

Testimony Submitted by the Massachusetts Law Reform Institute

Re: Proposed amendments to 130 CMR 506.000 MassHealth: Financial Requirements

Submitted by email to: masshealthpublicnotice@mass.gov

January 30, 2023

Dear Friends,

These comments supplement my oral testimony on behalf of the Massachusetts Law Reform Institute and its clients at today's hearing and focus on the Proposed Regulation at 506.012 MassHealth Premium Assistance Payments

506.012(F) Premium Assistance Payment Administration

(3) Termination of Premium Assistance Payments. The proposed regulations repromulgate subsections (F)(3)(a) and (b) without changes, but these subsections require amendment. These subsections state that in certain circumstances, premium assistance will end without clarifying that assistance may only be terminated with advance notice except in limited circumstances. Federal regulations at 42 CFR 431.11 requires 10 days advance notice except in the circumstances described in 431.212 or 431.213. None of the circumstances described in (F)(3)(a) and (b) regarding the criteria for premium assistance eligibility correspond to any exception set forth in 431.212. 42 CFR 431.213 pertains to probably fraud in which case 5 days advance notice is required. This clarification relates to the changes in 506.012 (F)(4) regarding overpayments because no benefits received during an advance notice period should be treated as benefits to which an individual was not entitled.

(4)-(6) Premium Assistance Overpayments, Referral to State Intercept and Temporary Waivers

Subsection (4)-(6) are new. Subsection (4) restates and is built upon the rule for Recovery of Overpayment of Medical Benefits at 130 CMR 501.012 which states that the agency has the right to recover benefits to which the member was not entitled regardless of who was responsible or the member's intent. However, this sweeping assertion of the rights of the agency goes far beyond what is allowed under federal Medicaid law. We urge the agency to go back to the drawing board and fundamentally narrow the scope of permissible recovery, and, to the extent recovery is permitted by federal law, to provide a more meaningful provision for waiver of overpayments.

The agency can only recover from a beneficiary in those circumstances explicitly provided for in federal statute or regulation.

The Medicaid statute includes many provisions for recovery of overpayments from providers, but it authorizes recovery from beneficiaries in only limited circumstances. For example, the Medicare and Medicaid Program Integrity Provisions at 42 USC 1320a-7k (d) require state agencies to repay the federal government for reported provider overpayments whether the agency

has been able to collect the overpayment from the provider or not. However, recovery under this section is explicitly inapplicable to beneficiaries who are not defined as “persons” subject to repayment. 42 USC 1320a-7k(d)(4)(C). The only administrative remedy created for beneficiary overpayments is for a beneficiary who knowingly in a scheme of health care fraud. 42 USC 1320a-7k(c).

In recent sub-regulatory guidance, CMS addressed the issue of when a state can recover or recoup the cost of services from a beneficiary and clearly stated that the only circumstances are those explicitly provided for in federal statutes and regulations. The CMS guidance was in a set of FAQs that includes guidance on the unwinding, but it is clear from the context that CMS was stating a general policy regarding the need for express federal authority to recover from a beneficiary.

[COVID-19 Public Health Emergency Unwinding Frequently Asked Questions for State Medicaid and CHIP Agencies](#), (Oct. 17, 2022)

Fraud & Abuse/Recoupment

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)

The temporary hardship waiver proposed is unreasonably narrow and far harsher than waiver provisions for nonpayment of MassHealth premiums or waiver of overpayments in other benefit programs

We have not located any federal authority for a state to recover premium assistance overpayments from a beneficiary regardless of fault. However, even assuming such authority exists, the temporary hardship waiver proposed in 506.012(F)(6) fails to provide meaningful relief to MassHealth beneficiaries and is far harsher than overpayment waiver rules in other benefit programs or in the agency's own rules that apply to waiver of past due premiums.

MassHealth charges premiums only for individuals with income higher than 150 percent of the poverty level and in accordance with a premium schedule that increases with income. Presumably it has determined that its schedule is generally affordable to individuals at this income level. Its rules provide that MassHealth may be terminated if premiums are unpaid for more than 60 days, but it allows for waiver of current and past due premiums in the case of undue financial hardship which are defined as circumstances giving rise to extraordinary expenses such as eviction, foreclosure, or a pandemic. 130 CMR 506.011. The criteria in the proposed rule for a temporary hardship waiver are largely based on the criteria in the rule for premium waivers.

However, the debt incurred for a premium assistance overpayment, unlike the debt for a premium is not income-based. The vast majority of MassHealth members have income well below 150 percent of the poverty level including those who may have access to employer-sponsored insurance, and for whom repayment of any amount may prevent them from paying for ordinary expenses and taking care of their families. Further, the premium waiver is not premised on their first being a payment plan in existence for past due premiums and is not limited to the amount of the monthly repayment. The premium waiver provides for waiver of past due premium amounts as well as ongoing premiums. A payment plan arises only if the waiver is denied for the past period in which case a minimum payment of \$5 per month is required.

In other benefit programs too where recovery is legally authorized regardless of fault, there are more reasonable opportunities for beneficiaries to be relieved of debt through a request for a waiver.

- The Social Security Administration, for example, after assessing a beneficiary overpayment, allows for a waiver request to be filed at any time. A waiver may be granted if the beneficiary was not at fault taking into account such factors as the individual's ability to understand and comply with reporting rules and reliance on misinformation from the agency coupled with the inability to repay the overpayment and still meet ordinary expenses. SSA assumes that SSI beneficiaries cannot afford to repay the overpayment, it requires Social Security Insurance-Based beneficiaries to demonstrate it. Disability Law Center, [SSI/SSDI Overview](#), 1.14.3 Request for Waiver of Overpayment (p. 107).
- In the SNAP program, in the case of agency errors, there is a minimum threshold of \$600 before collection is pursued, and for current SNAP beneficiaries who are elderly, an

overpayment based on agency error is waived in full, for younger SNAP beneficiaries 50 percent of the overpayment is waived. MLRI, [SNAP Advocacy Guide](#), 2022 (p. 182)

The proposed temporary waiver takes no account of the whether the beneficiary is still a low income Medicaid beneficiary who will be unable to pay for necessities and repay an overpayment, even one for which the beneficiary was entirely without fault. In fact, the poorer the beneficiary, the less any monthly payment plan will be and the less relief from debt if only the monthly repayment is waived as proposed. Further, because only beneficiaries with access to ESI are subject to these harsh overpayment policies, they act as a disincentive for employment.

Other due process shortcomings compound the unfairness of the current overpayment recovery policy and the inadequacy of the proposed temporary waiver

While beyond the scope of the proposed changes to the rule at 130 CMR 506.000, at some future date we would like to discuss other issues with the Premium Assistance Unit including a notice of overpayment that adequately explains the basis for the overpayment, and assurance that overpayment notices are in the primary language of limited English proficient beneficiaries, and in an accessible format for individuals with disabilities. In addition, we are concerned that individuals are not required to enroll in employer sponsored insurance, particularly lower income individuals in Standard and Careplus, until the agency has determined that there is a reasonable overlap between the private insurance network and the MassHealth fee for service system such that beneficiaries are not either denied access to care or forced to incur medical debt because the private providers available to them under the plan do not participate in MassHealth (and in the case of certain behavioral health providers, are not permitted to become MassHealth fee for service providers).

Recommendations for a more humane policy for collecting overpayments of Premium Assistance

- An individual assessed an overpayment should be able to request a waiver at any time and denial of a waiver should be subject to appeal rights. No collection action should occur during time for appeal or while an appeal is pending.
- The right to request a waiver should not be premised on having a MassHealth approved payment plan in place.
- There should be no overpayment subject to recovery in at least the following situations –
 - MassHealth knew or had reason to know an individual was LEP & preferred language or other accommodation needed based on disability, and did not give notice of OP in accessible language/format
 - The beneficiary was initially required by MassHealth to enroll in employer-sponsored insurance and was enrolled at the time of the potential overpayment
 - The beneficiary was enrolled in ESI at the time of the potential overpayment and the reason for the potential overpayment was -
 - the employer's change in health plan offerings
 - an error by the agency

- an error in the information the employer supplied to the agency
- The overpayment was based on the beneficiary's mistake, inadvertence or excusable oversight taking into account extenuating circumstances and repayment would deprive the beneficiary of sufficient income to meet ordinary costs
- The overpayment was based on a monthly premium assistance payment made to a MassHealth member in the month in which the member lost employment
- The overpayment was not caused by the beneficiary's willful intent to defraud and repayment would create an undue financial hardship as defined in the regulation

The stories of two clients represented or assisted by MLRI

MLRI's testimony is informed by the lives of our clients:

Anh's story

Anh was a working parent whose family had MassHealth. Her primary language was Vietnamese. She was notified by MassHealth that she was required to enroll in her employer's family coverage policy or MassHealth would end her coverage. It said MassHealth would reimburse her for her premium. She enrolled.

Her employer switched its coverage to a plan with a higher deductible; Anh continued paying her share of the premium and using her reimbursement check to make up for the loss of income. Six months after Anh had been on the higher deductible plan, MassHealth notified Anh that it was ending her reimbursement and she owed the state \$7000 for the past 6 months because the plan deductible didn't meet its criteria any more. All the notices were in English.

Anh went to her appeal with a Vietnamese interpreter and a legal aid lawyer. Under the rules, if there was an overpayment, there is no exception for agency error, inadvertent beneficiary error or financial hardship. Anh won her appeal, but only because her lawyer proved that there was no overpayment because even with the higher deductible, the plan did in fact meet the criteria under the rules.

Jill's story

Jill was a single parent who worked nights so she could be home days to care for her daughter and her elderly mother. Her income varied but was generally 150-200% of the poverty level. She enrolled in her employer's family coverage plan and, because her daughter had MassHealth, she also qualified for premium assistance. She had \$400 per month in MassHealth premium assistance direct deposited into her checking account to reimburse her for the monthly premium costs taken out of her pay. When she was laid off at the end of the month, her premium costs for that month's coverage were still taken out of her pay. She used her premium assistance check that month as she had in past months to make up for the reduction in her take-home wages and pay her bills.

Thank you for the opportunity to make these comments. Please let me know if I can supply any additional information.

Yours truly,

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