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Fast-Track Regulation
Agency Background Document

Agency name	Department of Medical Assistance Services
Virginia Administrative Code (VAC) Chapter citation(s)	12 VAC 30-110-10; 12 VAC 30-110-185; 12 VAC 30-110-220; 12 VAC 30-110-370; 12 VAC 30-120-670; 12 VAC 30-141-40; 12 VAC 30-141-700
VAC Chapter title(s)	Eligibility and Appeals
Action title	Client Appeals Update
Date this document prepared	March 24, 2023

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 19 (2022) (EO 19), any instructions or procedures issued by the Office of Regulatory Management (ORM) or the Department of Planning and Budget (DPB) pursuant to EO 19, the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

This fast track regulatory action follows an emergency regulation, which seeks to comply with a 2021 General Assembly mandate that requires DMAS to clarify (i) the burden of proof in client appeals; (ii) the scope of review for de novo hearings in client appeals, and (iii) the timeframes for submission of documents and decision deadlines for de novo client hearings.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

CCC Plus = Commonwealth Coordinated Care Plus
DBHDS = Department of Behavioral Health and Developmental Services
DMAS = Department of Medical Assistance Services
DSS = Department of Social Services
FAMIS = Family Access to Medical Insurance Security Plan
VDH = Virginia Department of Health

Statement of Final Agency Action

Provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

As of March 24, 2023, DMAS hereby approves the foregoing Regulatory Review Summary entitled "Client Appeals Update" and adopts the action stated therein. DMAS certifies that this regulatory action has completed all the requirements of the Code of Virginia § 2.2-4012 of the Administrative Process Act.

Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, "mandate" has the same meaning as defined in the ORM procedures, "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

Consistent with Virginia Code § 2.2-4012.1, also explain why this rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track rulemaking process.

Item 317.GG (2) in the 2021 Appropriations Act mandated that DMAS make these changes via an emergency regulation. The language is: "The Department of Medical Assistance Services shall amend regulations to clarify (i) the burden of proof in client appeals; (ii) the scope of review for de novo hearings in client appeals, and (iii) the timeframes for submission of documents and decision deadlines for de novo client hearings. The department shall have the authority to promulgate emergency regulations to implement these amendments within 280 days or less from the enactment of this Act."

This fast track action follows the ER/NOIRA. It is expected to be non-controversial because it allows applicants and members to have a full understanding of their appeal rights and what occurs throughout the DMAS appeal process. The changes clarify portions of the appeal process that have been at issue in cases in the past, including the scope of the appeal and who is assigned the burden of proof. Furthermore, the changes are non-controversial because they do not place any additional requirements on the appellant. Instead, some of the changes are more favorable to the appellant, including specifying the requirements for the appeal summary, affording the individual a de novo hearing, and assigning the burden of proof to the party who is seeking the change (as opposed to the prior model of placing the burden on the appellant in all appeals).

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

The Code of Virginia § 32.1-325, grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance and to promulgate regulations. The Code of Virginia § 32.1-324, grants the Director of the Department of Medical Assistance Services the authority of the Board when it is not in session.

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This fast track action follows the ER/NOIRA.

Purpose

Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it is intended to solve.

These changes clarify (i) the burden of proof in client appeals; (ii) the scope of review for de novo hearings in client appeals, and (iii) the timeframes for submission of documents and decision deadlines for de novo client hearings.

Substance

Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.

Changes are being made to the client appeals regulations, including the sections on definitions, evidentiary hearings, and final decisions. A new client appeal regulation is being created titled "Appeal Summary." Additional client appeals changes for consistency are being made to a CCC Plus appeal regulation, as well as to a FAMIS and FAMIS MOMS appeal regulations.

Issues

Identify the issues associated with the regulatory change, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, include a specific statement to that effect.

The advantages of these changes are that they will clarify the client appeal rules for Medicaid members. There are no disadvantages to these changes.

Requirements More Restrictive than Federal

Identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements, or no requirements that exceed applicable federal requirements, include a specific statement to that effect.

This regulatory action contains no changes that are more restrictive than federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

Consistent with § 2.2-4007.04 of the Code of Virginia, identify any other state agencies, localities, or other entities particularly affected by the regulatory change. Other entities could include local partners such as tribal governments, school boards, community services boards, and similar regional organizations. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

All adverse actions involving Medicaid eligibility or coverage may be appealed to DMAS. The primary agencies that take action other than DMAS itself are: the Department of Social Services ("DSS"), including the local Departments of Social Service; the Virginia Department of Health ("VDH"), including the local health districts/departments; and the Virginia Department of Behavioral Health and Developmental Services ("DBHDS"). DMAS has discussed the proposed regulatory changes with DSS, VDH, and DBHDS. None of these agencies identified any significant impact to their operations if the changes were to go into effect.

Economic Impact

Consistent with § 2.2-4007.04 of the Code of Virginia, identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Keep in mind that this is the proposed change versus the status quo.

DMAS does not anticipate that any of these changes will increase the number of appeals. Following a legal review of the requirements in the federal regulations, DMAS transitioned to de novo hearings in November 2020. The volume of appeals has not increased in the two years this has been in place. Due to the fact that this Fast Track action formalizes the previous change in practice, it should not result in an increase in appeals. Furthermore, DMAS is under the same responsibility to issue decisions in the timeframes required by federal regulations. Therefore, there will not be an increase in the time to process appeals.

The proposed regulations will not result in any additional costs. In fact, they may result in an unquantifiable savings because the clarifications in the regulations should result in less litigation over previously ambiguous requirements.

Impact on State Agencies

For your agency: projected costs, savings, fees or revenues resulting from the regulatory change, including: a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and c) whether any costs or revenue loss can be absorbed within existing resources	None
For other state agencies: projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.	None
For all agencies: Benefits the regulatory change is designed to produce.	These regulatory changes will clarify the client appeal rules for Medicaid members.

Impact on Localities

If this analysis has been reported on the ORM Economic Impact form, indicate the tables (1a or 2) on which it was reported. Information provided on that form need not be repeated here.

Projected costs, savings, fees or revenues resulting from the regulatory change.	None
Benefits the regulatory change is designed to produce.	These regulatory changes will clarify the client appeal rules for Medicaid members.

Impact on Other Entities

If this analysis has been reported on the ORM Economic Impact form, indicate the tables (1a, 3, or 4) on which it was reported. Information provided on that form need not be repeated here.

Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.	Individuals who file a client appeal may be affected by these changes.
Agency's best estimate of the number of such entities that will be affected. Include an estimate of the number of small businesses affected. Small	In calendar year 2021, DMAS had 4087 client appeals. In calendar year 2022, DMAS had 4,483 client appeals. In calendar year 2023, DMAS had 8,606 client appeals. The increase in

business means a business entity, including its affiliates, that: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than $6 million.	2023 was due to the end of the federal continuous coverage requirements.
All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to: a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and e) time required to comply with the requirements.	There are no additional costs to individuals as a result of these changes.
Benefits the regulatory change is designed to produce.	These regulatory changes will clarify the client appeal rules for Medicaid members.

Alternatives to Regulation

Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulatory change.

No alternative would meet the legislative mandate to implement these regulatory changes.

Regulatory Flexibility Analysis

Consistent with § 2.2-4007.1 B of the Code of Virginia, describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the regulatory change.

No alternative would meet the legislative mandate to implement these regulatory changes. These regulations have no effect on small businesses.

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below.

Consistent with § 2.2-4011 of the Code of Virginia, if an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

If you are objecting to the use of the fast-track process as the means of promulgating this regulation, please clearly indicate your objection in your comment. Please also indicate the nature of, and reason for, your objection to using this process.

DMAS is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal and any alternative approaches, (ii) the potential impacts of the regulation, and (iii) the agency's regulatory flexibility analysis stated in this background document.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: https://townhall.virginia.gov. Comments may also be submitted by mail, email or fax to Meredith Lee, DMAS, 600 E. Broad Street, Richmond, VA 23219, 804-371-0552, or Meredith.Lee@dmas.virginia.gov. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

Detail of Changes

List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

Changes in the Emergency Regulation:

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements
12 VAC 30-110-10			"Denial" and "fail to readmit" are added to definitions of the terms "action." "Contractor" and "benefits" are added to the term "agency." "De novo" is added to the term "hearing." "Day" is defined as a calendar day.
12 VAC 30-110-185		There is no section on appeal summaries.	A new section is added describing agency appeal summaries, listing the items that must be included in that document, along with the timeframe for submitting it to the appellant and/or representative.
12 VAC 30-110-220			The language in paragraph A is simplified. A new paragraph B related to de novo hearings is added, a new

			paragraph C related to burden of proof is added, and a new paragraph D for the process to submit evidence is added.
12 VAC 30-110-370			Language in paragraph A is simplified.
12 VAC 30-120-670			A new paragraph A is inserted to state that hearings will be de novo. The subsequent paragraphs have been re-lettered. Paragraph B2 is amended to state that "compelling reasons" are determined by the hearing officer. Paragraph I – "or" is changed to "and" to make it consistent with other subsections. Paragraph J removed language about "sustain," "reverse," or "remand." Under the de novo hearing process, a case begins anew such that the hearing officer no longer makes a determination of the correctness of the MCO's decision, but instead on whether coverage should be approved.
12 VAC 30-141-40			Paragraph G is amended to clarify the burden of proof.
12 VAC 30-141-700			Paragraph G is amended to clarify the burden of proof.

Changes between the Emergency Regulation and the Fast Track.

Emergency chapter-section number	**New chapter-section number, if applicable**	**Current <u>emergency</u> requirement**	**Change, intent, rationale, and likely impact of new or changed requirements since emergency stage**
12 VAC 30-110-10			A new last sentence was added to the definition of the term "action" to add other types of actions that were not included before. In the definition of the term "appellant" two instances of the word "his" were changed to "their" and "failure to readmit" was added to (ii). Definitions were added for the terms "burden of proof," "de novo," "fail to readmit," "preponderance of the evidence," and "state fair hearing."

12 VAC 30-110-185			The word “fair” was added in paragraph A. In A3, “local office” was removed and replaced with “agency or contractor.” In A4, the word “adverse” was removed and the words after “action” (including the text of “a” and “b’) was added. In A5, “department’s Medicaid manual” was removed and replaced with “Virginia Medical Assistance Eligibility Manual.” In B, the following words were added: “filed with the DMAS Appeals Division with a complete copy,” the appellant’s authorized” and “business.”
12 VAC 30-110-220			In A, the words “laws and regulations” were added. In B, the last sentence was added. In C, the words “the status quo” were removed and the words “make a” were inserted. Some of the wording in the second sentence was reordered and the words “a medical service” were replaced with the words “Medicaid covered services.” The words “an increase in the Medicaid eligibility level” were also removed and the words “eligibility for a higher level of coverage than has already been approved” were inserted to clarify DMAS’ intent and to avoid conflicting with Va. Code 2.2-4025(B). In the last sentence, the words “to the satisfaction of the hearing officer” were removed. In D, the following words were deleted: “Failure to submit information with the appeal so that it can be moved forward will add” and the following words were added: “If the appeal request does not identify the action being appealed with reasonable specificity include documentation to validate authorization for representation (if elected), or the Department requests good cause for late filing of the appeal, then …will be added…” Subsection E was added.
12 VAC 30-110-370			In B, the word “his” was replaced with “the appellant’s authorized”
12 VAC 30-120-670			In A, the second sentence was added. In E, the word “working” was replaced with “business.” In G, the word “nonadversarial” was replaced with “impartial.” In I4, the word “final” was added.

12 VAC 30-141-40			In G, “the status quo” was removed and replaced with “make a change.”
12 VAC 30-141-700			In G, “the status quo” was removed and replaced with “make a change.”