

Temporary Prohibition of Administrative Overpayment Recoveries

May 17th, 2023

Temporary Prohibition of Administrative Recoveries

Information/Background

On October 17, 2022, Centers for Medicare and Medicaid Services (“CMS”) issued a Frequently Asked Question (“FAQ”) document entitled "[COVID 19-PHE Unwinding FAQs](#).” FAQ number 31 (“FAQ 31”) of this document says in part that: “States cannot recover or recoup the cost of services from a beneficiary, even if they have been found after an administrative or criminal proceeding to have committed Medicaid beneficiary fraud or abuse.”

CMS FAQ

Q31: Can a state recover or recoup the cost of services from a beneficiary who committed Medicaid fraud or abuse?

A: No. States cannot recover or recoup the cost of services from a beneficiary, even if they have been found after an administrative or criminal proceeding to have committed Medicaid beneficiary fraud or abuse. States must continue furnishing Medicaid to all beneficiaries until they are determined ineligible per 42 CFR § 435.930(b), and such recovery or recoupment would effectively represent a retroactive termination of Medicaid eligibility, which would violate a beneficiary's due process rights under section 1902(a)(3) of the Act, 42 CFR part 431 subpart E, and relevant Supreme Court due process jurisprudence (see *Goldberg v. Kelly*, 397 U.S. 254 (1970) and its progeny).

The only circumstances under which a state may recover funds from a beneficiary are those explicitly provided for in federal statute and regulation. These include: (1) liens placed on a beneficiary's property when a court judgment finds that Medicaid benefits were improperly paid under section 1917(a) of the Act and 42 CFR § 433.36(g)(1); (2) estate recovery proceedings required under section 1917(b)(1) of the Act; and (3) benefits provided pending the outcome of a fair hearing under 42 CFR § 431.230 (except that benefits provided pending the outcome of a fair hearing during the PHE may not be recouped, and states that do so risk losing enhanced match claimed pursuant to section 6008 of the FFCRA; see footnote 9 in the March 2022 SHO Letter # 22-001).



Operational Memo

Information/Temporary Prohibition on Administrative Overpayment Recoveries from Members

The Department has had several conversations with CMS representatives regarding FAQ 31 and was told by CMS it is not limited to those Health First Colorado/Medicaid members who maintained eligibility due to the Public Health Emergency (PHE) period.

The Department has requested, and is still awaiting, further clarification and guidance from CMS related to FAQ 31. However, in consideration of what the Department has been told verbally by CMS thus far, effective May 11, 2023, *all counties must temporarily cease all overpayment administrative recovery actions against Health First Colorado/Medicaid members.*

This temporary prohibition means that no overpayment recovery from a current or past Health First Colorado/Medicaid member may proceed outside of the criminal court system, whether that be by formal administrative process, county demand or request, a new or ongoing payment plan, or by any other non-criminal court means.

Operational Memo

Purpose and Audience

The purpose of the Operational Memo is to inform county departments of human/social services that in light of recent guidance issued by the Centers for Medicare and Medicaid Services (“CMS”), effective May 11, 2023, the Department of Health Care Policy and Financing (“the Department”) is issuing a temporary prohibition on the administrative recovery of all Health First Colorado/Medicaid overpayments from current and former Health First Colorado/Medicaid members.

This Operational Memo will be available to all county staff, including fraud investigators involved with investigations and recoveries, to advise them of the CMS guidance received by the Department, and to provide specific instructions regarding administrative and criminal overpayment recoveries from members.

Operational Memo

Definitions

Administrative recovery - any recovery of medical assistance overpayments that is not court ordered restitution, ordered by a judge in a criminal court proceeding.

Criminal recovery - recovery of medical assistance overpayments through criminal restitution ordered by a criminal court judge.

Overpayments - any medical assistance payments, including capitation payments, paid on behalf of a recipient who was not lawfully entitled to receive the benefits for which the payments were made.

Operational Memo

Information/Further Guidance

All administrative, non-criminal court recoveries are prohibited from May 11, 2023, until such time as the Department issues updated guidance in the form of an Operational Memo.

This temporary prohibition on administrative recoveries may be subsequently revised, removed, or made permanent, pending further CMS guidance.

Court-ordered criminal recoveries from members may proceed as normal at the present time.

Operational Memo

Information/Further Guidance

While the prohibition on all administrative overpayment recoveries is effective May 11, 2023, the date on which the PHE is scheduled to officially end, Department Policy Memo PM 21-002, issued February 2, 2021, with an effective date of March 18, 2020 ("[HCPF PM 21-002](#)"), currently remains in effect and will remain in effect even after the PHE is officially over.

HCPF PM 21-002 will continue to prohibit overpayment recoveries from members for any period of ineligibility that falls within the PHE period. Health First Colorado/Medicaid members will not be responsible for medical assistance payments made on their behalf from the beginning of the COVID-19 health crisis through the end, as measured by the PHE period of March 18, 2020 through May 11, 2023.

After the PHE has officially ended, counties still may not establish overpayment claims which occurred during the PHE period, no matter the reason they occurred.

Fraud Investigations

Counties are required to continue to investigate fraud referrals.

- If upon investigation it is determined that the member is currently ineligible, the member's eligibility can be terminated.
- If the member was previously ineligible and now is eligible for benefits, their eligibility should be based on current eligibility requirements

While FAQ 31 also prohibits criminal recoveries from Health First Colorado/Medicaid members, based on the Department's conversations with CMS, there is no cause at this time for the Department to prohibit the recovery of payments ordered by a criminal court.

Monitoring Compliance

The Department staff responsible for county oversight activities may review overpayment recovery data during the county's Management Evaluation or during other necessary Desk Reviews.

Findings of non-compliance may result in the issuance of a Management Decision Letter (MDL). The MDL acts as a non-compliance notice and will require the county to address the root cause of non-compliance and correct internal procedures to prevent future non-compliance.

Q & A

Question: Our county has received civil court judgments which means we can take cases that are not paying to small claims court for the court to order repayment. Are these collections okay as this is not a criminal court?

Answer: No, this would still constitute an administrative recovery, which is prohibited. The only court order relevant is within a criminal proceeding, specifically criminal restitution ordered by a criminal court judge.

Q & A

Question: Are Intentional Program Violation (IPV) waivers signed by the client allowable as an agreement for repayments?

Answer: No. Intentional Program Violation (IPV) waivers do not exist for Medicaid. IPV waivers exist for SNAP.

Fraud referrals must continue to be investigated. You can still disenroll a member if you determine a member is currently ineligible. However, if a client later applies for Medicaid and is eligible for Medicaid, the client needs to be enrolled. There is no permanent disqualification for Medicaid.

Q & A

Question: Does this include stopping collections on claims established before the PHE?

Answer: Counties must pause any and all Medicaid collections that are not ordered in a criminal court-ordered restitution, including those established before the PHE.



Q & A

Question: What about established payment plans?

Answer: After the effective date of this Memo, no payments may be accepted from members, voluntary or otherwise. Even if a member was previously paying on a payment plan, the effective date of the Memo will prohibit accepting any further payments.

No payments of any kind, voluntary or otherwise, may be collected from members outside of criminal restitution ordered by a criminal court judge.



Q & A

Question: Are we to terminate or cancel all pre-pandemic administrative Medicaid claims or are we to just stop/pause collections on those claims?

Answer: There is not currently a requirement to terminate or cancel claims, but no administrative recovery may be pursued.

Q & A

Questions - Refunds

- It is our understanding that counties only need to refund payments for administrative Medicaid claims received during the pandemic period. Is that correct?
- Are we going to have to refund payments made on pre-pandemic administrative Medicaid claims that were established and collected upon?
- When we collect on a Medicaid claim, we send the money to the State. If the county refunds the money to the client, does the State refund that money to the county?
- What happens to the retention money the county received?
- Is CMS going to refund the State for the federal portion of the incentive dollars they collected?

Q & A

Answer - Refunds: HCPF has requested from CMS, but not received, guidance regarding any potential refunds. Under this Memo, all administrative recovery of overpayments must cease, but no refunds should be given to members at this time.

Further, no county repayment of past county-retained overpayment recovery incentives should be paid back to HCPF at this time, and no overpayment recovery refund dollars will be sent to the counties at this time.

Until such time as CMS issues further guidance, no action should be taken regarding previously collected overpayments.

Q & A

Question: What if a member was never eligible for Medicaid?

Answer: If a member received Medicaid benefits and was later found to be not eligible for the benefits previously received (i.e. the member was never eligible), no administrative recovery of the Medicaid overpayment is permissible. Recovery from the member would only be possible through a criminal court proceeding and criminal restitution ordered by the criminal court judge. If the member is not currently eligible, the member can be terminated in accordance with eligibility rules.



Q & A

Question: Do we stop doing investigations?

Answer: Counties are required to continue to investigate fraud referrals. If upon investigation it is determined that the member is currently ineligible, the member's eligibility can be terminated.

If the member was previously ineligible and now is eligible for benefits, their eligibility should be based on current eligibility requirements.

Q & A

Question: What constitutes criminal versus administrative recoveries?

Answer: Administrative recoveries are essentially any recoveries that take place outside of a criminal court proceeding. Administrative recoveries are prohibited by FAQ31.

Criminal recovery is criminal restitution ordered by a criminal court judge in a criminal court proceeding. Criminal court restitution recoveries are allowed to continue under FAQ31.

Q & A

Question: We should still close cases that are ineligible, right?

Answer: If upon investigation it is determined that the client is currently ineligible, the member's eligibility can be terminated. If the member was previously ineligible and now is eligible for benefits their eligibility should be based on current eligibility requirements.

Q & A

Question: Is a ruling from the Administrative Law Judge (ALJ) considered criminal?

Answer: ALJ is not a criminal court and would not fall under the criminal restitution collections.

Q & A

Question: Will eligibility partners be required to continue to complete the annual fraud report?

Answer: Yes. The annual Improving Medicaid Fraud Prosecution Report is required by Colorado statute: C.R.S. § 25.5-1-115.5 and is compiled with self-reported data from all 64 counties; this report also tracks terminations and criminal court prosecution data.



Q & A

Question: CBMS automatically sends out overpayment notice and repayment agreements when a claim is established. How will this be suppressed?

Answer: CBMS functionality is in the process of being reviewed. Any changes to the system will take time. The Department will provide guidance in the HCPF FAQ.



Q & A

Question: Does county noticing need to be sent to members when their ongoing payment plans are paused?

Answer: Yes. For members with ongoing payment plans, counties will no longer be allowed to accept payments as of May 11, 2023. The Department has approved noticing which is being shared with counties.

Q & A

Question: If counties wish to pursue criminal recoveries, what actions can they take?

Answer: Criminal actions against Medicaid members are up to the discretion of county district attorneys. Meeting with your county DA can clarify their expectations and requirements for these types of cases. A meeting would also provide a good opportunity to update your DA on this new guidance which removes the administrative remedy for Medicaid overpayment cases.



Closing Remarks

Reminder that this is a temporary prohibition on administrative recoveries which may be subsequently made permanent, amended, or revoked, pending additional CMS guidance

We are told that formal written guidance from CMS is in progress

The temporary prohibition is a proactive approach to ensure compliance with existing CMS guidance



Questions?

Contact Info

Submit your question on our
County Relations Webform or
email us!

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