeanor, a felony, or a delinquent act), and is totally excluded from Medicaid coverage (whether during the period before trial or other disposition of the charges or after conviction), regardless of whether the person resides in the penal institution for a full calendar month.

### **Ohio’s Medicaid program**

The Medicaid program, established under Title XIX of the Federal Social Security Act, is a health care coverage plan that provides medical assistance to qualifying individuals through the use of federal and state funds. Federal law establishes basic requirements, and each participating state adopts its own plan, containing a package of services defined by the state in compliance with the federal requirements. *See* 42 U.S.C.A. §§ 1396-1396d (West 2003 & Supp. 2005); R.C. 5111.01; R.C. 5111.021.

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A person who is convicted of or pleads guilty to a Medicaid fraud offense may be required to forfeit any profit, money, proceeds, or property that is derived from or traceable to the proceeds of the Medicaid fraud offense. R.C. 2933.71; R.C. 2933.73. *See generally* R.C. 109.85; R.C. 2933.71-.75 (Medicaid fraud forfeitures).

The Ohio Department of Job and Family Services (ODJFS) is designated as the single state agency with authority to supervise the administration of the Medicaid program in Ohio. R.C. 5111.01; 12 Ohio Admin. Code 5101:1-37-01. ODJFS has authority to adopt rules implementing the Medicaid program, and its rules are binding upon other agencies that administer components of the Medicaid program. “No agency may establish, by rule or otherwise, a policy governing medicaid that is inconsistent with a medicaid policy established, in rule or otherwise, by the director of job and family services.” R.C. 5111.01; *see also* R.C. 5111.02.

ODJFS is authorized to “provide medical assistance under the medicaid program as long as federal funds are provided for such assistance,” to various persons and families meeting statutory criteria. R.C. 5111.01(A). If funds are appropriated by the General Assembly, ODJFS may provide medical assistance to groups whose coverage under Medicaid is optional. R.C. 5111.01(B). Ohio’s Medicaid program covers low-income individuals who are sixty-five or older, blind, have a disability, are pregnant, or are children under age twenty-one, and also covers members of families with dependent children. 12 Ohio Admin. Code 5101:1-37-01(A).

To receive Medicaid assistance, an individual must be a member of a covered group and must meet all other eligibility requirements. *See* R.C. 5111.01; 12 Ohio Admin. Code 5101:1-37-01(B)-(C). Eligibility requirements for individuals who are aged, blind, or have a disability are set forth in Chapter 5101:1-39 of the Ohio Administrative Code, and eligibility requirements for covered families and children are set forth in Chapter 5101:1-40 of the Ohio Administrative Code. 12 Ohio Admin. Code 5101:1-37-01(B).

The responsibility for determining whether eligibility exists in a particular case is given, in the first instance, to the county department of job and family services (CDJFS), except with regard to the Ohio breast and cervical cancer project, where the responsibility is given to the Ohio Department of Health or its designated local agencies or subgrantees. R.C. 5111.012 (“[t]he county department of job and family services of each county shall establish the eligibility for medical assistance of persons living in the county, and shall notify the department of job and family services in the manner prescribed by the department”); 12 Ohio Admin. Code 5101:1-38-01(F) (“[t]he CDJFS is responsible for determining eligibility for all medicaid programs with the exception of the Ohio breast and cervical project as outlined in rule 5101:1-41-05 of the Administrative Code”); 12 Ohio Admin. Code 5101:1-41-03(A) (“[t]he Ohio department of health (ODH) or its designated local agencies or subgrantees must determine the individual eligible for the ODH breast and cervical cancer project (BCCP)”); 2005 Op. Att’y Gen. No. 2005-039, at 2-409. The CDJFS must provide notice of its eligibility determinations to the Ohio Department of Job and Family Services. R.C. 5111.012. Eligibility determinations are subject to administrative appeals to ODJFS or another administrative agency and to judicial appeals. *See*

R.C. Chapter 119; *Gorenflo v. Ohio Dep't of Human Servs.*, 81 Ohio App. 3d 500, 611 N.E.2d 425 (Marion County 1992).<sup>2</sup>

The CDJFS is also responsible for the determination of continued eligibility for Medicaid, is required to make redeterminations of eligibility at scheduled intervals, and is permitted to make a redetermination of eligibility at another time based upon a reasonable belief that circumstances have changed that may affect eligibility. 12 Ohio Admin. Code 5101:1-38-01(H)-(L). Assistance groups receiving Medicaid benefits are required to report changes in conditions affecting eligibility, including any change in living arrangements, to the administrative agency within ten days of the date that the change occurs. 12 Ohio Admin. Code 5101:1-38-02(C). The decision to terminate benefits is subject to various procedural requirements and protections. *See, e.g.*, 12 Ohio Admin. Code 5101:1-38-01.1; *see also, e.g.*, 42 C.F.R. § 431.213 (2005) (the state agency administering the Medicaid program “may mail a notice not later than the date of action if . . . (c) The recipient has been admitted to an institution where he is ineligible under the plan for further services”); 42 C.F.R. § 435.919(a) (2005) (“[t]he agency must give recipients timely and adequate notice of proposed action to terminate, discontinue, or suspend their eligibility or to reduce or discontinue services they may receive under Medicaid”); 42 C.F.R. § 435.930(b) (2005) (the state agency administering the Medicaid program must “[c]ontinue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible”).

Decisions concerning the eligibility for Medicaid or the termination of benefits once they have begun depend upon the facts of particular circumstances. The discretion to make those determinations in accordance with applicable standards and procedures has, by statute and rule, been given to designated officials. The Attorney General is not empowered, by means of an opinion, to circumvent these procedures or to attempt to prescribe to those officials the manner in which they should exercise their discretion. Accordingly, this opinion does not purport to determine the right of any individual to participate in the Medicaid program. Instead, we set forth general principles to be applied to particular situations by those with authority to act in those situations.<sup>3</sup>

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<sup>2</sup> The CDJFS, ODJFS, or other entity that administers a Medicaid program and determines eligibility for assistance is known as the administrative agency. *See, e.g.*, 12 Ohio Admin. Code 5101:1-37-01.1(B)(3); 12 Ohio Admin. Code 5101:1-38-01.6(B)(1); 12 Ohio Admin. Code 5101:1-40-02.2.

<sup>3</sup> As stated in 1995 Op. Att’y Gen. No. 95-002, at 2-7 to 2-8:

The authority to determine in the first instance whether a particular individual is eligible for medical assistance under R.C. Chapter 5111 is, by statute, given to the county department of health and human services [now the county department of job and family services] of the county in which the individual lives. R.C. 5111.012 (“[t]he county department of human services of

**Authority of Alcohol, Drug Addiction and Mental Health Services Board  
to provide Medicaid services**

Provisions of statute and rule authorize the providers of services to eligible Medicaid recipients to be paid for those services. *See, e.g.*, R.C. 5111.021. Ohio's Medicaid program includes the provision of certain mental health services by community mental health facilities, and provides for the Director of Job and Family Services to adopt rules governing payment for mental health and alcohol and drug addiction services. R.C. 5111.023; R.C. 5111.025; 14 Ohio Admin. Code Chapter 5101:3-27; 14 Ohio Admin. Code Chapter 5101:3-30.

Alcohol, drug addiction and mental health services boards (ADAMH boards) are established throughout Ohio pursuant to R.C. Chapter 340 to develop and implement community mental health plans and plans for alcohol and drug addiction programs. *See, e.g.*, R.C. 340.01-.03; R.C. 340.033. An ADAMH board is authorized to contract with public and private entities for the operation of facilities and the provision of mental health services and alcohol and drug addiction services, and may, in certain circumstances, itself operate a facility or provide a community mental health service. R.C. 340.03(A)(8); R.C. 340.033(A)(5), (F). The ADAMH board is responsible for establishing, to the extent resources are available, a community support system providing for treatment, support, and rehabilitation services and opportunities, including

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each county shall establish the eligibility for medical assistance of persons living in the county"). That department notifies the Ohio Department of Human Services [now the Ohio Department of Job and Family Services] of its determinations. R.C. 5111.012. Such determinations are subject to administrative and judicial appeals pursuant to R.C. Chapter 119. *See generally Gorenflo v. Ohio Department of Human Services*, 81 Ohio App. 3d 500, 611 N.E.2d 425 (Marion County 1992) (discussing fact-finding and appeals procedures in a case concerning eligibility for Medicaid benefits).

It would be inappropriate for the Attorney General to interfere with the established statutory procedure governing the determination of Ohio Medicaid eligibility by attempting to use a formal opinion to determine the eligibility of a particular individual. *See generally, e.g.*, 1989 Op. Att'y Gen. No. 89-008 at 2-33 (the Attorney General is not authorized to exercise on behalf of another governmental entity discretion that the General Assembly has granted to that entity); 1986 Op. Att'y Gen. No. 86-076 at 2-422 ("it is inappropriate for [the Attorney General] to use the opinion-rendering function to make findings of fact or determinations as to the rights of particular individuals"). Accordingly, this opinion does not make a determination regarding the eligibility of the child in question to continue to receive Medicaid benefits under Ohio's medical assistance program if the child's custody is transferred to the child's grandmother. Instead, this opinion discusses provisions of statute and rule that may be relevant to such a determination and leaves to the county department of human services the application of those provisions to the facts of a particular case.

inpatient and outpatient mental health care. R.C. 340.03(A)(11). An ADAMH board has financial responsibilities with respect to the operation of its programs, and may receive moneys from various sources, including the county and the state. *See, e.g.*, R.C. 340.03; R.C. 340.033; R.C. 340.07-.09; R.C. 3793.05; R.C. 5111.025; R.C. 5119.62.

An ADAMH board established pursuant to R.C. Chapter 340, or a provider with which the ADAMH board contracts, may only access Medicaid funding when authorized by statute and rule, including R.C. 5111.023, R.C. 5111.025, 14 Ohio Admin. Code Chapter 5101:3-27, and 14 Ohio Admin. Code Chapter 5101:3-30. Neither an ADAMH board nor a provider with which the board contracts may access Medicaid funding for services provided to an individual who is not eligible for Medicaid. As discussed above, the determination as to whether a particular individual meets all Medicaid eligibility requirements is made, in the first instance, by the county department of job and family services, except with regard to the Ohio breast and cervical cancer project, where eligibility is determined by the Ohio Department of Health or its designated local agencies or subgrantees.

#### **Exclusion of inmates of penal institutions from Medicaid coverage**

Your question concerns the ability of an ADAMH board, or a provider with which the board contracts, to access Medicaid funds for mental health services provided to a client who has been found eligible for Medicaid and then becomes incarcerated in the county jail. It appears that the question has arisen because the ability of the board or provider to receive Medicaid funds has been impeded by the application of rules that purport to prohibit the payment of Medicaid benefits for persons who are incarcerated. The applicable provisions appear in rules 5101:1-39-04(H) and 5101:1-40-09(E) of the Ohio Administrative Code.

Rule 5101:1-39-04 establishes the requirement that, to be eligible for participation in Medicaid, an applicant/recipient must be living in an appropriate living arrangement, as set forth in 12 Ohio Admin. Code 5101:1-39-04 or 12 Ohio Admin. Code 5101:1-40-09. Rule 5101:1-39-04 governs Medicaid living arrangements for individuals who are aged, blind, or have a disability. With regard to inmates of penal institutions, rule 5101:1-39-04 states:

(H) *Inmates of penal institutions, whether during the period before trial or other disposition of the charges or after conviction, are totally excluded from medical coverage.*

*A person is considered an inmate of a penal institution if he is incarcerated under process of the penal system, whether the offense is a misdemeanor or a felony or is a delinquent act. (Emphasis added.)*

The plain language of this rule states that inmates of penal institutions are totally excluded from medical coverage (Medicaid), and that a person who is incarcerated under process of the penal system is considered an inmate. It thus indicates that no Medicaid eligibility exists while an

individual is incarcerated because the individual does not meet the eligibility requirement of living in an appropriate living arrangement.

Rule 5101:1-40-09 is part of Chapter 5101:1-40 of the Ohio Administrative Code, which governs eligibility for Covered Families and Children's Medicaid. See 12 Ohio Admin. Code 5101:1-40-01. Division (E) of rule 5101:1-40-09 states:

(E) *An individual who is committed by the court to a correctional institution for detention in connection with a violation of the law is considered an inmate of a penal institution and is not eligible for covered families and children medicaid.* (Emphasis added.)

Like rule 5101:1-39-04(H), this rule excludes certain offenders from Medicaid coverage. The language is somewhat different, however, applying to an individual who is "committed by the court to a correctional institution for detention in connection with a violation of the law."

Both of these provisions appear to exclude from Medicaid coverage persons who are incarcerated, even if the persons meet all other eligibility requirements. As outlined above, the CDJFS is given the responsibility of determining whether eligibility exists in particular circumstances. That responsibility includes the authority to decide if the particular provisions of the rules are satisfied – that is, to decide whether a particular individual is incarcerated under process of the penal system for purposes of rule 5101:1-39-04(H) or is committed by the court to a correctional institution for detention in connection with a violation of the law for purposes of rule 5101:1-40-09(E). See *Dep't of Health & Human Servs. v. Chater*, 163 F.3d 1129, 1135 (9th Cir. 1998) ("[d]eference is . . . afforded to an agency's construction of its own regulation because its expertise makes it well-suited to interpret its own language. . . . The question is not whether the interpretation represents the best reading of the statute, but whether it represents a reasonable one"); *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St. 3d 282, 287, 750 N.E.2d 130 (2001) ("[i]t is axiomatic that if a statute provides the authority for an administrative agency to perform a specified act, but does not provide the details by which the act should be performed, the agency is to perform the act in a reasonable manner based upon a reasonable construction of the statutory scheme. A court must give due deference to the agency's reasonable interpretation of the legislative scheme") (citations omitted)).

You have suggested that the language of rule 5101:1-39-04(H) does not operate to render an inmate of a penal institution ineligible for Medicaid immediately upon incarceration because of language appearing in division (G) of that rule. Division (G) of rule 5101:1-39-04 contains provisions governing individuals who live in institutions, as follows:

(G) *Persons who live in public institutions which are not medical institutions cannot qualify for medicaid because they are inmates of a public institution.* An "institution" is an establishment which provides food, shelter and some treatment or services. A "public institution" is one which is the

responsibility of a governmental unit or over which the governmental unit exercises administrative control.

(1) A public institution does not include a medical institution. Persons residing in a public medical facility may qualify for medicaid.

(2) Facilities which have no control over an individual's leaving and returning are not considered public institutions, i.e., the residential area of the Ohio veteran's home.

Persons who live in public nonmedical institutions and are not free to choose whether or not they want to leave or return to the institution are considered inmates whether admitted or placed on a voluntary basis or committed under some legal process. As long as individuals reside in the facility as inmates, they are not eligible for medicaid. *A person is not considered to be an inmate of a public facility until he has resided therein for a full calendar month.*

(3) A public institution does not include a publicly operated community residence. Persons residing in a publicly operated community residence that services no more than sixteen residents may qualify for medicaid.

(4) Persons residing in emergency shelters no longer than three months in any twelve-month period may qualify for medicaid. "Emergency shelters" are defined as residential facilities in which individuals reside for a temporary period pending other arrangements appropriate to their needs. The primary purpose of emergency shelters is housing.

(5) Persons who reside in public facilities in order to receive educational or vocational training provided by the facility, e.g., a state school for the blind, are not considered to be inmates of a public institution and are, therefore, entitled to medicaid if they are otherwise eligible.

(6) Persons who are temporarily placed in public facilities on an emergency basis pending other arrangements appropriate to their needs are not considered to be inmates, providing that suitable arrangements are made without delay. (Emphasis added.)

Pursuant to division (G), a person who is an inmate of a public institution is not eligible for Medicaid, but a person is not considered to be an inmate of a public facility until that person has resided in the facility for a full calendar month.

Your argument suggests that division (G)'s requirement that an individual reside in a public facility for a full calendar month before being considered an inmate applies also to an individual who resides in a penal facility under division (H) and, therefore, that an ADAMH board or provider should receive Medicaid funding for services provided to persons residing in penal institutions before the full month residence requirement is completed. Our analysis of rule 5101:1-39-04(G) and (H) finds this argument unconvincing.

The language of division (H) of rule 5101:1-39-04 categorically excludes from Medicaid coverage anyone who is residing in a penal facility. It covers anyone who is "incarcerated under

process of the penal system,” in conjunction with a misdemeanor, felony, or delinquent act, and applies “during the period before trial or other disposition of the charges or after conviction.” 12 Ohio Admin. Code 5101:1-39-04(H). This language prohibits the provision of any Medicaid services to an individual who is incarcerated in a penal or correctional facility.

On its face, division (H) is complete in itself, and provides a definitive statement with regard to the Medicaid eligibility of persons residing in penal institutions. Division (G) applies to persons who live in public institutions that are not medical institutions, and states that the inmates of those institutions cannot qualify for Medicaid. It defines an “institution” as “an establishment which provides food, shelter and some treatment or services.” 12 Ohio Admin. Code 5101:1-39-04(G). It appears, accordingly, that division (G) addresses facilities that are intended to benefit inmates by providing them with a residence and with appropriate treatment or services, such as drug or alcohol treatment or assistance for persons with mentally retardation or developmental disabilities, and not to penal or correctional facilities, which are addressed separately in division (H). *See Dep’t of Health & Human Servs. v. Chater*, 163 F.3d 1129, 1135-36 (9th Cir. 1998) (upholding federal regulation that excludes correctional facilities from the definition of publicly operated community residences (whose residents are eligible for SSI) when Commissioner based the exclusion on the fact that correctional facilities are not “designed to provide the desired living arrangement envisioned by the statute” (quoting 43 Fed. Reg. 55379, 55380)); 42 C.F.R. § 435.1009 (2005) (definitions relating to institutional status for purposes of federal financial participation in Medicaid). Further, division (H) contains a different definition of “inmate,” stating that a person is considered an inmate of a penal institution “if he is incarcerated under process of the penal system.” Thus, the language of divisions (G) and (H) support the conclusion that, because of the distinct and specific provisions in division (H) that address inmates of penal institutions, those inmates are not covered by the provisions of division (G).<sup>4</sup>

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<sup>4</sup> Ohio’s Medicaid program does not base a determination of eligibility upon determinations made under any federal program. *See* 42 C.F.R. § 435.121 (2005) (requirements for state that does not provide Medicaid to aged, blind, and disabled individuals who are recipients of SSI); <http://www.bazelon.org/issues/criminalization/findingthekey.html> at n.7 (Judge David L. Bazelon Center for Mental Health Law) (in most states, not including Ohio, SSI recipients automatically have Medicaid coverage).

Ohio’s determination to restrict the Medicaid eligibility of individuals who reside in penal institutions finds support in certain aspects of the history and administration of federal programs under the Federal Social Security Act. The federal Medicaid program is a development of the federal Supplemental Security Income (SSI) program, which provides a subsistence allowance to needy aged, blind, and disabled persons. From its inception, the SSI program excluded individuals who were already being taken care of by state or local governments in penal facilities or other public institutions, except for a minimal amount provided to otherwise eligible persons residing in certain institutions that receive Medicaid benefits for the care of those persons. *See* 42 U.S.C.A. §§ 1381-1382 (West 2003 & Supp. 2005); *see Schweiker v. Wilson*, 450 U.S. 221, 223-25, 235-39 (1981); *Dep’t of Health & Human Servs. v. Chater*, 163

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F.3d 1129, 1135 n.7 (9th Cir. 1998) (“[a]s the states have traditionally assumed responsibility for those who break state or local law, the Commissioner suggests that Congress intended that the SSI program not be used to shift this financial burden to the federal government”); *Baur v. Mathews*, 578 F.2d 228 (9th Cir. 1978) (residents of public alcohol treatment centers).

The intent to exclude incarcerated criminal offenders from SSI benefits was stated clearly in House Report No. 92-231 (Ways and Means Committee), which accompanied the Social Security Amendments of 1972 (P.L.92-603) that created the SSI program: “No assistance benefits will be paid to an individual in a penal institution.” 1972 U.S.C.C.A.N. 5136; *see Schweiker v. Wilson*, 450 U.S. at 235; *Dep’t of Health & Human Servs. v. Chater*, 163 F.3d at 1136 (one of the legislative purposes behind the original SSI legislation was to disallow benefits to persons residing in penal institutions whose care is provided by state and local governments); *Baur v. Mathews* at 232; <http://www.bazelon.org/issues/criminalization/findingthekey.html> (“[p]eople who have been getting SSI or SSDI [Social Security Disability Income] payments when arrested cannot receive benefits while in jail. . . . The monthly payments are nearly always interrupted while someone is in jail, but benefits are payable up until the time of incarceration and sometimes a little longer”). Federal SSI provisions find a person ineligible “with respect to any month if throughout such month he is an inmate of a public institution,” including a penal institution. 42 U.S.C.A. § 1382(e)(1)(A) (West Supp. 2005); *accord* 20 C.F.R. § 416.211(2005); *see also Dep’t of Health & Human Servs. v. Chater*, 163 F.3d at 1132-36 (finding that juvenile offenders incarcerated in group homes were inmates of a public institution for purposes of SSI). No monthly federal SSI benefits may be paid to any individual “for any month ending with or during or beginning with or during a period of more than 30 days throughout all of which such individual . . . is confined in a jail, prison, or other penal institution or correctional facility pursuant to his conviction of a criminal offense”; is confined by court order in an institution at public expense in connection with a verdict or finding of not guilty by reason of insanity, guilty but insane, or incompetent to stand trial; is confined by court order in an institution at public expense pursuant to a finding that the individual is a sexually dangerous person or a sexual predator; is fleeing to avoid prosecution or custody; or is violating a condition of probation or parole. 42 U.S.C.A. § 402(x)(1)(A) (West Supp. 2005).

“Under Medicaid law, states do not receive federal matching funds for services provided to individuals in jail. However, federal law does not require states to terminate inmates’ eligibility, and inmates may remain on the Medicaid rolls even though services received while in jail are not covered.” <http://www.bazelon.org/issues/criminalization/findingthekey.html> (footnotes omitted) (citing language now appearing in 42 U.S.C.A. § 1396d(a)(28)(A) (West Supp. 2005), which excludes from Medicaid “any such payments with respect to care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution)”). “When an inmate’s Medicaid eligibility is not tied to SSI, the state has the flexibility under federal law to suspend the eligibility status during incarceration. But the federal Medicaid rules establish only minimum requirements, while states are permitted to impose more restrictive policies. Unfortunately, *most states have procedures that terminate Medicaid eligibility automatically any time someone is in jail.*” *Id.* (footnotes omitted; emphasis added);

It is our understanding that ODJFS construes divisions (G) and (H) of rule 5101:1-39-04 separately, so that the full month residence requirement of division (G) does not apply to incarceration in a penal facility pursuant to division (H). As discussed above, this is a reasonable interpretation of Ohio law. Further, it is consistent with federal law, and it is the same position that various other states have taken in implementing their Medicaid programs. *See, e.g.*, N.D. Admin. Code 75-02-02.1-19 (“3. Individuals who are committed under the penal system to a public institution are not eligible for Medicaid even though they may be receiving care in a medical facility. Inmate status at a penal facility (correctional) begins at the time of confinement”); note 4, *supra*.

We conclude, accordingly, that the provisions of division (G) of rule 5101:1-39-04 stating that “[a] person is not considered to be an inmate of a public facility until he has resided therein for a full calendar month” are not applicable to inmates of penal institutions governed by division (H) of rule 5101:1-39-04. Rather, pursuant to division (H) of rule 5101:1-39-04, a person is considered an inmate of a penal institution “if he is incarcerated under process of the penal system” (whether the offense is a misdemeanor, a felony, or a delinquent act), and is totally excluded from Medicaid coverage (whether during the period before trial or other disposition of the charges or after conviction), regardless of whether the person resides in the penal institution for a full calendar month.

This conclusion does not resolve all possible questions concerning the interpretation of division (E) of rule 5101:1-40-09, which excludes from eligibility for Covered Families and Children’s Medicaid “[a]n individual who is committed by the court to a correctional institution for detention in connection with a violation of the law,” and the application of rules 5101:1-39-04(H) and 5101:1-40-09(E) to particular factual situations. Given the differences in language between rule 5101:1-39-04(H) and rule 5101:1-40-09(E) and the variety of factual situations possible – including distinctions between being arrested, making bail, awaiting trial, serving a sentence, and so on – there may be various factors to consider in determining when and how rules 5101:1-39-04(H) and 5101:1-40-09(E) apply to particular circumstances. As discussed above, the responsibility for deciding whether there is Medicaid eligibility in particular circumstances, so that Medicaid funding is available to providers, rests not with the providers but, initially, with the CDJFS or Department of Health, and then, through appropriate procedures, with ODJFS, another administrative agency, or the courts.

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*see also* 42 C.F.R. § 435.1008(a) and (b) (2005) (federal financial participation in Medicaid is not available for services provided to individuals who are inmates of public institutions, but the exclusion does not apply during the part of the month in which the person is not an inmate); *accord* 42 C.F.R. § 441.13(a)(1) (2005); *see also* 42 C.F.R. § 435.1009 (2005) (definition of “[i]nstitution” and “[p]ublic institution”). The analysis of Ohio law set forth in this opinion supports the conclusion that Ohio is among the states that terminate Medicaid eligibility automatically when a person is in jail.

### Conclusions

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. An alcohol, drug addiction and mental health services board (ADAMH board) established pursuant to R.C. Chapter 340, or a provider with which the ADAMH board contracts, may only access Medicaid funding when authorized by statute and rule, including R.C. 5111.023, R.C. 5111.025, 14 Ohio Admin. Code Chapter 5101:3-27, and 14 Ohio Admin. Code Chapter 5101:3-30. Neither an ADAMH board nor a provider with which the board contracts may access Medicaid funding for services provided to an individual who is not eligible for Medicaid. The determination as to whether a particular individual meets all Medicaid eligibility requirements is made, in the first instance, by the county department of job and family services, except with regard to the Ohio breast and cervical cancer project, where eligibility is determined by the Ohio Department of Health or its designated local agencies or subgrantees.
2. The provisions of division (G) of rule 5101:1-39-04 of the Ohio Administrative Code (12 Ohio Admin. Code 5101:1-39-04) stating that “[a] person is not considered to be an inmate of a public facility until he has resided therein for a full calendar month” are not applicable to inmates of penal institutions governed by division (H) of rule 5101:1-39-04. Rather, pursuant to division (H) of rule 5101:1-39-04, a person is considered an inmate of a penal institution “if he is incarcerated under process of the penal system” (whether the offense is a misdemeanor, a felony, or a delinquent act), and is totally excluded from Medicaid coverage (whether during the period before trial or other disposition of the charges or after conviction), regardless of whether the person resides in the penal institution for a full calendar month.

Respectfully,



JIM PETRO  
Attorney General