

March 2, 2018

Nicole M. Cunningham
Planning, Policy & Quality Unit
Division of Medicaid & Medical Assistance
1901 N. DuPont Hwy.
P.O. Box 906
New Castle, DE 19720-0906

RE: DMMA Proposed Managed Care Hearings Regulation [21 DE Reg. 606 (February 1, 2018)]

Dear Ms. Cunningham:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Delaware Health and Social Services/Division of Medicaid and Medicare Assistance (DMMA) proposal to amend the Delaware Social Services Manual (DSSM) 5304.3. The amendment is being done in order to align the DMMA Medicaid Managed Care policy with the new federal requirements found in the Centers for Medicare and Medicaid Services (CMS) Medicaid Managed Care Final Rule. Council would like to share the following observations.

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 managed care organization (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 particular order and could elect one over the other, or do both. There was no requirement that the recipient to "exhaust" the internal appeal process before moving forward with a state fair hearing. CMS extensively revised the Medicaid Managed Care regulations. A significant change is that the regulations now require a Medicaid Managed care services recipient 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.

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 the MCO to offer conciliation services. However, the regulation is unclear, with regard to conciliation services. The following issues need additional clarification:

- 1.) A recipient can decline an offer of conciliation services;
- 2.) The MCO cannot delay the issuance of their decision in the appeal while they make this offer or engage in conciliation; and
- 3.) These processes do not act as a stay on the fair hearing process.

Council would like to note that no authority for allowing an MCO to offer conciliation was found in the regulations. This too would benefit from additional clarification.

The prohibition in the federal regulation regarding multiple levels of appeal is very troublesome. 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. However, 42 CFR 438.402 (b) clearly states that an MCO can only have one level of appeal for enrollees. Furthermore, 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 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 be a violation of the regulation. Council asks that DMMA consider withdrawing this change in language. Council also requests that the regulation be further amended to clarify that conciliation services are voluntary and do not impact the appeal and/or fair hearing procedures.

Council does endorse adding language that clarifies that expedited review can extend to both physical and mental conditions and changes the timeframe in which the MCO must issue a decision from three working days to 72 hours. This change is beneficial and makes it clear that decisions may have to be provided over weekends and holidays if necessary.

Thank you for your consideration of our observations. Please contact me or Wendy Strauss at the GACEC office if you have any questions.

Sincerely,

Dafne A. Carnright
Chairperson

DAC:kpc