Market Study – Approaches to Increase the Availability of Medical Malpractice for Community-Based Healthcare Providers in Washington State Carceral Settings:

Related to Community-Based Healthcare Providers, Qualified Under the Medicaid 1115 Waiver, Providing Transitional Services to Individuals in the Last 90 Days of their Incarceration Per the MTP 2.0 Initiative

Presentation to Work Group Members Prepared at the Request of the Washington State Office of the Insurance Commissioner

Prepared by Davies Actuarial, Audit & Consulting, Inc. with support from Alvarez & Marsal Financial Services Industry Group, LLC

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Davies

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Introduction to the Presenters (or "Authors")

The Washington Office of Insurance Commissioner ("OIC") Retained Davies Actuarial, Audit & Consulting, Inc. ("Davies") to conduct this market study. Alvarez & Marsal Financial Services Industry Group, LLC ("A&M") assisted Davies on the project.

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Presentation Structure

- Genesis and Purpose of Study
- Background Information
- Review of State's Commitments to Facilitating Safe Transitions of Care for Incarcerated Individuals Under MTP 2.0
- Analysis of Barriers to Accessing Liability Coverage for Community-Based Health Care Providers (CHPs)
- Actuarial Analysis
- Policy Options for Legislative Consideration
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Genesis and Purpose of Study

Genesis and Purpose of this Study – MTP 2.0, Reentry, and CHPs

In June 2023, the Centers for Medicare & Medicaid Services ("CMS") approved an extension of Washington State's Section 1115 waiver, known as the "**Medicaid Transformation Project 2.0**" or "**MTP 2.0**."

Under MTP 2.0, **Medicaid can reimburse Community Healthcare Providers ("CHPs") for Transitional Services they provide to incarcerated individuals** during their last 90 days of incarceration.

According to research, **when incarcerated individuals have an established relationship with CHPs prior to release, they are more likely to continue their treatment upon community re-entry**. This leads to fewer overdoses, reduced recidivism, and **substantial societal and individual benefits**.

Governor Jay Inslee expressed support for Medicaid 1115 waiver reentry provisions in **Executive Order 24-03**.

Genesis and Purpose of this Study – Medical Malpractice Insurance

CHPs cannot acquire Medical Malpractice insurance for services rendered in carceral settings and are therefore unable to provide transitional services.

Medical malpractice insurance is triggered in the event of an error or omission by a healthcare practitioner during their work:

- Compensates the injured party
- Provides financial protection for the practitioner

This insurance is necessary for CHPs to provide services in carceral settings.

Genesis and Purpose of this Study – Legislative Directive

In its 2024 supplemental operating budget (ESSB 5950), the Washington State Legislature ("Legislature") requested the Washington Office of Insurance Commissioner ("OIC") to study "how to increase the availability of health care malpractice liability coverage or other liability protection options for community-based health care providers who deliver transition of care services to incarcerated individuals." The Legislature stated that the study must include:

(i) A review of the state's commitments to facilitating safe transitions of care for incarcerated individuals through medicaid coverage of health services under the 2023 medicaid transformation waiver;
(ii) An analysis of the barriers to accessing liability coverage for community-based health care providers on the private market;
(iii) An actuarial analysis of the potential risk to be incurred by providing health care malpractice liability coverage for transition of care services to individuals who are incarcerated and near release; and
(iv) Policy options and recommendations, if any, for consideration by the Legislature regarding provision of or increasing the availability of health care malpractice liability coverage or other liability protection options for community-based health care providers delivering these services.

Background Information

Background – Authors' Approach to Gathering Information

- Interviews with Market Participants
  -Carceral healthcare experts
  -Correctional experts
  -Community Healthcare Providers
  -Insurance Companies, Brokers, and Third-Party Administrators
  -Risk Managers for State, Counties, and Cities
  -Health Care Authority
- Attend work group meetings
- Research the MTP 2.0 initiative, the benefits of CHP involvement in carceral settings, current heterogeneous structures for providing healthcare services in a variety of carceral settings, medical malpractice environment in Washington State and nationally, information specific to carceral settings.
- Review and analyze limited data available
- Issue (with OIC) voluntary survey to jails regarding their current structure for the provision of healthcare services.
- Gathered publicly available data regarding the Medical Malpractice environment in Washington State and nationally, as well as information specific to carceral settings.

Background – Carceral Settings in Washington State

Includes state prisons and county, city, and tribal jails

11 state prisons –

- Administered by Department of Corrections ("DOC")
- For individuals who have committed a felony with a length of stay of at least 1 year and 1 day

36 county jails, 18 city or tribal jails, 2 multi-jurisdictional jails

- Administered by counties, cities, and tribes
- For individuals who have committed misdemeanors, have committed a felony with a length of stay of a year or less, or are awaiting arraignment or other placement.

All must ensure the incarcerated individuals' Eighth Amendment rights. "Deliberate indifference" to an individual's medical needs is "cruel and unusual punishment" and is a violation of the Eighth Amendment.

Background –
Carceral Med Mal Insurance is Largely Not Regulated by the OIC

State prisons are self-insured by the Office of Risk Management, an office of the Washington Department of Enterprise Services ("DES") – not regulated by OIC

County, city, and tribal jails are frequently self-insured or insure through risk pools – not regulated by OIC

Jails may require third-party providers to present evidence of medical malpractice insurance

- If provided by a non-admitted carrier, not regulated by OIC

Background – FQHCs, FTCA, and HRSA PIN

Federally Qualified Health Centers ("FQHCs") are federally funded nonprofit health centers or clinics (including some CHPs) that provide services to underserved populations. FQHCs receive Medicaid reimbursement for eligible patients, other federal funding for non-eligible patients, and malpractice coverage under the Federal Tort Claims Act ("FTCA"). Under FTCA, the federal government defends FQHCs as if they were federal employees for errors and omissions in the course of their work.

Currently, work in carceral settings is not covered under an FQHC's "scope of project."

In April 2024, the US Dept of Health and Human Services Health Resources and Services Administration ("HRSA") issued a draft Policy Information Notice ("PIN") identifying a set of transitional services in carceral settings that would be eligible to include in an FQHC's "scope of project" if the PIN becomes a published rule. If that is the case and an FQHC's application is accepted, transitional work in a carceral setting could be covered under the FTCA.

Although this would be helpful, FQHCs are concerned that they will still be unable to provide services in carceral settings unless they are able to obtain additional "wraparound" medical malpractice coverage.

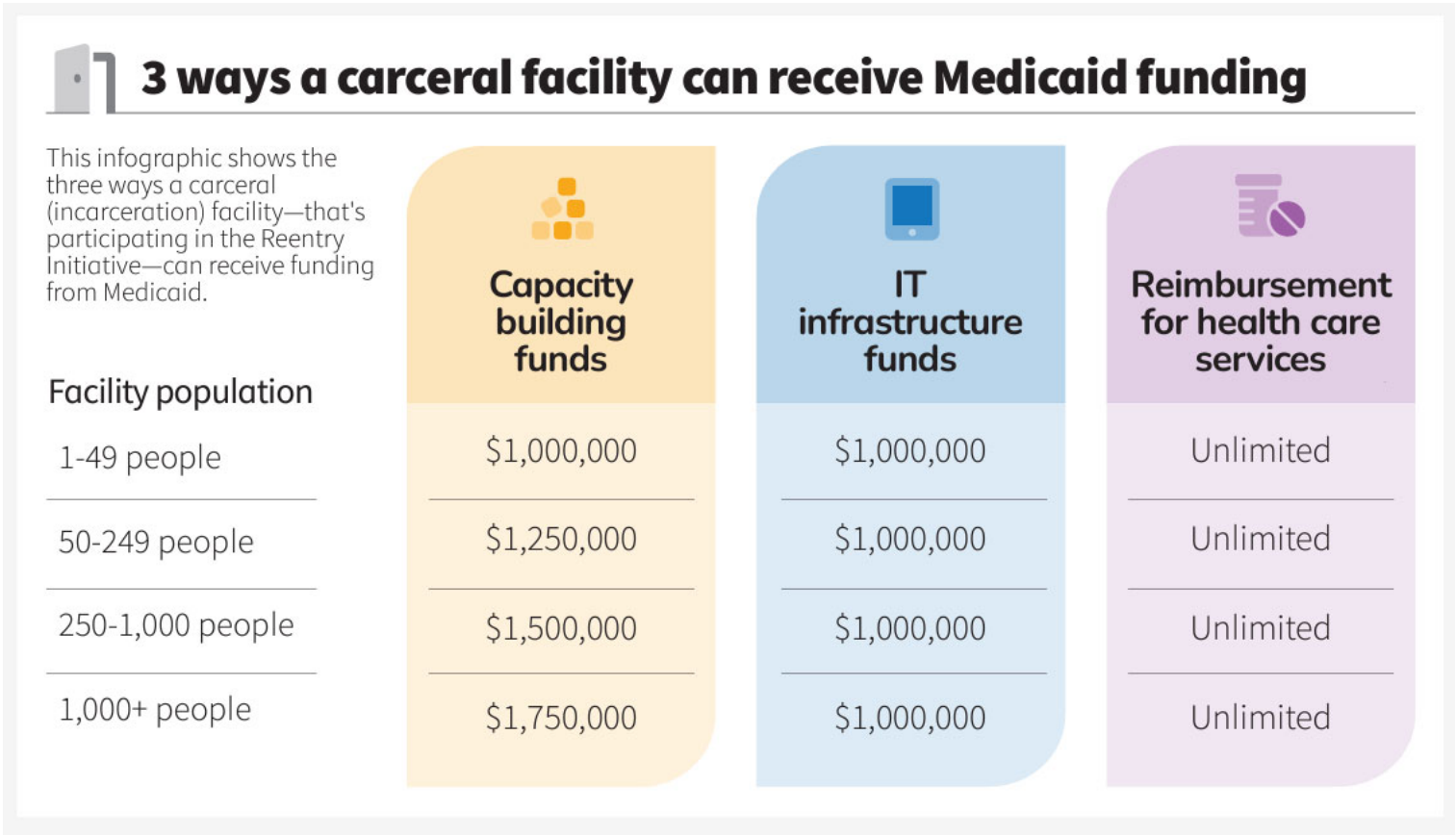
State's Commitments to Facilitating Safe Transitions of Care for Incarcerated Individuals Under MTP 2.0

MTP 2.0 - Transitional Services

- Under the Reentry Initiative of MTP 2.0, the Washington Health Care Authority ("HCA") will fund certain healthcare services ("transitional services") provided to Apple Health-eligible adults and youth in carceral settings up to 90 days prior to release. These services are eligible for Medicaid reimbursement.

- These services are more limited than general carceral healthcare, and include services such as:
  - case management
  - prescribing medications for alcohol and opioid use disorder
  - providing 30-day supply of medications and medical supplies at release
  - providing medications during the pre-release period
  - providing lab and radiology services
  - services by community health workers with lived experiences
  - physical and behavioral clinical consultations

MTP 2.0 - Funding



Analysis of Barriers to Accessing Liability Coverage for Community-Based Health Care Providers (CHPs)

Barriers to Liability Coverage

The barriers to liability coverage in the private insurance market in carceral settings are **NOT** exclusive to CHPs.

The barriers relate to the general reluctance of the private market to take on Medical Malpractice exposure in carceral settings.

Barriers to Liability Coverage
Background – Healthcare Mechanisms – Jails vs Prisons

Key differences between the populations and provision of healthcare in prisons and jails that affect the liability exposure in these settings include:

Metric	County, City and Tribal Jails	State Prisons
Length of Stay	▪ Few remain incarcerated for over a year. ▪ Many inmates in a jail are kept for only a few days ▪ Average length of stay in most is less than 30 days.	Almost all individuals incarcerated within the state prison system have lengths of stay over a year, with many staying for many years
Knowledge about incarcerated individuals' pre-existing conditions upon intake	▪ Handle intake of unknown individuals. ▪ Individuals may enter under the influence of drugs, with untreated mental health problems, or with another undiagnosed medical condition	Population typically enters either from a jail or from another prison. Generally, more is known about a prison inmate's medical history compared to a jail inmate
Entity providing healthcare in the carceral setting	▪ 85% of survey respondents use 3rd party healthcare providers on-site in some fashion ▪ In rural areas or when a procedure cannot be done in on site, they may transport to local doctors or facilities ▪ In some cases, a healthcare provider visits the jail on a regular schedule (perhaps not daily) and emergencies are sent to a local emergency room	Healthcare is provided by state employees and contracted community providers

Barriers to Liability Coverage
Background – Insurance and Types of Claims– Jails vs Prisons

There are key differences between the way that medical malpractice insurance is procured, and the types of malpractice claims, between prisons and jails:

Metric	County, City and Tribal Jails	State Prisons
The way medical malpractice is insured	▪ Many providers are required by the county or municipality to demonstrate that they have their own medical malpractice insurance ▪ Large third-party carceral healthcare providers effectively self-insure their risk	▪ The Dept of Corrections ("DOC") uses a standard insurance and indemnification agreement ▪ The DOC self-insures the liability of its employees and insures and indemnifies 3rd party contractors through the State of Washington Self-Insurance Liability account
Typical medical malpractice claim types	▪ Overdoses, especially from opioids ingested shortly before or upon arrival ▪ Other conditions mistaken for detox symptoms ▪ Suicides after an incarcerated individual has been given a very long sentence, and before they are transferred to a prison. ▪ Individuals with mental health issues who are in jail for a longer than average stay. They may refuse medications and eventually cause harm to themselves or others	▪ Failure to diagnose cancer ▪ Delayed cancer care ▪ Failure in diabetes management ▪ Failure in sepsis management ▪ Co-morbidity issues ▪ Hybrid claims where an individual is injured through in-prison violence and then is dissatisfied with the subsequent medical care

Barriers to Liability Coverage
Insurer Concerns

Entanglement of Medical Malpractice with Eighth Amendment claims impacts:

- Time to close a claim
- Attorneys' fees – Average of $240k per claim as opposed to statewide average of $89k[1]
- Number of claims
- Coordination of Defense

Existing Medical Complications/Lack of Continuity of Care

Location

- Security risks may impede standard of care
- Equipment
- Additional risks of telemedicine

Reinsurance Exclusions

Financial Strength Rating

[1] WA OIC 2024 Medical Malpractice Annual Report

Actuarial Analysis

Actuarial Analysis

A repository of sufficiently large insurance-type exposure and claim data that would be necessary to make an actuarial projection for this report was **unavailable** for review

Although some confidential data is gathered for the WA OIC Medical Malpractice Annual Report, the information in its current form would not be sufficient for the scope of this project:

- Difficult to ascertain completeness of data
- Claims only, no exposures
- Key elements of information needed for this study, such as facility and specialty, not captured

One policy option involves collection of data so that future studies can be conducted.

Metrics

DES (state prisons) and one risk pool (county jails) generously provided us information related to historical closed claims.

Data Limitations:

- **Number of claims is not sufficient to be sure that they are representative of exposure**
- Jail data did not include liability/payouts from third party providers
- Claims may not have been related exclusively to medical malpractice; other claims for which medical malpractice was a non-primary cause may not have been included in the listing
- Attorneys' fees were captured for external attorneys, not state or risk pool employees

Based on our review of the data, the following metrics are provided for informational purposes only – they are not actuarially credible:

- Frequency of jail claims (# claims per annual populated bed) > prison claims (about 12x)
- Loss cost (average annual payment per populated bed) of jails > prisons (about 4x)

Policy Options

Policy Option 1 – Enhanced Data Collection

Description: Support the future development of liability insurance mechanisms for CHPs providing transitional services in carceral settings by **supplementing future data that is collected for the WA OIC confidential Annual Medical Malpractice Report.** (Note that this option could assist in any future carceral studies).

This policy option may be a necessary precursor to other policy options.

Rationale: The insurance mechanisms related to insurance and self-insurance for jail medical liability are disparate. There is no central repository of insurance type data, including exposures and other key claim information. Actuarial projections cannot be performed without key data elements.

Detail: The development of the modified data requirements should be performed in close coordination with DES and risk pools that self-insure this liability as well as insurers and experts in carceral healthcare. However, based on our study, we would anticipate that *minimum* additional data that would be required would include the information below in annual reports made by each insurer and self-insured to cover all jails and prisons:

Exposures:

- Identification of facility
- Facility size
- Provider specialties covered and services provided
- Policy deductibles and limits
- Premium amount if premium is charged

Losses:

- Identification of facility for each claim reported
- Identification of specialties/medical services involved with claim
- Loss report for each facility, even if no claims are made

Policy Option 1 – Enhanced Data Collection (Cont.)

Challenges:

- Separation of true medical malpractice losses from Eighth Amendment losses
- Data for this reporting is confidential. The collection of this data would make future actuarial studies accessible to the OIC and the Legislature. To encourage greater market involvement, the OIC may wish to enhance its annual medical malpractice report to include more specific reporting regarding carceral setting claims that does not undermine the confidentiality of the data.
- Which parties should report?
  - Insurance and self-insurance mechanisms may be best-equipped to report insurance-type data; however, RRGs and non-admitted carriers are not under OIC regulation.
  - Carceral settings that are invested in this project may be motivated to provide information and the Legislature can require the provision of this information; however, as non-insurance-entities, it may be difficult for them to provide the insurance-type information requested.
  - If information is gathered from multiple parties, the repository will need to include sufficient data to identify records from multiple parties on the same claim

Policy Option 2 – New Risk Pool

Description: Increase availability of insurance by creating a **new risk pool or other insurance mechanism that provides medical liability insurance for transitional services and then reinsures to the Lloyds market**. The state could subsidize the cost of insurance if the risk pool charges less than actuarially justified premiums for the coverage. For this initiative, a program manager could design and price the program in partnership with Lloyds.

Rationale: Establishing a risk pool that specializes in this market will resolve the insurance availability problem.

Risks ..... and Potential Mitigants:

▪ Insufficient data to price risk	Work with a specialized program manager. The program manager in combination with Lloyd's may have sufficient data
▪ Reinsurers may not want to participate	Recruit a program manager that has strong relationships with specialty reinsurers
▪ Risk pool may not manage claims effectively	Recruit an experienced claim management team or outsource claim management to a TPA
▪ Claim costs may be high	Set a policy maximum of $1M per claim (note – this may not be acceptable to some jurisdictions)

Dependencies:

- Initial capitalization from the state
- Ongoing funding from the state if the premium rates are lower than actuarially sound rates
- Program manager and reinsurer will determine the underwriting criteria which may differ from what the state had initially envisioned

Policy Option 3 – Extending State Tort Claims Act

Description: Increase availability of insurance by **extending the state tort claims act ("STCA") to CHPs** that meet certain criteria established by the state– **including certification by a state agency**. The CHPs would then be deemed employees of the state, **for liability protections only**, when providing transitional services.

Rationale: Extending the act to cover CHPs in their provision of transitional services in carceral settings would offer the same level of defense and indemnification to CHPs that state government employees currently receive.

Considerations by Setting:

1. **State Prisons** - This policy option would be very similar to the existing coverage by the STCA of many DOC employees and would allow CHPs to practice in prisons.
2. **County and City Jails** - This policy option would create a new relationship between the state and the counties and cities regarding this exposure. However, it comes with several challenges:
   - Difficulty for the DES-engaged actuaries to estimate the initial premiums
   - Determination whether the state and its attorneys are responsible for investigation and defense of the claim, or whether the county or city should continue to engage counsel to defend the claim
   - Insufficient county and city budgets if some portion of cost passed back to them
   - State denies STCA treatment, the liability would stay with the CHP or county or city jail
3. **Tribal Jails** - It is unclear whether the STCA can be applied to Transitional Services providers in tribal jails due to the tribes' sovereign status.

Policy Option 4 – Negligence Standards

Description: Reduce cost by **implementing different negligence standards** for transitional services provided by CHPs in some circumstances, so that they can only be held liable if they display gross negligence or bad faith.

Rationale: This recommendation envisions a situation in which certain qualified CHPs can be sued only for gross negligence or bad faith, as long as they have (i) become certified by the state and (ii) demonstrate compliance with state-determined protocols for the provision of transitional services.

Dependencies: Developing statewide standards for the provision of healthcare in carceral settings is a pre-requisite to the state certification process.

Limitations: This policy option would not reduce the risk of large verdicts in cases that involve grossly negligent acts and omissions or wanton misconduct. Additionally, this option does not immediately provide insurance to CHPs and there is no guarantee that the private market will insure this exposure even with lower negligence standards.

Risks: The Supreme Court has interpreted the Eighth Amendment of the U.S. Constitution, which prohibits cruel and unusual punishment, to include the right to adequate medical care in carceral settings. Implementing a different negligence standard for transitional services by CHPs does not change this right and may simply shift the medical liability risk from the CHP to the jail or prison. Also, a different negligence standard may create a situation in which an injured party cannot be compensated for their injury.

Precedent: In 1982, the Supreme Court of the United States held that federal government officials are entitled to Qualified Immunity, which provides immunity from being sued rather than a mere defense to liability. Washington State has also enacted different negligence standards in certain situations (e.g. certain first responders to behavioral health crises in the course of their work, certified burn managers).

Policy Option 5 – Combination Option

Description: Combine policy options to integrate benefits of several options.

Example:

The Legislature may consider the combination of the following options:

1. Initiate Policy Option #1 (enhanced data collection) to begin gathering credible data about medical malpractice claims in carceral settings as they relate to transitional services.
2. An agency of the state creates certification requirements for CHP best practices in providing transitional care in carceral settings (part of Policy Option #3). These requirements would be developed by a team of stakeholders with expertise in correctional settings, medicine, and law. The goal of these certification requirements would be to improve healthcare and ultimately reduce claims.
3. If desired, different negligence standards could be put in place for certified CHPs (Policy Option #4), further reducing potential liability.
4. Some funding/insurance mechanism could be made available for certified CHPs, which may include:
    a. A risk pool (Policy Option #2) OR
    b. STCA (Policy Option #3)

Appendix – Additional Detail on Jail Liability

Appendix – Jail Liability: Challenges in Procuring Carceral Healthcare and Liability Insurance

- Many **jails have substantive difficulties in finding healthcare providers**, in large part because of the unavailability of medical malpractice insurance for healthcare provided in carceral settings
- Examples of issues noted by interview and survey respondents include:
  - Two interviewees noted that five to ten years ago, their jail healthcare RFPs had many respondents, but recently they have only **a single RFP respondent**
  - One respondent noted that a previous healthcare **provider went out of business** due to the cost of insurance
  - It is difficult to choose the most qualified medical provider when only one provider will respond because of challenges in obtaining medical malpractice insurance
  - Healthcare providers have been **dropped from insurance coverage** when taking jail contracts, or have to pay premiums for providing services in the carceral setting that are higher than they can afford
- Based on interviews, we understand that frequently **large third-party carceral healthcare providers are essentially self-insuring their risk** by using extremely large deductibles or by the insurance company ceding back the losses to a captive company of the healthcare provider. Local providers cannot obtain the insurance needed to meet RFP requirements.

Appendix – Jail Liability: Suggestions from Jail Risk Managers

- Reduce cost by replacing joint and several liability with proportional liability
  - Under joint and several liability, one party may be financially responsible for a large portion of the damages if the second party cannot pay, regardless of the jury's findings on percent culpability
- Reduce cost by creating regional jails managed and funded by the state
  - Rural counties may not have the ability to provide the healthcare required and insure liability risks
  - Logistical issues which would need to be addressed would include (but are not limited to):
    - shuttle transportation to regional jails so that officers need not leave their post
    - virtual arraignments
- Provide state subsidization of initiatives to mitigate medical risks to incarcerated individuals and improve medical services:
  - Develop statewide healthcare staffing ratio guidelines and provide increased state funding to jails to meet those guidelines
  - Subsidize the cost of medical devices and related services such as:
    - Body scanners and drug dogs to prevent people entering jails from bringing drugs on their person (sometimes hidden in body cavities)
    - Wristwatch device to monitor vital signs (would need many for larger jails)

Q&A