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MEMORANDUM

TO: EMILY MCCLELLAN
Regulatory Supervisor
Department of Medical Assistance Services

FROM: JENNIFER L. GOBBLE 
Assistant Attorney General

DATE: June 28, 2019

SUBJECT: Emergency Regulations – Settlement Agreement Discussion Process

I have reviewed the attached emergency regulations that would make changes necessary to implement a process for settlement agreement discussions between a Medicaid provider and the Department of Medical Assistance Services during the informal and formal administrative appeal stages, in accordance with the directive in Items 303.V.2 and 303.JJ.1.vii of Chapter 2 of the 2018 *Acts of Assembly*. Item 303.JJ.2 provides DMAS with authority to promulgate regulations to implement the changes within 280 days or less.

Based on my review, it is this Office's view that the Director of the Department of Medical Assistance Services, acting on behalf of the Board of Medical Assistance Services pursuant to Virginia Code § 32.1-324, has the authority to promulgate these regulations, subject to compliance with the provisions of Article 2 of the Virginia Administrative Process Act (VAPA), and has not exceeded that authority.

The authority for this emergency action is found in Virginia Code § 2.2-4011(B), which provides that agencies may adopt emergency regulations in situations in which Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment and the regulation is not exempt under the provisions of subdivision A.4 of Virginia Code § 2.2-4006.

Pursuant to Virginia Code § 2.2-4012, the attached emergency regulations shall become effective upon approval by the Governor and filing with the Registrar of Regulations. The emergency regulations shall be effective for no more than 18 months. If the Department intends to continue regulating the subject matter governed by these emergency regulations beyond 18 months, then it will be necessary to replace these emergency regulations with regulations promulgated in accordance with Article 2 of the VAPA. A Notice of Intended Regulatory Action relating to the proposed replacement regulations must be filed with the Registrar within 60 days of the effective date of the emergency regulations. The proposed replacement regulations must be filed with the Registrar within 180 days after the effective date of the emergency regulations. Virginia Code § 2.2-4011(C).

If you have any questions or need any additional information, please feel free to contact me at 786-4905.

cc: Kim F. Piner
Senior Assistant Attorney General/Section Chief

Action:

Settlement Agreement Discussion Process

Stage: Emergency/NOIRA

6/28/19 3:55 PM [latest]

12VAC30-20-540. Informal appeals.

A. Notice of informal appeal.

1. Providers appealing the termination or denial of their Medicaid agreement pursuant to § 32.1-325 E of the Code of Virginia shall file a written notice of informal appeal with the DMAS Appeals Division within 15 days of the provider's receipt of the notice of termination or denial.
2. Providers appealing adjustments to a cost report shall file a written notice of informal appeal with the DMAS Appeals Division within 90 days of the provider's receipt of the notice of program reimbursement. The written notice of informal appeal shall identify the issues, adjustments, or items that the provider is appealing.
3. Providers appealing all other DMAS decisions shall file a written notice of informal appeal with the DMAS Appeals Division within 30 days of the provider's receipt of the decision. The written notice of informal appeal shall identify each adjustment, patient, service date, or other disputed matter that the provider is appealing.

B. Administrative dismissals.

1. Failure to timely file a written notice of informal appeal with the information required by subdivision A 2 or A 3 of this section shall result in an administrative dismissal.
2. A representative, billing company, or other third-party entity filing a written notice of appeal on behalf of a provider shall submit to DMAS, at the time of filing or upon request, a written authorization to act on the provider's behalf, signed by the provider. The authorization shall reference the specific adverse action or actions being appealed including, if applicable, each patient's name and date of service. Failure to submit a written authorization as specified in this subdivision shall result in an administrative dismissal. This requirement shall not apply to an appeal filed by a Virginia licensed attorney.
3. If a provider has not exhausted any applicable DMAS or contractor reconsideration or review process or contractor's internal appeals process that the provider is required to exhaust before filing a DMAS informal appeal, the provider's written notice of informal appeal shall be administratively dismissed.
4. If DMAS has not issued a decision with appeal rights, the provider's attempt to file a written notice of informal appeal, prior to the issuance of a decision by DMAS that has appeal rights, shall be administratively dismissed.

C. Written case summary.

1. DMAS shall file a written case summary with the DMAS Appeals Division within 30 days of the filing of the provider's notice of informal appeal and shall transmit a complete copy of the case summary to the provider on the same day.
2. For each adjustment, patient, and service date or other disputed matter identified by the provider in its notice of informal appeal, the case summary shall explain the factual basis upon which DMAS relied in taking its action or making its decision and identify any authority or documentation upon which DMAS relied in taking its action or making its decision.
3. Failure to file a written case summary with the DMAS Appeals Division within 30 days of the filing of the written notice of informal appeal shall result in dismissal in favor of the provider.
4. The provider shall have 12 days following the due date of the case summary to file with the DMAS Appeals Division and transmit to the author of the case summary a written notice of all alleged deficiencies in the case summary that the provider knows, or reasonably should know, exist. Failure of the provider to timely file a written notice of deficiency with the DMAS Appeals Division shall be deemed a waiver of all deficiencies, alleged or otherwise, with the case summary.

5. Upon timely receipt of the provider's notice of deficiency, DMAS shall have 12 days to address the alleged deficiency or deficiencies. If DMAS does not address the alleged deficiency or does not address the alleged deficiency to the provider's satisfaction, the alleged deficiency or deficiencies shall become an issue to be addressed by the informal appeals agent as part of the informal appeal decision.

6. The informal appeals agent shall make a determination as to each deficiency that is alleged by the provider as set forth in this subsection. In making that determination, the informal appeals agent shall determine whether the alleged deficiency is such that it could not reasonably be determined from the case summary the factual basis and authority for the DMAS action, relating to the alleged deficiency, so as to require a dismissal in favor of the provider on the issue or issues to which the alleged deficiency pertains.

D. Conference.

1. The informal appeals agent shall conduct the conference within 90 days from the filing of the notice of informal appeal. If DMAS, the provider, and the informal appeals agent agree, the conference may be conducted by way of written submissions. If the conference is conducted by way of written submissions, the informal appeals agent shall specify the time within which the provider may file written submissions, not to exceed 90 days from the filing of the notice of informal appeal. Only written submissions filed within the time specified by the informal appeals agent shall be considered.

2. The conference may be recorded at the discretion of the informal appeals agent and solely for the convenience of the informal appeals agent. Because the conference is not an adversarial or evidentiary proceeding, no other recordings or transcriptions shall be permitted. Any recordings made for the convenience of the informal appeals agent shall not be released to DMAS or to the provider.

3. Upon completion of the conference, the informal appeals agent shall specify the time within which the provider may file additional documentation or information, if any, not to exceed 30 days. Only documentation or information filed within the time specified by the informal appeals agent shall be considered.

E. Informal appeals decision. The informal appeal decision shall be issued within 180 days of receipt of the notice of informal appeal unless the provider and DMAS have mutually agreed in writing to stay the timeframe for issuing the informal decision pursuant to 12 VAC 30-20-550.

F. Remand. Whenever an informal appeal is required pursuant to a remand by court order, final agency decision, agreement of the parties, or otherwise, all time periods set forth in this section shall begin to run effective with the date that the document containing the remand is date-stamped by the DMAS Appeals Division in Richmond, Virginia.

12VAC30-20-550. Settlement Agreements.

A. Providers who have filed an administrative appeal under 12 VAC 30-20-540 or 12 VAC 30-20-560 may submit a proposal to DMAS to settle the appeal.

B. A proposal for a settlement shall be submitted in writing by the provider or the provider's counsel to the Director of the DMAS Appeals Division. The proposal shall include the justification for the settlement and the terms proposed to settle the case. The Director of the DMAS Appeals Division shall refer the proposal to a DMAS Appeal Representative authorized by the Office of the Attorney General under Virginia Code § 2.2-509 to represent DMAS in administrative proceedings.

C. Stay of Decision Deadlines

1. Receipt of a settlement proposal from a provider in accordance with subsection B shall not require the DMAS Appeal Representative to engage in settlement negotiations and/or agree to stay the deadline for the informal appeal decision or for the formal appeal recommended decision of the Hearing Officer (collectively, the "decision deadline"). The DMAS Appeal Representative and the provider may jointly agree in writing to stay the decision deadline for a period of up to 60 days to facilitate settlement discussions. The date of the written agreement of the parties to stay the decision deadline shall be the start date for calculating the length of the stay. Written notice of the agreement to stay the decision deadline and the length of stay shall be provided to the Appeals Division Director on the start date. During the stay, the time period to issue the informal appeal decision or the formal appeal recommended decision shall not run; however, all other interim deadlines remain applicable.

2. If the parties mutually agree in writing to a proposed resolution within the agreed upon stay period afforded in subsection C(1), then the stay shall be extended for such additional time as may be necessary for review and approval of the settlement in accordance with Virginia Code § 2.2-514.

3. A stay may be removed by a party to the appeal for any reason, including but not limited to the following: (a) the parties do not agree to a full settlement within the agreed upon stay period afforded in C(1); (b) one party advises the other and the Appeals Division Director in writing that it no longer agrees for the stay to continue; or (c) the parties reach a proposed settlement, but it is not approved in accordance with Virginia Code § 2.2-514. If the stay is removed, it shall be communicated in writing between the parties and written notice provided to the Appeals Division Director. The time period to issue the informal appeal decision or the formal appeal recommended decision shall resume on the day the notice is provided to the Appeals Division Director.

12VAC30-20-560. Formal appeals.

A. A provider appealing a DMAS informal appeal decision shall file a written notice of formal appeal with the DMAS Appeals Division within 30 days of the provider's receipt of the informal appeal decision. The notice of formal appeal shall identify each adjustment, patient, service date, or other disputed matter that the provider is appealing. Failure to file a written notice of formal appeal in the detail specified within 30 days of receipt of the informal appeal decision shall result in dismissal of the appeal. Pursuant to § 2.2-4019 A of the Code of Virginia, DMAS shall ascertain the fact basis for decisions through informal proceedings unless the parties consent in writing to waive such a conference or proceeding to go directly to a formal hearing, and therefore only issues that were addressed pursuant to § 2.2-4019 shall be addressed in the formal appeal, unless DMAS and the provider consent to waive the informal fact-finding process under § 2.2-4019 A of the Code of Virginia.

B. Documentary evidence, objections to documentary evidence, opening briefs, and reply briefs.

1. Documentary evidence, objections to documentary evidence, opening briefs, and reply briefs shall be filed with the DMAS Appeals Division on the date specified in this subsection. The hearing officer shall only consider those documents or pleadings that are filed within the required timeline. Simultaneous with filing, the filing party shall transmit a copy to the other party and to the hearing officer.

a. All documentary evidence upon which DMAS or the provider relies shall be filed within 21 days of the filing of the notice of formal appeal.

b. Any objections to the admissibility of documentary evidence shall be filed within seven days of the filing of the documentary evidence. The hearing officer shall rule on any such objections within seven days of the filing of the objections.

c. The opening brief shall be filed by DMAS and the provider within 30 days of the completion of the hearing.

d. Any reply brief from DMAS or the provider shall be filed within 10 days of the filing of the opening brief to which the reply brief responds.

2. If there has been an extension to the time for conducting the hearing pursuant to subsection C of this section, the hearing officer is authorized to alter the due dates for filing opening and reply briefs to permit the hearing officer to be in compliance with the due date for the submission of the recommended decision as required by § 32.1-325.1 B of the Code of Virginia and subsection E of this section.

C. The hearing officer shall conduct the hearing within 45 days from the filing of the notice of formal appeal, unless the hearing officer, DMAS, and the provider all mutually agree to extend the time for conducting the hearing. Notwithstanding the foregoing, the due date for the hearing officer to submit the recommended decision to the DMAS director, as required by § 32.1-325.1 B of the Code of Virginia and subsection E of this section, shall not be extended or otherwise changed.

D. Hearings shall be transcribed by a court reporter retained by DMAS.

E. The hearing officer shall submit a recommended decision to the DMAS director with a copy to the provider within 120 days of the filing of the formal appeal notice, unless the provider and DMAS have mutually agreed in writing to stay the timeframe for issuing the recommended decision pursuant to 12 VAC 30-20-550. If the hearing officer does not submit a recommended decision within 120 days of the filing of the notice of formal

appeal or the period specified under 12 VAC 30-20-550, then DMAS shall give written notice to the hearing officer and the Executive Secretary of the Supreme Court that a recommended decision is due.

F. Upon receipt of the hearing officer's recommended decision, the DMAS director shall notify DMAS and the provider in writing that any written exceptions to the hearing officer's recommended decision shall be filed with the DMAS Appeals Division within 14 days of receipt of the DMAS director's letter. Only exceptions filed within 14 days of receipt of the DMAS director's letter shall be considered.

G. The DMAS director shall issue the final agency decision within 60 days of receipt of the hearing officer's recommended decision in accordance with § 32.1-325.1 B of the Code of Virginia.