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Proposed Regulation Agency Background Document

Agency name	DEPT OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) citation(s)	<u>12 VAC 30 - 20- 500 et seq.</u>
Regulation title(s)	General Provider Administrative Appeals
Action title	Appeal Regulations Updates
Date this document prepared	

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

The sections of the State Plan for Medical Assistance that are affected by this action are 12 VAC 30-20-500, 520, 540, and 560 (General Provider Administrative Appeals). The regulatory changes herein specifically address the DMAS timelines and specifications for filing required documentation, including the process for addressing the sufficiency of the contents of case summaries. The method and timing of the filing and exchange of documentation is updated to include electronic transmission and the Department's authority to take administrative action to dismiss untimely, unauthorized or insufficient appeal requests is clarified.

Legal basis

Please identify the (1) the agency (includes any type of promulgating entity) and (2) the state and/or federal legal authority for the proposed regulatory action, including the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable. Your citation should include a specific provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency’s overall regulatory authority.

The *Code of Virginia* (1950) as amended, § 32.1-325, grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. The *Code of Virginia* (1950) as amended, §§ 32.1-324 and 325, authorizes the Director of DMAS to administer and amend the Plan for Medical Assistance according to the Board's requirements. The *Code of Virginia* (1950) as amended, § 32.1-325.1 provides for a provider appeal process. The Medicaid authority as established by § 1902 (a) of the *Social Security Act* [42 U.S.C. 1396a] provides governing authority for payments for services.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The purpose of this regulatory action is to comply with the legislative mandate and address recent case law and administrative decisions. The case law and administrative decisions have created the need to clarify existing appeals processes and codify emerging processes made urgent by court and administrative case decisions. The increasing volume of appeals generated by provider audits and other utilization review mandates have also created a need for this regulatory action. Additionally, recent case decisions such as VA Department of Medical Assistance Services v. Patient Transportation System, 58 Va.App.328, 709 S. E. 2d 188 (2011), and its predecessor appeal in circuit court have necessitated clarifying the means by which documentation can be transmitted and the manner in which alleged deficiencies in case summaries can be addressed.

Substance

Please 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.

The section of the State Plan for Medical Assistance that is affected by this action is General Provider Administrative Appeals (Attachment 7.5) (12 VAC 30-20-500 *et seq.*).

CURRENT POLICY

These appeal regulations were originally promulgated in 2000 and have been substantively revised only once since that time. From the onset of these regulations, the number of appeal actions has more than tripled to the current day. In 2000 and 2009, there was no need to provide for administrative dismissals, such as those that exist for client/recipient appeals, provide for mutually agreed upon time extensions, establish a timely process for providers to challenge alleged deficiencies in case summaries and provide consistent and effective timelines for appeal actions resulting from a remand by court order. The current process also permits exchange of documentation solely by U.S. mail, with no provision for electronic transmittal.

ISSUES

The increased volume of provider appeals over the past decade has taxed the resources of the Department's appeals process in a manner that is not sustainable without updating, clarifying and providing greater consistency. Specifically, a consistent timeline and method for filing documentation within normal business hours and one that allows for transmission methods other than solely U.S. mail is essential to functioning, including electronic transmission. Recent case decisions such as VA Department of Medical Assistance Services v. Patient Transportation System, 58 Va.App.328, 709 S. E. 2d 188 (2011), and its predecessor appeal in circuit court have necessitated clarifying the means by which documentation can be transmitted and the manner in which alleged deficiencies in case summaries can be addressed. Clarification as to the content of case summaries and the provider's identification of those issues the provider wishes the case summary to address are critical for the agency to comply with the law and provide a thorough case summary. Increases in the number of case remands necessitate a uniform method of processing remanded cases by all hearing officers. The growth in the number of appeals over the last decade necessitates that DMAS streamline the process for administratively dismissing untimely, unauthorized and insufficient appeal requests while maintaining due process through the right to appeal such action. The elements of recommended decisions in formal hearings are also streamlined and clarified. Lastly, the volume of appeals necessitates that the parties to the appeal be permitted some consistent and defined level of flexibility to extend and adjust appeal timelines for their specific circumstances, where the timeline is not dictated by state or federal statute.

RECOMMENDATIONS

The proposed regulations specifically address the issues identified above, including clarity and consistency regarding DMAS' timelines for appeals and remands, specifications for time and method of filing required documentation, the process for challenging the sufficiency of case summaries and clarification of the Department's process for administrative dismissals.

This action is critical to keeping abreast of the caseload increases due to enrollment growth and the increase in number, type and complexity of provider audits and initiatives aimed at fraud, waste and abuse. Improved consistency in methodology ensures fair and equal processing of appeals and maintenance of due process.

Issues

Please identify the issues associated with the proposed regulatory action, 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, please indicate.

Appeal regulatory timetables were established a decade ago and at that time, the volume of appeals was less than one-third of the present day. Over time, the volume of appeals has significantly increased, requiring regulatory clarification and updating. These recommended changes reflect the realities that the hearing officers and all affected parties face in attempting to process appeals and meet timelines that, over time, have become outdated. A consistent timeline and method for filing documentation within normal business hours and one that allows for methods other than solely U.S. mail, including electronic transmission, is essential to functioning efficiently. Recent case decisions such as VA Department of Medical Assistance Services v. Patient Transportation System, 58 Va.App.328, 709 S. E. 2d 188 (2011), and its predecessor appeal in circuit court have necessitated clarifying the means by which documentation can be transmitted and the manner in which alleged deficiencies in case summaries can be addressed. Clarification as to the content of case summaries and the provider’s identification of those issues the provider wishes the case summary to address are critical for the agency to comply with the law and provide a sufficient case summary that addresses all of the provider’s issues. Increases in the number of case remands necessitate a uniform method of processing such cases by all hearing officers.

The growth in the number and complexity of appeals over the decade necessitates that DMAS streamline the process for administratively dismissing untimely, unauthorized and insufficient appeal requests while maintaining due process. The elements of recommended decisions in formal hearings are also streamlined and clarified. Lastly, the volume of appeals necessitates that the parties to the appeal be permitted some consistent and defined level of flexibility to extend and adjust appeal timelines for their specific circumstances, by mutual consent, where the timeline is not dictated by state or federal statute.

The primary advantage of the proposed action is to guarantee that provider appeals are afforded due process through clear and consistent processes that are not compromised as volume increases. The public is served through the agency’s ability to address concerns of the courts in their recent decisions and assure that efficiency of available limited resources is maximized without compromising due process. Updating the existing regulations to reflect the practices of an increasingly digital and electronic business model improves efficiency and quality of service to providers and the public. DMAS sees no disadvantages to the proposed modifications herein.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include 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 statement to that effect.

There are no requirements more restrictive than federal requirements. There are no requirements that exceed applicable federal requirements. The proposed regulations set forth processes to remain in compliance with statutory timelines and due process requirements for appeals.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

No localities will be uniquely affected by these regulations as they apply statewide.

Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.

The agency/board is seeking comments on the intended regulatory action, including but not limited to 1) comments to be considered in the development of a proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives and 3) potential impacts of the regulation. The agency/board is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit comments may do so via the Regulatory Town Hall website (<http://www.townhall.virginia.gov>), or by mail, email, or fax to **Samuel Metallo, Appeals Division, DMAS, 600 E. Broad Street, Suite 1300, Richmond, VA 23219, 804 786-1501, fax 804 371-8491, Samuel.Metallo@dmas.virginia.gov**. Written comments must include the name and address of the commenter. In order to be considered, comments must be received by midnight on the last day of the public comment period.

A public meeting will not be held pursuant to an authorization to proceed without holding a public meeting.

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.

<p>Projected cost to the state to implement and enforce the proposed regulation, including: a) fund source / fund detail; and b) a delineation of one-time versus on-going expenditures</p>	<p>No additional cost and a potential increased efficiency in use of resources.</p>
<p>Projected cost of the new regulations or changes to existing regulations on localities.</p>	<p>None.</p>
<p>Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.</p>	<p>Medicaid service providers of every type avail themselves of the DMAS appeals process. Clarifying the appeals process and timelines, while also increasing efficiencies, positively affects the providers as well as the agency.</p>
<p>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small 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.</p>	<p>With the exception of about 108 hospitals and 273 nursing facilities (some of which are large national chains), the remainder of DMAS’ approximately 52,000 providers could be considered small businesses. However, DMAS does not specifically retain data about small businesses.</p>
<p>All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs including: a) the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; and b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</p>	<p>No additional cost and a potential increased efficiency in use of resources.</p> <p>Since providers are not required to file appeals, any costs (such as for their legal counsel) that they incur would be by their own choice and not required by these DMAS regulations.</p> <p>There are no costs associated with real estate as a consequence of these regulations.</p>
<p>Beneficial impact the regulation is designed to produce.</p>	<p>Expected benefits are: (i) providing clarity of regulatory requirements, (ii) allowing for document processing in keeping with modern business practices and (iii) allowing the parties some level of flexibility in adjusting timelines that are not dictated by statute.</p>

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. 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 regulation.

Agency action on appeals is governed by the Agency's regulations for the purpose and needs described herein. Other alternatives do not exist and this regulatory action is the most cost-effective manner to address the identified purpose and need.

Regulatory flexibility analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, please 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) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of 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 proposed regulation.

Effective due process to providers of all types, no matter how big or small the business may be, requires a fair, uniform and consistent exercise of the right to appeal agency decisions. DMAS provider appeal regulations have served that purpose well for over a decade by providing a uniform and efficient structure by which providers can challenge agency decisions and exercise their due process rights.

Family Impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

These changes do not strengthen or erode the authority or rights of parents in the education, nurturing, and supervision of their children; nor encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents. It does not strengthen or erode the marital commitment, but may decrease disposable family income depending upon which provider the recipient chooses for the item or service prescribed.

Public comment

Please summarize all comments received during the public comment period following the publication of the NOIRA, and provide the agency response.

DMAS' Notice of Intended Regulatory Action was published in the *Virginia Register* on December 2, 2013 (VR 30:7) for a comment period from December 2, 2013, through January 1, 2014. No comments were received during the comment period.

Detail of changes

*Please list all changes that are being proposed and the consequences of the proposed changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action. If the proposed regulation is intended to replace an emergency regulation, please list separately: (1) all differences between the **pre-emergency** regulation and this proposed regulation; and 2) only changes made since the publication of the emergency regulation.*

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, and likely impact of proposed requirements
12 VAC 30-20-500		<p>Current requirements do not define how documentation is to be transmitted.</p> <p>Current requirements do not define the term "administrative dismissal."</p>	<p>Add the definition of "transmit". This definition provides that documentation can be sent by means of the U.S. Postal Service, courier or other hand delivery, facsimile, electronic mail or electronic submission.</p> <p>Add the definition of "administrative dismissal" which means a dismissal that requires only the issuance of a decision with appeal rights but that does not require the submission of a case summary or any further proceedings.</p> <p>Term clarification: "transmit" inserted and "mail" deleted to conform to amended language and definitions throughout regulations.</p> <p>Added text to define "Last Known Address."</p>
12 VAC 30-20-520		Sets parameters for daily activity but does not currently define normal business hours or the practice to be followed when the agency is open only a partial day.	<p>In Subsection C insert the term "transmit" in place of the term "mail" and adjust references accordingly to conform to amended language and definitions throughout the regulations. Also added text clarifying receipt of e-mail and fax, presumption of receipt and transmittal dates.</p> <p>Subsection E clarifies that its provision (extending appeal deadlines when DMAS is closed) also applies to days that DMAS is 'partially closed.' There are times when DMAS is unexpectedly closed mid-day by reason of weather, holiday leave or other reasons. Providers and DMAS' outside contractors are often unaware of early closing and should not be penalized if they cannot deliver documents that are on deadline. This amendment clarifies that the extension due to DMAS' closure also pertains to partial day closures.</p> <p>Subsection F – added clarifying language re agreed upon change for venue for hearings.</p>

		Current requirements do not indicate the specific time that the day of delivery ends.	Subsection I clarifies that day of delivery ends at normal agency business hours of 5:00 pm.
12 VAC 30-20-540		Sets forth the requirements for processing an informal appeal.	Subsection A is amended to clarify the requirements for notices of informal appeal. Subsection B adds text addressing authorizations for billing companies, exhaustion of administrative remedies and when appeals shall be administratively dismissed. Subsection C clarifies case summary obligations and timelines.
12 VAC 30-20-540		Current requirements do not address the issue of time periods when appeals are remanded back to the Appeals Division.	In Subsection D, added text prohibiting hearing recordings other than those for the use by the hearing officer, and prohibiting the release of such recordings to all parties. Added Subsection F that whenever an informal appeal is required pursuant to a remand by court order, Final Agency Decision, agreement of the parties or otherwise, all time periods shall begin to run effective with the date that the document containing the remand is date-stamped by the DMAS Appeals Division.
12 VAC 30-20-560		Sets forth the requirements for processing a formal appeal.	Subsection A adds text to clarify prerequisites and requirements for notices of formal appeal. Subsection B adds text to clarify the timelines for formal appeals. Subsection C codifies current practice of commencement and extension of 45-day timeline by mutual consent of the hearing officer and all parties. The timelines in Subsection E were moved to Subsection B, and Subsection E is deleted. Subsection F is added to clarify the requirements for recommended decisions. Subsection G amends the deadline for the parties' submission of "exceptions" to the Hearing Officer's Recommended Decision from the current 30 days to 14 days. This
		Current requirement deadline is 30 days for the parties' submission of "exceptions" to	

		the Hearing Officer's recommended decision.	shortens the timeline for the filing of exceptions, to give the Agency needed additional time to review and address exceptions and to discuss the Final Agency Decision draft with the Agency Counsel.
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Changes Between the Emergency and Proposed Regulations

12 VAC 30-20-500: Added definition of “Last known address,” which is based upon the provider’s address that is listed in the DMAS MMIS payment system.

12 VAC 30-20-520: In Subsection C, added new text: “The parties may mutually consent, in writing, to transmit a specific item or type of item to an alternate location.” and new text regarding document transmission during the appeal process. Also added text that provider has burden to rebut the presumption of receipt.

Deleted text of Emergency regulation Subsection E, and replaced it with text from Emergency regulation Subsection G, adding text to clarify that this provision applies to all items transmitted to the Hearing Officer pursuant to -560(B)

Changed Emergency regulation Subsection G to Subsection F. Added new text stating that the parties may mutually agree to another location for the hearing.

12 VAC 30-20-540: Reorganized Subsections A, B and C to clarify the various elements of informal appeals. In Subsection (A)(2), clarified that the Notice of Appeal “shall identify each adjustment, patient, service date, or other disputed matter being appealed.”

Added new numbered paragraphs to Subsection B to clarify various aspects of administrative dismissals. Added text to Subsection C text to clarify information regarding the filing and processing of the appeal summary, including challenges to the sufficiency of the content and to address provider concerns regarding vagueness and uncertainty with the previously used term “non-substantive.”

In new Subsection D, clarifies existing practice that a informal appeal agent’s recording of a conference is non-evidentiary and shall not be submitted to either party. Also added clarifying information regarding remands.

12 VAC 30-20-560: Added text to Subsection A to clarify what must be described in the notice of formal appeal. Also added the following text to Subsection A:

“Pursuant to § 2.2-4019(A) of the Code of Virginia, DMAS shall ascertain the fact basis for decisions through informal conference or consultation proceedings unless the parties mutually consent in writing to waive such a conference or proceeding to go directly to a formal hearing, and therefore only issues that were addressed in the informal appeal decision shall be addressed in the formal appeal.”

DMAS added clarifying language regarding the filing of objections to Subsection B, and added to Subsection C a clarifying citation to Va. Code 32.1-325.1(B). Subsection E regarding opening briefs was deleted. In a new Subsection E, DMAS added clarifying language regarding the recommended decision. Subsection F, which provided additional information on recommended decisions, was deleted.

