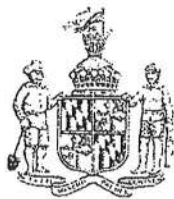


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Department of Health and Mental Hygiene

FAX NO.

410-333-5409

WRITER'S DIRECT DIAL NO.

410-767-1879

January 11, 2013

Thomas E. Dewberry, Esquire
Chief Administrative Law Judge
Office of Administrative Hearings
11101 Gilroy Road
Hunt Valley, Maryland 21031-1301

Dear Judge Dewberry,

Several sources have recently contacted our office with concerns that a new change in the Fair Hearing Appeals under the Maryland State Medical Assistance Program regulations ("Medicaid Fair Hearing regulations"), COMAR 10.01.04, is being implemented in an unintended manner that may be unduly restricting the appeal rights of Medicaid applicants and recipients. I am writing in hopes to explain the intent of the regulations and their interaction with federal Medicaid law.

The Department of Health and Mental Hygiene (the Department) recently amended the Medicaid Fair Hearing Regulations. 39:5 Md. R. 382 (March 19, 2012). One aspect of the amendments involved an alteration to the definition of "authorized representative." See COMAR 10.01.04.01(B)(3). The prior regulation did not specify what was required at what stage of the hearing process to demonstrate that the applicant or recipient intended for a representative to act on her behalf. Experience with the prior regulation demonstrated that it was often difficult or impossible to verify whether a purported representative had actually been authorized by the applicant or recipient to act on her behalf, or if the representative had actually contacted the applicant or recipient to notify her of the representation. Therefore, the definition of "authorized representative" was added to memorialize the types of evidence that would ensure that applicants and recipients are fully afforded the right to be represented by a person whom they knowingly designated for that purpose.

Federal law requires that applicants and recipients be permitted to represent themselves or “use legal counsel, a relative, a friend, or other spokesman” during the appeals process. 42 C.F.R. § 431.206. The new fair hearing regulations must be read in conjunction with this federal requirement to create a regime that protects applicants and recipients from unauthorized exercise of their appeal rights while still affording free choice of representatives.

In the past few months since the new regulation has been in effect, it appears that it has been implemented on at least several occasions to deny an applicant or recipient her right to a hearing because of technical defect in proof of representation. There are two main scenarios that we have been alerted to that strike us as particularly problematic. First, there have been situations where an applicant is told that her chosen representative may not act on her behalf at the hearing because no proof was filed with the notice of appeal, even when the applicant or recipient herself is present and expresses the desire to be represented. Second, an applicant’s notice of appeal filed by a representative may be rejected for lack of proof without an opportunity to cure the failure.

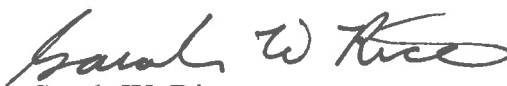
Both of these scenarios imperil applicants’ and recipients’ broad authority to designate a representative of choice. However, neither is a necessary interpretation of the new fair hearing regulation. While the definition of authorized representative does require documentation to be submitted at the notice of appeal stage for certain categories of representatives, the most logical reading of the regulation is that this requirement applies only at the notice of appeal stage. To elaborate, an applicant may note an appeal and then later designate an authorized representative to accompany him to the hearing. The same logic should apply if the applicant uses one authorized representative for the notice of appeal and a second, different authorized representative for the hearing. Moreover, there is no requirement in the fair hearing regulation that the requirement of proof is *jurisdictional*. A reading that allows an opportunity to cure a lack of proof of authorized representative relationship, relating back to the original notice of appeal date, preserves the applicant or recipient’s right of appeal while ensuring that only authorized representatives proceed on behalf of an applicant or recipient.

One other issue that has been raised is the requirement for attorneys to attest to their lawyer-client relationship. A proposed amendment to COMAR 10.01.04.01(B)(3)(f) will appear in the January 25, 2013 issue of the Maryland Register (enclosed) that eliminates the requirement for attorneys to provide proof of their lawyer-client relationships. Pending the final adoption of this regulation, we would ask that administrative law judges be informed of the pending regulation and request that

assurances from counsel that an attorney-client relationship exists with the appellant be accepted in lieu of the written attestation.

I deeply appreciate your attention to these concerns. Please feel free to contact me if I can be of further assistance.

Best,



Sarah W. Rice
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Department of Health and Mental Hygiene
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Enclosure

cc: Charles Milligan, Deputy Secretary, Department of Health and Mental Hygiene
Lorie Mayorga, Deputy Director for Eligibility Policy
Jennifer Goldberg, Assistant Director of Advocacy for Elder Law and Health Care
Ron Landsman, Esq.
Mark Davis, AAG

MARYLAND REGISTER

Proposed Action on Regulations

Transmittal Sheet PROPOSED OR REPROPOSED Actions on Regulations	Date Filed with AELR Committee	TO BE COMPLETED BY DSD
	12/14/2012	Date Filed with Division of State Documents
		Document Number
		Date of Publication in MD Register

1. Desired date of publication in Maryland Register: 1/25/2013

2. COMAR Codification

Title Subtitle Chapter Regulation

10 01 04 01 and .02

3. Name of Promulgating Authority

Department of Health and Mental Hygiene

4. Name of Regulations Coordinator Telephone Number

Michele Phinney 410-767-5623

Mailing Address

201 W. Preston Street

City State Zip Code
Baltimore MD 21201

Email

michele.phinney@maryland.gov

5. Name of Person to Call About this Document Telephone No.

Lisa Fassett 410-767-0579

Email Address

lisa.fassett@maryland.gov

6. Check applicable items:

New Regulations

Amendments to Existing Regulations

Date when existing text was downloaded from COMAR online: November 13, 2012.

- Repeal of Existing Regulations
- Recodification
- Incorporation by Reference of Documents Requiring DSD Approval
- Reproposal of Substantively Different Text:

: Md. R
(vol.) (issue) (page nos) (date)

Under Maryland Register docket no.: --P.

7. Is there emergency text which is identical to this proposal:

Yes No

8. Incorporation by Reference

Check if applicable: Incorporation by Reference (IBR) approval form(s) attached and 18 copies of documents proposed for incorporation submitted to DSD. (Submit 18 paper copies of IBR document to DSD and one copy to AELR.)

9. Public Body - Open Meeting

OPTIONAL - If promulgating authority is a public body, check to include a sentence in the Notice of Proposed Action that proposed action was considered at an open meeting held pursuant to State Government Article, §10-506(c), Annotated Code of Maryland.

OPTIONAL - If promulgating authority is a public body, check to include a paragraph that final action will be considered at an open meeting.

10. Children's Environmental Health and Protection

Check if the system should send a copy of the proposal to the Children's Environmental Health and Protection Advisory Council.

11. Certificate of Authorized Officer

I certify that the attached document is in compliance with the Administrative Procedure Act. I also certify that the attached text has been approved for legality by Sarah W. Rice, Assistant Attorney General, (telephone #410-767-1879) on November 19, 2012. A written copy of the approval is on file at this agency.

Name of Authorized Officer

Joshua M. Sharfstein, M.D.

Title

Secretary

Telephone No.

410-767-6500

Date

December 12, 2012

Title 10
DEPARTMENT OF HEALTH AND MENTAL HYGIENE

Subtitle 01 PROCEDURES

10.01.04 Fair Hearing Appeals Under the Medical Assistance Program

Authority: Health-General Article, §2-104, Annotated Code of Maryland

Notice of Proposed Action

□

The Secretary of Health and Mental Hygiene proposes to amend Regulations .01 and .02 under 10.01.04 Fair Hearing Appeals Under the Medical Assistance Program.

Statement of Purpose

The purpose of this action is to amend fair hearing regulations to:

- 1) Provide a less restrictive definition of for the appellant's legal counsel who serves as an authorized representative; and
- 2) Clarify that an opportunity for a fair hearing shall be granted if any part of an application is not acted upon in a timely manner.

Comparison to Federal Standards

There is no corresponding federal standard to this proposed action.

Estimate of Economic Impact

The proposed action has no economic impact.

Economic Impact on Small Businesses

The proposed action has minimal or no economic impact on small businesses.

Impact on Individuals with Disabilities

The proposed action has no impact on individuals with disabilities.

Opportunity for Public Comment

Comments may be sent to Michele A. Phinney, Director, Office of Regulation and Policy Coordination, Department of Health and Mental Hygiene, 201 West Preston Street, Room 512, Baltimore, MD 21201, or call 410-767-6499; TTY:800-735-2258, or email to dhmh.regs@maryland.gov, or fax to 410-767-6583. Comments will be accepted through February 25, 2013. A public hearing has not been scheduled.

Economic Impact Statement Part C

- A. Fiscal Year in which regulations will become effective: FY 2013
- B. Does the budget for the fiscal year in which regulations become effective contain funds to implement the regulations?
- C. If 'yes', state whether general, special (exact name), or federal funds will be used:
- D. If 'no', identify the source(s) of funds necessary for implementation of these regulations:
- E. If these regulations have no economic impact under Part A, indicate reason briefly:
This proposed action has no economic impact since it is clarification of existing regulations.
- F. If these regulations have minimal or no economic impact on small businesses under Part B, indicate the reason and attach small business worksheet.
This proposed action has no economic impact on small businesses under Part B since it is clarification of existing regulations.
- G. Small Business Worksheet:

Attached Document:

Title 10

DEPARTMENT OF HEALTH AND MENTAL HYGIENE

Subtitle 01 PROCEDURES

10.01.04 Fair Hearing Appeals Under the Medical Assistance Program

Authority: Health-General Article, §2-104, Annotated Code of Maryland

10.01.04.01 (11/13/12)

.01 Definitions.

A. (text unchanged)

B. Terms Defined.

(1)—(2) (text unchanged)

(3) "Authorized representative" means:

(a)—(e) (text unchanged)

(f) [The appellant's legal counsel if the counsel files a statement attesting to his or her active,

contemporaneous and ongoing representation of the appellant along with the request for a fair hearing under Regulation .04 of this chapter] *An attorney retained by the appellant:*

(g)—(j) (text unchanged)

(4)—(7) (text unchanged)

10.01.04.02 (11/13/12)

.02 Opportunity for a Fair Hearing.

A. An opportunity for a fair hearing shall be granted if:

(1) (text unchanged)

(2) A Program applicant claims their application for Program eligibility, *or any part thereof*, is not acted upon within 30 days from the date of application or 60 days from the date of application in the case of determination of disability;

(3)—(7) (text unchanged)

B.—C. (text unchanged)

JOSHUA M. SHARFSTEIN, M.D.

Secretary of Health and Mental Hygiene