Virginia Department of Planning and Budget

Economic Impact Analysis

12 VAC 30-20 Administration of Medical Assistance Services
Department of Medical Assistance Services
Town Hall Action/Stage: 5162 / 8811
April 9, 2021

Summary of the Proposed Amendments to Regulation

Pursuant to the 2018 Acts of Assembly, Chapter 2, Item 303, V.2 and JJ.1.vii[1] and the 2019 Acts of Assembly, Chapter 854, Item 303, V.2 and JJ.1,[2] the Director of the Department of Medical Assistance Services acting on behalf of the Board proposes to permanently replace an emergency regulation, which established a process for settlement agreements during the informal and formal provider appeals processes. The proposed process for settlement agreements has been implemented since January 2018 under a Medicaid Memo.

Background

Under the Department of Medical Assistance Services (DMAS) provider appeal regulations and the Virginia Administrative Process Act, Virginia Medicaid providers are afforded two levels of appeal: an informal appeal and a formal appeal. Informal appeals must be filed within 30 days of when the adverse action was issued. The informal appeals are decided by an informal appeals agent, who is a DMAS employee who has not been involved in any prior level of the decision-making on the appealed action. DMAS has 180 days to process informal appeals. If the appeal is not decided in that timeframe, the provider prevails, regardless of the amount at stake.

DMAS is represented in the formal appeal by a staff attorney. Providers are not required to obtain legal counsel, but if the provider is a corporation and does not have legal counsel, it cannot make legal arguments. A hearing officer assigned by the Executive Secretary of the

[1] See https://budget.lis.virginia.gov/item/2018/2/HB5002/Chapter/1/303
[2] https://budget.lis.virginia.gov/item/2019/1/HB1700/Chapter/1/303/

Virginia Supreme Court presides over the appeal and issues a recommended decision to the DMAS director. The recommended decision must be received within 120 days of when the formal appeal request was filed. The DMAS director then has 60 days from receipt of the recommended decision to issue the final agency decision.

The 2017 Acts of Assembly, Chapter 1, Item 306, WW.3[3] directed DMAS to convene a workgroup consisting of representatives from the provider community, legal community, and the Office of Attorney General (OAG) to study issues relating to contractual compliance. This workgroup studied, in part, the need for a process that would allow cases to be settled during the informal appeals process in situations that did not merit the time and cost of a formal administrative hearing.

The workgroup discovered that the primary reason providers did not reach a settlement with DMAS during an informal appeal was the fact that there was no process or point of contact to submit a request for a settlement. In contrast, the formal appeals process allowed providers to tender settlement proposals to the attorney representing DMAS. Following up the workgroup's findings,[4] DMAS determined that there was no legal barrier to start a process for settlement requests during an informal appeal. As a result, DMAS issued a Medicaid memo in January 2018 advising providers of the ability to propose a settlement during an informal appeal.

The workgroup also recommended that DMAS seek emergency regulatory authority to amend 12VAC30-20-540 of the Virginia Administrative Code to allow additional time for issuance of the informal appeal decision to allow sufficient time for settlement if the provider waives the deadline. In response, during the 2018 General Assembly Session budget language was added that provided the requested authority. Specifically, Item 303 JJ.1.vii in Chapter 2, 2018 Acts of Assembly (2018 Appropriation Act) directed DMAS to promulgate amendments that

> clarify that settlement proposals may be tendered during the appeal process and that approval is subject to the requirements of § 2.2-514 of the Code of Virginia. The amended regulations shall develop a framework for the submission of the settlement proposal and state that DMAS and the provider may jointly agree to stay the deadline for the informal appeal decision or for the formal appeal recommended decision of the Hearing Officer for a period of up to sixty (60) days to facilitate settlement discussions. If

[3] See https://budget.lis.virginia.gov/item/2018/2/HB5002/Chapter/1/303
[4] The link to the Appeals Workgroup report is: https://rga.lis.virginia.gov/Published/2017/RD604/PDF.

> the parties reach a resolution as reflected by a written settlement agreement within the sixty-day period, then the stay shall be extended for such additional time as may be necessary for review and approval of the settlement agreement in accordance with law.

Item 303 V.2 provides additional details about the settlement agreement process, noting that

> An appeal of the director's informal fact-finding conference decision concerning provider reimbursement shall be heard in accordance with § 2.2-4020 of the Administrative Process Act (§ 2.2-4020 et seq.) and the State Plan provided for in § 32.1-325, Code of Virginia. [DMAS] and the provider may jointly agree to stay the deadline for the informal appeal decision or for the formal appeal recommended decision of the Hearing Officer for a period of up to sixty (60) days to facilitate settlement discussions. If the parties reach a resolution as reflected by a written settlement agreement within the sixty-day period, then the stay shall be extended for such additional time as may be necessary for review and approval of the settlement agreement in accordance § 2.2-514 of the Code of Virginia.

Emergency regulations[5] became effective on November 14, 2019, and specified the process for settlement requests, including staying the informal appeal deadline for a period of up to 60 days to facilitate settlement discussions, so long as the DMAS appeal representative and the provider jointly agree in writing. Since the Medicaid memo, settlement proposals are first reviewed by the DMAS staff attorney, who submits the recommendation to the DMAS director. If the DMAS director approves the settlement, it is sent to the OAG, who is required by Virginia Code Section 2.2-514 to review any proposed compromise. If the settlement amount exceeds $250,000, it must also be approved by the Governor.

Estimated Benefits and Costs

The proposed action would permanently adopt the emergency regulations which have formalized the settlement agreement option that has been allowed under a Medicaid memo since January 2018. Since this option had already been made available under DMAS's then existing authority as a DMAS policy, the economic impact of this policy change cannot be directly attributed to this regulatory action. However, since DMAS already have data about pre and post policy change, the following discussion is provided for informational purposes only.

The settlement option requires agreement of both parties to stay the appeal for up to 60 days to reach a settlement. The purpose of the settlement option is to resolve disputes that does not merit the time and expense of a formal appeal. Because requesting a settlement would be less costly, a provider would have incentives to make such requests so long as it believes DMAS

[5] https://townhall.virginia.gov/l/ViewStage.cfm?stageid=8435

would agree to it and to the extent that the cost of making such a request is below the expected amount the provider hopes to recover. Thus, we can reliably infer that the settlement option is unlikely to make providers worse off, or have any adverse impact on them. However, the settlement agreement option would likely lead to an increase or shift in administrative costs from other areas for DMAS to evaluate settlement requests and an increase in additional funds to be expended as a result of settled cases.

The following table provides statistics regarding provider appeals over the years 2017 – 2020.

		Pre-Medicaid Memo	Post-Medicaid Memo		
		2017	2018	2019	2020
Informal Appeals	Cases Filed	3,700	3,500	4,800	6,200
	Settlement Requested	NA	5	1	4
	Settlement Approved	NA	1	1	1*
Formal Appeals	Cases Filed	151	106	134	170
	Final Agency Decisions Issued**	29	16	21	12
	Settlement Requested	7	6	3	4
	Settlement Approved	5	4	2	4

* Currently under review at OAG.

** Excludes withdrawn and settled cases.

It appears that the number of informal cases filed has noticeably increased in 2019 and 2020 compared to 2017 (i.e. 3,700 vs. 4,800 and 6,200, respectively). It also appears the number of settlement agreements requested during an informal appeal ranges from one to five, usually

only one of them being approved. The impact on the number of formal appeals filed appears mixed, but the number of final agency decisions issued, settlements requested and approved seems to have decreased. The trend over time appears to be that the majority of provider appeals end at the informal level, without filing a formal appeal. Whether this trend is directly related to the settlement option made available in the informal appeals since January 2018 is difficult to assess as there could be many other confounding factors.

According to DMAS, the average settlement is around a $30,000 reduction in the initial overpayment amount. Non-monetary settlements sometimes occur to allow an informal appeal on the merits even when the initial informal appeal was dismissed as a result of untimely filing. (In those instances, the provider usually submits evidence during the formal appeal of issues receiving mail).

As far as the administrative costs for DMAS to handle these appeals, DMAS reports that it has two staff attorneys who review the settlement requests for appeals (informal or formal, and their average salary is $96,000/year), the average hearing officer payment for a case is $3,000, and the average cost for transcripts per case is $650. Whether DMAS has experienced an increase in its administrative costs is difficult to assess similarly due to possibility of many other confounding events occurring over the same time period. According to DMAS, there has not been an increase in administrative costs with the settlement process since the 2018 Medicaid memo. The reduction over the past years of formal appeals proceeding to a final agency decision has allowed DMAS to utilize the two current formal appeal staff attorneys to perform the informal appeal settlement reviews. If the volume of settlement requests at the informal appeal level significantly increased or formal appeals spiked, that may cause an increase, but the data does not indicate that is likely. There is the possibility that published final regulation may cause an increase in settlement requests as it may inform some providers about the settlement option who may be currently unaware of it.

Businesses and Other Entities Affected

DMAS currently has 67,000 unique providers enrolled as participating in the fee-for-service program. All providers can appeal adverse actions. The most recent data from 2020 indicate there were 6,200 informal and 170 formal appeals filed.

Since the settlement option is implemented under a DMAS policy at the beginning of 2018, any economic impact associated with the policy change cannot be directly attributed to this regulation. Thus, this actions does not appear to indicate any adverse[6] or disproportionate impact on any entity.

Small Businesses[7] Affected:

As already mentioned, the analysis of the proposed changes does not indicate any adverse impact on any entity including the small businesses. Providers enrolled with DMAS who operate as small businesses could benefit from the option to reach a settlement through the informal appeals process; however, the number of such providers is unknown.

Localities[8] Affected[9]

The proposed amendments do not particularly affect any locality or introduce costs for local governments.

Projected Impact on Employment

The proposed amendments do not appear to affect total employment.

Effects on the Use and Value of Private Property

No impact on the use and value of private property or real estate development costs are anticipated.

Legal Mandates

General: The Department of Planning and Budget has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia (Code) and Executive Order 14 (as amended, July 16, 2018). Code § 2.2-4007.04 requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the report should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5)the impact on the use and value of private property.

Adverse impacts: Pursuant to Code § 2.2-4007.04(D): In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant

[6] Adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined.

[7] Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than $6 million."

[8] "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

[9] § 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance within the 45-day period.

If the proposed regulatory action may have an adverse effect on small businesses, Code § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to Code § 2.2-4007.1, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.