



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

John McNeal
SCPD Director

MEMORANDUM

DATE: November 30, 2017

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

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

RE: 21 DE Reg. 389 [DMMA Proposed Medicaid Managed Care Regulation (11/1/17)]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Medicaid and Medical Assistance (DMMA) proposal to conform to CMS Medicaid managed care regulations published on May 6, 2016. The proposed regulation was published as 21 DE Reg. 389 in the November 1, 2017 issue of the Register of Regulations.

The SCPD has the following observations.

First, in proposed §5305 on p. 391, the citation to 42 CFR 438.208(f)(2) is incorrect. The reference should be to 42 CFR 438.408(f)(2).

Second, it appears that a word and/or punctuation may have been omitted in §3.1.2 on p. 392. It currently reads as follows:

3.1.2 Audited financial statements for the most recent calendar or fiscal year demonstrating, on a consolidated basis, generally accepted accounting principles and generally accepted auditing standards net equity in excess of \$10 million.

The Division could consider the following alternative:

3.1.2 Audited financial statements for the most recent calendar or fiscal year demonstrating, on a consolidated basis, [utilizing] generally accepted accounting principles and generally accepted auditing standards [,] net equity in excess of \$10 million.

Third, DMMA is adopting a piecemeal approach to revising the MCO appeal/fair hearing standards to be effective on January 1, 2018:

DMMA is moving forward with implementation of provisions of the Final Rule effective as of January 1, 2018.

20 DE Reg. at 389.

Effective for services provided on and after January 1, 2018 Delaware Health and Social Services/Division of Medicaid and Medical Assistance (DHSS/DMMA) proposed to amend the Division of Social Services Manual regarding Medicaid Managed Care Final Rule, specifically to align DMMA Medicaid Managed Care Policy with new Federal Requirements.

20 DE Reg. at 390.

Consistent with the attached excerpt from the CMS regulations, “(s)tates must comply with the [MCO appeal/fair hearing] requirements no later than the rating period for Medicaid managed care contracts starting on or after July 1, 2017.”

The problem with a “piecemeal” approach is that the federal regulations create an interrelated system. If DMMA only adopts a few standards, and omits others, it will not have an integrated system on January 1, 2018. Moreover, unless DMMA publishes an emergency regulation, it is too late to issue a proposed regulation which would be final on January 1, 2018. For example, proposed §5305 contains the following new subsection:

E. Recipients enrolled in a MCO

A hearing is granted if the request is received within 120 calendar days from the date of the MCO’s notice of an appeal resolution upholding an adverse benefit determination. If the request is not received during the timely notice period, the adverse benefit determination is to take effect.

This ignores the CMS regulation authorizing a beneficiary to appeal an adverse benefit determination without an MCO notice of appeal if the MCO has failed to adhere to notice and timing requirements [42 CFR 438.408(f)(1)].

The regulatory scheme is also unclear on “who” can request a fair hearing. The applicable CMS regulation [42 CFR 438.402] allows states to authorize providers to request a fair hearing with beneficiary consent. Current DHSS standards ostensibly authorize a provider to request an expedited MCO internal hearing/review but are unclear on whether a provider can request a fair hearing. See 16 DE Admin Code 5304.3.

The current DMMA regulation [16 DE Admin Code 5304.3] allows MCOs to conduct internal hearings and issue a decision within 45 days. This conflicts with the applicable CMS regulation [42 CFR 438.408] establishing a maximum 30-day time period for a decision.

The same DMMA regulation [16 DE Admin Code 5304.3] does not differentiate between grievances and appeals. The same CMS regulation [42 CFR 438.408] clearly differentiates between grievances and appeals.

The bottom line is that, on January 1, 2018, the DMMA regulatory scheme will not be uniformly consistent with the CMS standards. This may create confusion among beneficiaries, providers, advocates, and MCOs.

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

cc: Mr. Steve Groff, DMMA
Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

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Excerpt

Medicaid and Children's Health Insurance Program (CHIP) Programs; Medicaid Managed Care, CHIP Delivered in Managed Care, and Revisions Related to Third Party Liability

1. A Rule by the Centers for Medicare & Medicaid Services on 05/06/2016

For rating periods for Medicaid managed care contracts beginning before July 1, 2017, States will not be held out of compliance with the changes adopted in the following sections so long as they comply with the corresponding standard(s) codified in

2. 42 CFR part 438 contained in 42 CFR parts 430 to 481, edition revised as of October 1, 2015: §§438.3(h), 438.3(m), 438.3(q) through (u), 438.4(b)(7), 438.4(b)(8), 438.5(b) through (f), 438.6(b)(3), 438.6(c) and (d), 438.7(b), 438.7(c)(1) and (2), 438.8, 438.9, 438.10, 438.14, 438.56(d)(2)(iv), 438.66(a) through (d), 438.70, 438.74, 438.110, 438.208, 438.210, 438.230, 438.242, 438.330, 438.332, 438.400, 438.402, 438.404, 438.406, 438.408, 438.410, 438.414, 438.416, 438.420, 438.424, 438.602(a), 438.602(c) through (h), 438.604, 438.606, 438.608(a), and 438.608(c) and (d), no later than the rating period for Medicaid managed care contracts starting on or after July 1, 2017. States must comply with these requirements no later than the rating period for Medicaid managed care contracts starting on or after July 1, 2017.