

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

SUPPORTING OLDER ADULTS
AFTER INCARCERATION SERIES

Medicare Special Enrollment Period for Formerly Incarcerated Individuals: What Advocates Need to Know

As the overall population ages, the prison and jail population is aging too. Older adults reentering our communities are disproportionately older adults of color, especially Black men. The unique and significant disadvantages caused by structural racism in the criminal justice system and throughout their lives follow individuals well beyond the prison and jail walls. As a result, older adults leaving prison and jail are at risk of being unable to access health care, housing, and a range of health and economic security benefits that could help them transition smoothly and live securely in the community.

With support from AARP Public Policy Institute, Justice in Aging is releasing a series of issue briefs to ensure advocates and service providers are aware of the unique challenges older adults reentering the community after incarceration face and to provide the tools they need to connect their older adult clients to the safety net benefits they need.

This first issue brief in the series discusses the Medicare Special Enrollment Period (SEP) for formerly incarcerated individuals.

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INTRODUCTION

Older adults leaving incarceration face significant challenges in connecting with health care benefits when they return to their communities. Getting and using Medicare coverage is one of those challenges.

How those challenges play out depends in part on whether an older adult returning to the community also qualifies for state Medicaid coverage. Individuals who have Medicaid coverage when they leave a carceral setting will usually be directly enrolled in Medicare by their Medicaid program, which will pay their Part B premium. Although most older adults returning to the community are also Medicaid-eligible, some are not. Those who, because of assets or income, do not qualify for Medicaid coverage need an enrollment period to start their Medicare coverage.

A Medicare Special Enrollment Period for formerly incarcerated individuals (Incarceration SEP), which came into effect January 1, 2023, provides individuals leaving custody an opportunity to enroll in Medicare without late enrollment penalties. It is an important improvement in the process of obtaining or restoring Medicare health coverage. The Incarceration SEP provides significant relief from the prior rule which required those returning to the community to wait until the next Medicare General Enrollment Period (January through March annually) to enroll and imposed late enrollment penalties, even if they were incarcerated when they first become eligible for Medicare. Under the Incarceration SEP, individuals leaving custody have a 12-month period in which to enroll or re-enroll in Medicare and can do so without being subject to a late enrollment penalty.

This issue brief explains the details of the Incarceration SEP and looks at how it interacts with other existing Medicare rules. It provides scenarios of how Medicare enrollment plays out for Medicare-eligible individuals and spotlights issues that might arise for individuals in different circumstances including:

- Those with or without premium-free Medicare Part A
- Those who were enrolled in Medicare prior to incarceration and those who never enrolled
- Those also eligible for Medicaid coverage

WHAT IS THE INCARCERATION SEP?

The Incarceration SEP, codified at [42 C.F.R. § 406.27\(d\)](#), applies both to Medicare Part B and to Part A for those who do not qualify for premium-free Part A.¹ The SEP starts on the date of release from custody and extends for 12 months. It allows both individuals who never enrolled in Medicare and those who were disenrolled after stopping premium payments to enroll without late enrollment penalties. Enrollment is effective the first day of the month following enrollment, but individuals can, with payment of premiums, obtain a maximum of 6 months retroactive coverage back to the date of release. Note that retroactive enrollment only applies to Part A and Part B services. Enrollment in the Part D prescription drug benefit is prospective so Medicare does not cover prescription drugs during the retroactive period.²

The Incarceration SEP is available to anyone with a release date on or after January 1, 2023. Individuals apply for the Incarceration SEP through the Social Security Administration using application form [CMS-10797](#).

WHAT CONSTITUTES CUSTODY?

The date of release from custody, which triggers the availability of the Incarceration SEP, is determined under the Medicare definition found at 42 C.F.R. § 411.4(b) and is not always the date on which an individual leaves a carceral institution. The definition provides that:

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

Note that the CMS regulation does not specifically identify parole or probation as “supervised release” and has not addressed the treatment of either category in any sub-regulatory guidance. We advise advocates to expect that parole and probation might be treated as “custody” under the regulation; however, advocates may see some variation in how carceral authorities code an individual’s status. Individuals can contact SSA to ask about their reported status.³

SUSPENDED MEDICARE BENEFITS WHILE IN CUSTODY

When individuals enrolled in Medicare are incarcerated, their benefits are suspended while they are in custody, meaning that, although enrollment can continue, the Medicare program will not pay for any claims for health care services during the period of suspension. Suspension starts when the Social Security Administration learns from electronic reports by carceral institutions or other sources that the individual is incarcerated. The suspension continues until the individual no longer is in custody as defined by the Medicare regulation. Individuals who turn 65 while incarcerated have the right to enroll in Medicare during the Initial Enrollment Period surrounding their 65th birthday, but enrolling would entail paying premiums and would not result in any access to Medicare services.

HOW DOES MEDICARE ENROLLMENT PLAY OUT IN PRACTICE?

There are many permutations for older adults reentering the community, depending on their particular circumstances. Below are scenarios that illustrate situations that advocates may encounter when assisting their Medicare-eligible clients.

OPPORTUNITY FOR RETROACTIVE ENROLLMENT

Mr. Carver, age 68, has been in a state prison for five years and has never enrolled in Medicare. He completed his sentence and was released from custody without supervision on March 28, 2023. Because of his work history, he qualifies for premium-free Part A. Although his income upon release is low, he received an inheritance from his brother that makes his assets too high for him to qualify for Medicaid.

Mr. Carver used most of his time in the first couple of months in the community working to secure stable housing and did not apply for Medicare until June 10, when he used the Incarceration SEP to apply for Part B. His coverage could begin on July 1 but, because he incurred thousands of dollars in medical bills in May and June, Mr. Carver opted to pay premiums for retroactive coverage back to March.

Note: Mr. Carver does not have the option of only paying for retroactive coverage for May and June, the months in which he incurred expenses. If he chooses retroactive coverage, he must pay premiums for all uncovered months up to and including the month of release (not to exceed 6 months total) – in this example March 2023.

Mr. Smith, 70, is released without condition on July 5, 2023. He applies for Medicare coverage on March 12, 2024, using the Incarceration SEP and chooses retroactive coverage. His retroactive coverage extends back to September 1, 2023. He cannot get retroactive coverage beyond six months from the date he applied.

Mr. Smith’s application involved one additional wrinkle. Because Mr. Smith applies in March, which is during the General

Enrollment Period (GEP) (January 1-March 31 annually), his advocate should tell him to be sure to inform SSA that he wants to use the Incarceration SEP and not apply under the GEP provisions. While it is likely that an SSA representative would correctly guide him to use the Incarceration SEP, it is worth cautioning him since, if he applies using the GEP, he will incur late enrollment penalties.⁴

ALTERNATIVE FOR INDIVIDUAL WITHOUT PREMIUM-FREE PART A ELIGIBILITY

Mr. Ng, 66, left state prison on March 12, 2023, after being exonerated of a crime for which he served 20 years. He does not meet the financial qualifications for Medicaid coverage and does not have a sufficient work history to qualify for premium-free Part A. Mr. Ng can use the Incarceration SEP to apply both for Part A and Part B coverage. However, he cannot afford the steep premiums for Part A (over \$500/month) and is hesitant to enroll. Because he is not entitled to free Part A, he is eligible for Marketplace coverage as an alternative to Medicare. He decides that enrolling in a Marketplace plan with subsidies is more cost-effective than paying both Part A and Part B premiums. He uses the Marketplace Incarceration SEP, which begins the day of his release and extends for 60 days.⁵ He also qualifies for Marketplace subsidies to lower his premiums. If he decides at some later date that he wants to enroll in Medicare instead, Mr. Ng may face late enrollment penalties.⁶

PRACTICE TIP

The Marketplace Incarceration SEP is significantly shorter than the Medicare Incarceration SEP and does not allow retroactive coverage. Advocates will need to advise their clients to act quickly to establish Marketplace coverage.

IMPACT OF MEDICARE CUSTODY DEFINITION—INDIVIDUAL QUALIFIES FOR PREMIUM-FREE PART A

Ms. Sanchez, 68, who qualifies for premium-free Part A, left a carceral institution on the same day as Mr. Ng, March 12, 2023. She was released under supervision so will be unable to use the Medicare Incarceration SEP until the date the supervision is lifted, which will be September 15, 2024. Her Incarceration SEP begins on September 15, 2024 and ends on September 30, 2025. She applies for Part B coverage promptly on September 16, 2024 and her coverage will begin on October 1.

From March through September 2024, Mrs. Sanchez is in a difficult position. The state corrections agency stopped paying for her medical care on March 12. Because she is still considered to be in custody under the Medicare definition, Medicare will not pay for any of her care even if she enrolled; and she has too many assets to qualify for Medicaid coverage. Further, because she is entitled to enroll in premium-free Part A (even though any Part A benefits will be “suspended” and Medicare will not pay for any services prior to September 2024), she cannot enroll in a Marketplace plan or receive Marketplace premium subsidies unless she forgoes her Social Security benefits.⁷

IMPACT OF MEDICARE CUSTODY DEFINITION—INDIVIDUAL IS NOT ELIGIBLE FOR PREMIUM-FREE PART A

Ms. Harris, 66, is released from state prison on June 30, 2023, and will serve the last year of her sentence under home confinement. She does not have the work history to qualify for free Part A. Even though Ms. Harris is still in custody under the Medicare definition, the Marketplace’s narrower definition of custody does not bar someone under home confinement from enrolling in Marketplace plan or receiving subsidies.⁸ She can use a Marketplace Incarceration SEP which will allow her to join a Marketplace plan as soon as she leaves the state prison. Her SEP begins on the date of her release from the institution (June 30, 2023) and extends for 60 days. After her year of home confinement has ended and she is fully released without supervision (June 30, 2024), her Medicare Incarceration SEP will start but, like Mr. Ng, she is likely to find Medicare Part A premiums too high and will continue to use Marketplace coverage instead.

INDIVIDUAL PREVIOUSLY ENROLLED IN MEDICARE—IMPACT OF PREMIUM GRACE PERIOD

Mr. Lee, age 68, was already enrolled in Medicare Parts A and B when he entered a carceral institution at age 66. His Part B premium had been automatically deducted from his Social Security benefit payment. After incarceration began, his Social Security benefits stopped and so did the automatic payment of his Part B premium. After automatic premium payments stopped, SSA gave Mr. Lee a three-month grace period and then disenrolled him from Part B. He paid no attention since Medicare was not paying for any of his health care. When he returned to the community and his Social Security benefits were reinstated, he was shocked to find that SSA had deducted the three months of Part B premiums during the grace period from his first benefit check.⁹ This deduction is in addition to the regular prospective Part B premium deduction from the Social Security benefit.

PRACTICE TIP

In most cases, advocates working with Medicare-enrolled individuals who are entering incarceration should instruct their clients to contact SSA and affirmatively disenroll from Part B. A prompt voluntary disenrollment will prevent the grace period deductions. Prior to the Incarceration SEP, some individuals with shorter sentences chose to continue payment of their Part B premiums in order to avoid late enrollment penalties when coverage resumed. The Incarceration SEP eliminates late enrollment penalties and thus eliminates most of the potential benefit of continuing Part B enrollment.

INDIVIDUALS WITH RELEASE DATES PRIOR TO JANUARY 1, 2023

Mr. Cruz, 72, was unconditionally released from incarceration on September 12, 2021, before the Incarceration SEP was created. He was unable to enroll in Medicare Part B until the General Enrollment Period in January 2022 and, when he did enroll, he was assessed a lifetime Part B late enrollment premium penalty because he had not enrolled in Part B when he turned 65 and had not started paying premiums, even though he was incarcerated at the time. The new SEP will not give Mr. Cruz any relief from his late enrollment penalties. It only applies to release dates on or after January 1, 2023, and does not offer retroactive relief prior to that date.¹⁰

Ms. Kim, 69, was released from state prison on September 12, 2022, but her conditions of release required her to live in a halfway house. Finally, on February 24, 2023, all conditions of her release ended and she returned to her family residence. Her Incarceration SEP began February 24 and extends for 12 months. She can enroll in Part B at any time in the 12-month period and will not face a late enrollment penalty. Even though she had been living outside of a carceral institution for several months before the January 1, 2023 Incarceration SEP effective date, she has access to the SEP because Medicare considered her to be in custody during that period.

WHAT HAPPENS TO PEOPLE ELIGIBLE FOR MEDICAID?

Leaving incarceration works differently for Medicare-eligible individuals who, upon return to the community, also qualify for Medicaid. First and most importantly, the Medicaid definition of who is released from custody includes almost everyone who leaves a carceral institutional setting. This means that individuals in home confinement, those who reside in a halfway house that allows freedom of movement,¹¹ and those under other forms of non-institutional supervision can use their Medicaid benefits. If their Medicare coverage is still in suspension, they can use Medicaid to pay for hospital, physician and other services. In addition, people who qualify for Medicaid do not need to use the Incarceration SEP to enroll in Medicare because their state Medicaid program will enroll them directly and pay their Part B premium, and sometimes, if needed, their Part A premium as well.

Below are some examples of the interaction of Medicare and Medicaid coverage and issues that advocates may encounter.

MEDICARE-ELIGIBLE INDIVIDUAL WITH MEDICAID ELIGIBILITY

Mr. Broz, 67, finished serving a three-year sentence. Prior to incarceration, he had Medicaid coverage. His state's policy is to suspend Medicaid during the entire period of incarceration, rather than disenroll individuals. One year into his sentence, when Mr. Broz turned 65, his state Medicaid program moved his suspended enrollment in expansion Medicaid to the Medicaid aged and disabled (A&D) group and began paying his Medicare Part B premium. SSA also automatically started his free Medicare Part A coverage. When he returned to the community, with only a very small SSA benefit, he continued to be eligible for Medicare and Medicaid and the state continued to pay his Part B premium. It was easy for him to "turn on" both his Medicare and Medicaid benefits. He does not need the Medicare Incarceration SEP. He does, however, need counseling on how Medicare and Medicaid work together and could benefit from assistance from a SHIP counselor in determining how he will access his Medicare benefits (i.e., choosing among Original Medicare, Part D coverage, and Medicare Advantage options).

Ms. Low, 70, lives in a state that disenrolls Medicaid-eligible individuals after one year of incarceration. She has been in a state carceral institution for ten years and will be serving the last two years of her sentence in the community under home confinement. With her small Social Security retirement benefit and no assets, she qualifies for her state Medicaid program upon release from the institution where she was incarcerated. Even though her right to Medicare services is still suspended because of the conditions of her release from the institution, Medicaid should cover her medical and hospital costs. However, she will be limited to using Medicaid providers. Further, her providers may be confused when they see Medicare "suspended" status for their billing, and she may require assistance explaining to her providers that Medicaid will be responsible.

Mr. Gonzales, 75, is currently in a California state prison and expects to return to the community in two years. He has complex medical conditions, including developing dementia, and also will need home and community-based services to stabilize his health in a community setting. California recently received approval to offer certain pre-release Medicaid services to high need individuals like Mr. Gonzales.¹² Other states have applied for waivers similar to California's, all with the goal of improving care continuity and ensuring better access to needed care immediately upon reentry.¹³ These innovative waivers offer promise for significant positive change and, if states incorporate planning specifically directed to the unique needs of dually eligible individuals, could be a major step in smoothing access for Mr. Gonzales and others like him to the many services necessary to live safely and have their needs met in a community setting.

MORE CHANGES ARE NEEDED TO MAXIMIZE MEDICARE COVERAGE DURING RE-ENTRY

The adoption of the Medicare Incarceration SEP is a very significant and helpful step in easing transitions for older individuals reentering the community but more action is needed.

As discussed in this paper, complexities and barriers persist and those complexities arise primarily from the Medicare regulation that defines "custody" for purpose of suspension of Medicare coverage and access to the Incarceration SEP. The regulation (42 C.F.R. § 411.4(b)) assumes that correctional authorities have responsibility to cover, and will cover, medical expenses during a wide range of non-institutional supervision, an assumption that is inconsistent with actual coverage by corrections authorities. Application of the regulation prevents many older individuals returning to the community from enrolling in Medicare or, even if already enrolled, from accessing Medicare services. This creates severe gaps in coverage, particularly for those who do not qualify for Medicaid upon reentry. Even when individuals qualify for Medicaid coverage, the regulation creates confusion among providers, which can delay care for individuals, and also burdens state Medicaid programs that must pay for services that Medicare should cover. Other policies, such as charging individuals for premiums accrued during a "grace period" while incarcerated also burden individuals trying to get established when returning to the community.

CONCLUSION

The Medicare Incarceration SEP is an important step in improving access to Medicare services for individuals returning to the community. The SEP is less than a year old and the experience of advocates and enrollment assisters is still limited. Justice in Aging is available to provide technical assistance to advocates working with clients to navigate the reentry process and establish stable health care coverage in the community. We also are interested to learn from advocates about any challenges and opportunities they are seeing in implementation. Questions can be sent to info@justiceinaging.org.

ENDNOTES

- 1 The Social Security Program Operations Manual System (POMS) provision discussing the Incarceration SEP is found in the SSA, POMS [HI 00805.386](#).
- 2 *See* 42 C.F.R. § 423.38(a)(3)(iii); CMS Prescription Drug Benefits Manual, Ch. 3, p. 41 at 19.
- 3 For details on SSA data exchange with carceral institutions and how SSA collects data from other sources, *see* SSA POMS [GN 02607.410 et seq.](#)
- 4 SSA, POMS [HI 00805.382.C](#).
- 5 CMS, [Understanding the Health Insurance Marketplace if You're Incarcerated](#), 11959 (Sep. 2021).
- 6 CMS, [Frequently Asked Questions Regarding Medicare and the Marketplace](#), at A.6. and A.9 (Aug. 28, 2014).
- 7 CMS, [Frequently Asked Questions Regarding Medicare and the Marketplace](#), at A.6. , A.8 and A.14 (Aug. 28, 2014).
- 8 CCIIO, [Incarceration and the Marketplace, Frequently Asked Questions](#), Q1 (May 3, 2016).
- 9 In the Final Rule creating the Incarceration SEP, CMS reaffirmed that it would continue this longstanding practice. *See* [87 Fed. Reg. 66,454, 66,464](#) (Nov. 3, 2022).
- 10 In the Final Rule establishing the Incarceration SEP, CMS said specifically that late enrollment penalties would continue. *See* [87 Fed. Reg. 66,454, 66,464](#) (Nov. 3, 2022).
- 11 The full Medicaid guidance on circumstances that require Medicaid suspension is set forth in a [State Medicaid Director, SMD-16007](#) (Apr. 28, 2016).
- 12 California has established a state webpage on its activities in planning and implementation of its waiver, [Justice-Involved Initiative Home \(ca.gov\)](#).
- 13 CMS released guidance through a [State Medicaid Director Letter, SMD 23-0003](#), (Apr. 17, 2023) to states on designing demonstration projects under Section 1115 waiver authority. For an overview of pending state waivers see, KFF, [State Policies Connecting Justice-Involved Populations to Medicaid Coverage and Care](#) (Dec. 17, 2021).