



STATE OF DELAWARE  
**STATE COUNCIL FOR PERSONS WITH DISABILITIES**  
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The Honorable John Carney  
Governor

John McNeal  
SCPD Director

**MEMORANDUM**

DATE: February 28, 2018

TO: Ms. Nicole Cunningham, DMMA  
Planning & Policy Development Unit

FROM: Ms. Jamie Wolfe, Chairperson  
State Council for Persons with Disabilities

RE: 21 DE Reg. 606 [(DMMA Amending Fair Hearing Regulation DSSM §5304.3  
(2/1/18)]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Medicaid and Medical Assistance's (DMMA's) proposed regulation to amend the Delaware Social Services Manual (DSSM) 5304.3, with the stated goal of aligning DMMA Medicaid Managed Care policy with the new federal requirements found in the CMS Medicaid Managed Care Final Rule. The proposed regulation was published as 21 DE Reg. 606 in the February 1, 2018 issue of the Register of Regulations.

As background, historically a recipient of Medicaid services enrolled in managed care who wished to challenge an adverse decision could file for an internal appeal with the MCO and independently file for a state fair hearing with an independent hearing officer who is not in the employ of the MCO. The recipient did not have to use these processes in any order, and could choose one over the other, or do both. There was no requirement that the recipient "exhaust" the internal appeal process before going forward with a state fair hearing. CMS extensively revised the Medicaid Managed Care regulations. One significant change is that the regulations now require a recipient of Medicaid Managed care services to exhaust the MCO appeal process before they can file for a state fair hearing.

This particular amendment to §5304.3 makes it clear that a recipient can request a state fair hearing only after they have received a notice from the MCO of an appeal resolution that

remains adverse, or when the MCO has failed to adhere to the notice and timing requirements associated with the internal appeal process found in 42 CFR §438.408. This means that generally speaking a state fair hearing can only be requested upon receipt of an adverse appeal decision from the MCO, unless the MCO has not followed notice requirements or handled the appeal within the appropriate time frame. This change reflects the changes made necessary by CMS.

The second change to 5304.3 adds language that “the rules do not prevent the MCO from offering...one level of appeal” prior to the state fair hearing. This amendment is problematic. Existing language allows for the MCO to offer conciliation services. It is unclear, even with regard to conciliation services, 1) that a recipient can decline such an offer; 2) that the MCO cannot delay the issuance of their decision in the appeal while they make this offer or engage in conciliation; and 3) that these processes do not act as a stay on the fair hearing process. These issues would all have to be further clarified in the regulation, provided conciliation is actually allowed by the regulations. There is a provision in the new regulations for obtaining an External Medical Review (42 CFR 438.402 (c)(B) which is instructive. This regulation does clarify that the process is at the option of the enrollee and does not delay or otherwise impact the timing of the appeal or the right to file a state fair hearing request. It is worth noting that we did not find any authority for allowing an MCO to offer conciliation in the regulations.

More troublesome is the prohibition in the federal regulation regarding multiple levels of appeal. The proposed language appears to suggest that the MCO can offer an additional level of appeal after they have issued an appeal resolution upholding an adverse benefit determination. That is the only way to read the language in context with the rest of the section. However, 42 CFR 438.402 (b) very clearly states that an MCO can only have one level of appeal for enrollees. Moreover, even in the context of offering conciliation if that is permissible under the regulations, it must be made plain that the service is voluntary and cannot delay the fair hearing process.

The final change relates to adding language that clarifies that expedited review can extend to both physical and mental conditions and changes the time that the MCO must issue a decision to 72 hours, not 3 working days, making clear that decisions may be have to rendered over weekends and holidays if necessary. This change is beneficial and the SCPD is endorsing this change.

The change to the language in 5304.3 that allows the MCO to offer “one level of appeal” after issuing a decision on an appeal appears to violate the regulation. The SCPD is asking that that it be withdrawn, and that the regulation be further amended to make clear that conciliation services are voluntary and do not impact the appeal and/or fair hearing procedures.

The SCPD also recommends that DMMA and the MCOs do more outreach to notify people of these changes.

Thank you for your consideration and please contact SCPD if you have any questions regarding our position on the proposed regulation.

cc: Mr. Stephen Groff  
Ms. Laura Waterland, Esq.  
Governor's Advisory Council for Exceptional Citizens  
Developmental Disabilities Council

21reg606 dmma-amending fair hearing 2-28-16