

NUMBER

#23-19-01

DATE

June 1, 2023

OF INTEREST TO

County Directors

Tribal Chairpersons and Tribal
Health Directors

Social Services Supervisors and
Staff

Financial Assistance Supervisors
and Workers

Collection Supervisors and
Workers

Fiscal Supervisors and Staff

County Attorneys

Fraud Investigators

ACTION/DUE DATE

Please read information and
prepare for implementation

EXPIRATION DATE

June 1, 2025

DHS Revises Minnesota Health Care Programs Policy for Enrollee Overpayments

TOPIC

Revised Minnesota Health Care Programs (MHCP) policy for enrollee overpayments following federal guidance about the unwinding period and a federal waiver of fair hearing requirements

PURPOSE

To revise MHCP policy for enrollee overpayments

CONTACT

Counties and tribes should send questions about MHCP enrollee overpayments to MN.MHCPenrolleeoverpayments.DHS@state.mn.us via SIR Webmail.

SIGNED



Julie Marquardt
Interim Assistant Commissioner/State Medicaid Director
Health Care Administration

TERMINOLOGY NOTICE

The terminology used to describe people we serve has changed over time. The Minnesota Department of Human Services (DHS) supports the use of "People First" language.

I. Overview

This bulletin revises MHCP policy for enrollee overpayments following guidance published by the Centers for Medicare & Medicaid Services (CMS) about the COVID-19 public health emergency (PHE) unwinding and a waiver approved by CMS for the unwinding. There are three directives:

1. Stop assessing and recovering MHCP overpayments established by an agency finding of enrollee error. This practice is permanently discontinued.
2. Until March 1, 2025, do not assess and recover MHCP benefits overpaid during the course of an enrollee's administrative appeal of an agency's eligibility decision. Before March 1, 2025, an enrollee who continues to receive benefits during an appeal, and who eventually loses the appeal when the agency's eligibility decision is upheld by the human services judge is not subject to an overpayment.
3. Continue to assess and recover MHCP overpayments established by a criminal or civil court judgment finding that an enrollee's Medical Assistance (MA) or MinnesotaCare coverage was improperly paid because of the enrollee's or a representative's actions.

These three directives apply to three different types of enrollee overpayment. The remainder of this bulletin explains each of the three types of enrollee overpayment discussed in these directives, the events causing these directives, and actions you should take to implement these directives.

II. Bulletin Definitions

Agency finding of enrollee error: A finding by DHS, or by a county or tribe, that an MHCP enrollee's or a representative's error in providing eligibility information caused the enrollee to receive MHCP benefits that the enrollee was not entitled to before a notice of that enrollee's ineligibility for those benefits is sent.

Administrative appeal: An appeal for a fair hearing filed with the Appeals Division at DHS, which is in Minnesota's executive branch. On behalf of the DHS commissioner, chief human services judges issue orders for administrative appeals filed with DHS.

Court judgment: A decision by a court of law that tells a person to do something. Criminal and civil law courts in the federal and state judicial branch issue court judgments. Under MHCP enrollee overpayment policy, a "court judgment" is not an order by a DHS chief human services judge on behalf of the DHS commissioner.¹

¹ Compare the court judgment provisions in 42 U.S.C. § 1396p(a)(1)(A) and 42 C.F.R. § 433.36(g)(1) with the fair hearing provisions of 42 U.S.C. § 1396a(a)(3) and 42 C.F.R. §§ 431.200–431.250. Human services judges at DHS conduct fair hearings required by federal law and regulation for the MA and MinnesotaCare programs. A fair hearing decision is not a court judgment under 42 U.S.C. § 1396p(a)(1)(A). This interpretation comports with informal guidance provided by CMS to DHS.

III. Background

A. Past policy

Under past MHCP policy, an enrollee overpayment occurred when an MHCP enrollee received more MHCP benefits than they were entitled to because of fraud, theft, abuse, or error on the part of the enrollee.

1. Overpayment because of fraud, theft, or abuse (court judgment)

An overpayment of MHCP benefits to an enrollee due to fraud, theft or abuse is generally established by a court judgment finding that an enrollee's MA or MinnesotaCare coverage was improperly paid. This happens when an enrollee is convicted of fraud and a court orders restitution for that overpayment of coverage. It can also happen after a civil or criminal court judgment finds MA or MinnesotaCare coverage was improperly paid to an enrollee because of the enrollee's or a representative's actions, with or without a finding that this person committed fraud.

2. Overpayment as a result of enrollee error

"Enrollee error" was distinct from the other, more intentional, bases of overpayment resulting from fraud, theft, and abuse. MHCP policy stated there were two different grounds on which an overpayment resulting from enrollee error could be assessed: (1) an agency finding of enrollee error and (2) an administrative appeal decision based on enrollee error.

a. Agency finding of enrollee error

An "agency finding based on enrollee error" generally meant overpayment for a span of MHCP eligibility that an enrollee should not have received before an agency sent notice to the enrollee of that enrollee's ineligibility. For example, if during an eligibility span, an MA enrollee had an increase of income that made the enrollee ineligible for the MA program, but the enrollee failed to report it, and the agency discovered the discrepancy three months after that, then there was an overpayment for what DHS paid for those three months of MA eligibility. As long as there was no fraud, theft or abuse established (no court judgment finding improper payment) and the agency itself was not in error, then the overpayment was attributed to an agency finding of enrollee error – commonly the result of the enrollee providing incorrect or incomplete eligibility information.

b. Administrative appeal decision based on enrollee error

An "administrative appeal decision based on enrollee error" meant overpayment for an enrollee's continuation of benefits during the course of the enrollee's MHCP eligibility appeal. In other words, after an agency sends an enrollee advance notice of a reduction or termination of MHCP benefits, if the enrollee appeals that agency's decision before the date that the benefits are to be reduced or terminated, then the agency cannot terminate or reduce the enrollee's benefits until a DHS human services judge issues an order about the appeal. The enrollee's benefits must continue during the period awaiting this outcome of the appeal.

But if the human services judge upholds the agency's action, the agency can institute recovery procedures against the enrollee to recover the cost of any benefits overpaid due to the enrollee having requested a hearing before the date of action. This is sometimes called an overpayment “of benefits pending the outcome of a fair hearing” and it recovers the cost of MA or MinnesotaCare benefits provided to an enrollee *after* the agency was to correctly reduce or terminate benefits but *before* the appeal decision confirmed the agency was correct.

B. Suspension of assessing and recovering enrollee overpayments during the COVID-19 PHE

Beginning March 1, 2020, in accordance with guidance from CMS, DHS directed counties and tribes to stop assessing and recovering overpayments for MA and MinnesotaCare services received during the time coverage was required to be maintained during the COVID-19 PHE.

This was a condition of receiving a temporary federal MA percentage increase authorized under section 6008 of the Families First Coronavirus Response Act of 2020 (FFCRA). The FFCRA did not authorize recovery of funds from any individual whose eligibility was continued to comply with the terms of section 6008(b) of the FFCRA.

However, during the PHE there were individuals whose MA or MinnesotaCare eligibility could be terminated before the PHE ended. This included people who were not validly enrolled because of fraud or abuse.

Assessment and recovery of enrollee overpayments under these circumstances was allowed during the PHE.

C. CMS guidance for the unwinding

On October 17, 2022, CMS published COVID-19 Public Health Emergency Unwinding Frequently Asked Questions for State Medicaid and CHIP Agencies. The guidance stated the following:

The only circumstances under which a state may recover funds from a [Medicaid] 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 [Social Security] Act and 42 C.F.R. 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 C.F.R. 431.230.

Items (1) and (3) fall into the category of enrollee overpayment under MHCP policy.² Item (1) is [enrollee overpayment established by a court judgment](#). Item (3) is an overpayment resulting from an [administrative appeal decision based on enrollee error](#).

² Item (2) is a separate policy specific to the MA program called “estate recovery” and does not pertain to this bulletin.

However, an [agency finding of enrollee error](#) is not included in items (1) – (3). CMS guidance does not permit overpayments resulting from an agency finding of enrollee error to be assessed or recovered. Further consultation between CMS and DHS indicated that, in addition to MA, these same provisions apply to MinnesotaCare as a federally funded Basic Health Program.

This prohibition on assessing and recovering overpayments established by an agency finding of enrollee error does not end with the unwinding period after May 2024 (see [DHS Bulletin #23-21-09](#) for more information about the unwinding period). Instead, this prohibition applies indefinitely, both now and beyond the unwinding period going forward.

D. Temporary waiver from CMS for the unwinding

On March 3, 2022, a CMS state health official letter provided strategies to promote the continuation of coverage and distribution of enrollment workloads for Medicaid, the Children’s Health Insurance Program (CHIP), and Basic Health Programs (BHPs) during the unwinding and return to regular operations after COVID-19. To support states facing significant operational issues regarding renewals and fair hearing processes during the unwinding, CMS gave states the option to apply for a federal waiver. Minnesota applied for this waiver from CMS.

During the 2023 regular Legislative Session, Minnesota enacted law temporarily extending the timeframe to take final administrative action on MA and MinnesotaCare fair hearing requests. CMS then approved the temporary waiver. This waiver is effective April 1, 2023, through February 28, 2025. During this time, as a condition of the waiver, Minnesota cannot assess or recover an overpayment resulting from an administrative appeal decision based on enrollee error in which the human services judge upholds the agency’s determination.

IV. Enrollee Overpayment Policies Effective Immediately

A. Permanently stop assessment and recovery of MHCP overpayments established by an agency finding of enrollee error

An [agency finding of enrollee error](#) is no longer a basis for assessing or recovering an MA or MinnesotaCare overpayment. This practice was suspended beginning March 1, 2020, for MA and MinnesotaCare services received during the COVID-19 PHE by enrollees who were protected by continuous coverage requirements.

Effective immediately, this practice is permanently discontinued. Stop assessing overpayments established by an agency finding of enrollee error. Assessment is prohibited regardless of whether the enrollee received the overpaid MHCP services before or after the PHE.

Stop recovering all previously assessed overpayments established by an agency finding of enrollee error. Refer to ONEsource for guidance on how to stop recovering these previously assessed overpayments.

B. Temporarily stop assessment and recovery of MHCP benefits overpaid during an enrollee’s eligibility appeal

From April 1, 2023, through February 28, 2025, (the period of the federal waiver), DHS, counties and tribes cannot assess or recover overpayments resulting from an [administrative appeal decision based on enrollee error](#). This is different from the prohibition against all enrollee overpayments established by an agency finding of enrollee error. Until March 1, 2025, do not assess or recover the cost of MHCP benefits overpaid to an enrollee who continued to receive benefits throughout an eligibility appeal and then lost the appeal.

DHS will provide counties and tribes with updated procedures and forms in the future so that they can resume assessment and recovery of overpayments resulting from an administrative appeal decision based on enrollee error beginning on March 1, 2025.

C. Continue to assess and recover MHCP enrollee overpayments established by criminal or civil court judgments

Continue to assess and recover enrollee overpayments established by a [criminal or civil court judgment](#) finding that MA or MinnesotaCare coverage was improperly paid to an enrollee because of the enrollee’s or a representative’s actions.

V. Action Required

County, tribal and DHS workers must follow the enrollee overpayment policies in section IV of this bulletin effective immediately.

VI. Legal Authority

Families First Coronavirus Response Act, Pub. Law No. 116-127, § 6008(b), 134 Stat 178, 208-209 (2020)

42 U.S.C. § 1396a(a)(3)

42 U.S.C. § 1396a(e)(14)(A)

42 U.S.C. § 1396p(a)

42 C.F.R. §§ 431.200–431.250

42 C.F.R. § 433.36(g)(1)

42 C.F.R. § 435.930(b)

Americans with Disabilities Act (ADA) Advisory

This information is available in accessible formats for people with disabilities by calling 651-297-3862 or toll free at 800-657-3672 or by using your preferred relay service. For other information on disability rights and protections, contact the agency's ADA coordinator.