MassHealth

Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
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MassHealth
Eligibility Letter 163
July 1, 2007

TO: MassHealth Staff

FROM: Tom Dehner, Acting Medicaid Director TD

RE: **Changes to the Fair Hearing Rules**

MassHealth is revising the fair hearing regulations to include the Board of Hearings' authority to hear certain appeals relating to Commonwealth Care, as governed by 130 CMR 610.000 and 956 CMR 3.00.

These regulations are being issued as emergency regulations, effective December 29, 2006.

MANUAL UPKEEP

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610.001: Purpose

The purpose of 130 CMR 610.000 is to set forth procedures that govern the conduct of adjudicatory proceedings whereby dissatisfied applicants, members, and employers seek administrative review of certain actions or inactions on the part of the MassHealth agency or on the part of a MassHealth managed care contractor. 130 CMR 610.000 also contains provisions under which nursing facility residents may seek review of discharges and transfers by a nursing facility, and where applicants and members seek review of a MassHealth determination of eligibility for low-income subsidies under Medicare Part D, as set forth in the Medicare Prescription Drug and Improvement and Modernization Act of 2003, as described in federal regulations 42 CFR Part 423, Subpart P. Applicants for and individuals receiving Commonwealth Care, pursuant to M.G.L. c. 118H, also may seek administrative review under 130 CMR 610.000 as provided under 956 CMR 3.14 and 3.17.

610.002: Authority

The authority for the regulations set forth in 130 CMR 610.000 is 42 CFR 431.200 et seq., M.G.L. c. 30A, c. 118E, §§ 12, 20, 47, and 48, and 801 CMR 1.03(7). Pursuant to M.G.L. c. 118E, § 48, the Board of Hearings has exclusive jurisdiction to hear appeals relating to the programs administered by the MassHealth agency. Pursuant to M.G.L. c. 176Q, § 3(a)(6) and § 3(m), the Commonwealth Health Insurance Connector Authority may establish procedures for appeals of eligibility decisions for Commonwealth Care through an interdepartmental agreement with the MassHealth agency.

610.003: Scope

130 CMR 610.000 sets forth the exclusive procedures governing adjudicatory proceedings initiated by applicants, members (or their appeal representatives), and employers under programs administered by the MassHealth agency, and for MassHealth determinations of eligibility for low-income subsidies under Medicare Part D, as set forth in the Medicare Prescription Drug and Improvement and Modernization Act of 2003. Appeals pursuant to the Executive Office of Elder Affairs Supplementary Rules to the Adjudicatory Rules of Practice and Procedures, 651 CMR 1.00 et seq., are governed by the procedures set forth in 130 CMR 610.000. Appeals by residents of a nursing facility who are to be discharged or transferred at the initiation of the nursing facility are governed by 130 CMR 610.000. Adjudicatory proceedings initiated by medical assistance providers are governed by 130 CMR 450.241 through 450.248 or, with regard to appeals of erroneously denied claims, by 130 CMR 450.323. Appeals pertaining to Commonwealth Care are governed by 130 CMR 610.000 and 956 CMR 3.00.

610.004: Definitions

For purposes of 130 CMR 610.000, the following terms have the meanings given below unless the context clearly indicates otherwise.

Acting Entity – the MassHealth agency, managed care contractor, nursing facility, or the Connector responsible for taking an appealable action.

Adequate Notice – a notice concerning an intended appealable action that conforms to the requirements of 130 CMR 610.026.

Appealable Action – certain actions, as further described in 130 CMR 610.032, by the MassHealth agency, managed care contractor, or a nursing facility, or certain actions of the Connector as set forth in 956 CMR 3.14 and 3.17. No action by a provider will constitute an appealable action, except as otherwise provided herein with regard to a transfer or discharge by a nursing facility.

Appeal Representative – a person who:

(1) is sufficiently aware of the appellant's circumstances to assume responsibility for the accuracy of the statements made during the appeal process, and who has provided the Board of Hearings with written authorization from the appellant to act on the appellant's behalf during the appeal process;

(2) has, under applicable law, authority to act on behalf of an appellant in making decisions related to health care or payment for health care. An appeal representative may include, but is not limited to, a guardian, conservator, executor, administrator, holder of power of attorney, or health-care proxy; or

(3) is an eligibility representative meeting the requirements of (1) or (2) above.

Appellant – an applicant, member, resident, or employer requesting a fair hearing.

Applicant – a person or family who has applied or attempted to apply for an assistance program administered by the MassHealth agency or the Connector.

Application – either a Medical Benefit Request (MBR) (see 130 CMR 501.001) or a Senior Medical Benefit Request (SMBR) (see 130 CMR 515.001), including authorized electronic applications.

Assistance – any medical assistance or benefits provided to a member by the MassHealth agency.

BOH – the Board of Hearings within the MassHealth agency.

Commonwealth Care – the Commonwealth Care Health Insurance Program administered by the Connector under M.G.L. c. 118H.

Connector – the Commonwealth Health Insurance Connector Authority established under M.G.L. c. 176Q.

Director – the Director of the Board of Hearings.

Discharge – the removal from a nursing facility of an individual who is a resident where the discharging nursing facility ceases to be legally responsible for the care of that individual.

Division – the Massachusetts Division of Medical Assistance organized under M.G.L. c. 118E, or its agent.

Employer – a business, including a self-employed individual, who has applied for or has been receiving payments under the Insurance Partnership.

Fair Hearing – an administrative, adjudicatory proceeding conducted according to 130 CMR 610.000 to determine the legal rights, duties, benefits, or privileges of applicants, members, residents, or employers.

Hearing Officer – an impartial and independent person designated by the Director of the Board of Hearings to conduct hearings and render decisions pursuant to 130 CMR 610.000.

Insurance Partnership – a program administered by the MassHealth agency to help qualified employers offer health insurance.

Interpreter – a person who translates for the appellant, when the appellant's primary language is not English or when the appellant is deaf or hearing-impaired. The interpreter is sworn to make an impartial and accurate translation of the events occurring at the hearing.

Managed Care Contractor – any MassHealth-contracted managed care organization (MCO), senior care organization (SCO), or behavioral health contractor, as defined and described in 130 CMR 508.000.

MassHealth – the medical assistance and benefit programs administered by the MassHealth agency pursuant to Title XIX of the Social Security Act (42 U.S.C. §1396), Title XXI of the Social Security Act (42 U.S.C. §1397) M.G.L. c. 118E, and other applicable laws and waivers to provide and pay for medical services to eligible members.

MassHealth Agency – the Executive Office of Health and Human Services in accordance with the provisions of M.G.L. c. 118E.

Member – a person or family who is or had been receiving assistance under a program administered by the MassHealth agency, or an enrollee in Commonwealth Care to the extent the enrollee is affected by decisions appealable to the Board of Hearings under 956 CMR 3.17.

Nursing Facility – a Medicare- or Medicaid-certified nursing facility, or certified unit within a nursing facility, that is licensed by the Department of Public Health to operate in Massachusetts.

Party – the appellant, the managed care contractor, the nursing facility, the respondent to a complaint of coercive behavior, the MassHealth agency, or the Connector.

Policy Memorandum – a written explanation, issued by the Medicaid Director or the General Counsel's office, of the MassHealth agency's intent and interpretation or application of its regulations under 130 CMR, or a written explanation, issued by the Connector or its designee, of the Connector's intent and interpretation or application of its regulations under 956 CMR.

Provider – any entity that furnishes medical services.

Resident – an individual who lives in a nursing facility, regardless of whether he or she is a member.

Resident Record – that portion of a nursing facility's records in which the nursing facility has documented the reason for the discharge or transfer of a resident.

Rural Service Area – any geographic area other than an urban area, as that term is defined in 42 CFR 412.62(f)(ii).

Timely Notice – adequate notice of an intended appealable action by the MassHealth agency that meets the additional requirements set forth in 130 CMR 610.015(A). The MassHealth agency must send a timely notice to the member, except as provided in 130 CMR 610.027.

Timely Request – a request for a fair hearing received by BOH within the timely notice period set forth in 130 CMR 610.015(B).

Transfer – movement of a resident from:

(1) a Medicaid- or Medicare-certified bed to a noncertified bed;

(2) a Medicaid-certified bed to a Medicare-certified bed;

(3) a Medicare-certified bed to a Medicaid-certified bed;

(4) one nursing facility to another nursing facility; or

(5) a nursing facility to a hospital, or any other institutional setting.

Movement of a resident within the same facility from one certified bed to another bed with the same certification does not constitute a transfer.

(130 CMR 610.005 through 610.010 Reserved)

610.011: The Board of Hearings

The Board of Hearings (BOH) is responsible for administering the fair hearing process in accordance with 130 CMR 610.000, holding hearings, and rendering decisions. At the MassHealth agency's discretion, BOH also will conduct adjudicatory proceedings governing providers pursuant to 130 CMR 450.241 through 450.248, and 130 CMR 450.323. BOH is administered by a Director who is appointed by the Medicaid Director, and who is responsible for ensuring that the fair hearing process and decisions comply with the requirements of 130 CMR 610.000.

610.012: General Description of the Fair Hearing Process

(A) The fair hearing process is an administrative, adjudicatory proceeding whereby dissatisfied applicants, members, residents, and employers can, upon written request, obtain an administrative determination of the appropriateness of:

(1) certain actions or inactions on the part of the MassHealth agency;

(2) certain actions or inactions on the part of a managed care contractor;

(3) certain decisions or determinations made by the Connector as set forth in 956 CMR 3.17;

(4) actions to recover payment for benefits to which the member was not entitled at the time the benefit was received;

(5) alleged coercive or otherwise improper conduct by a MassHealth agency employee;

(6) the denial or termination of an employer from the Insurance Partnership;

(7) the amount of an Insurance Partnership payment; or

(8) a decision by a nursing facility to discharge or transfer a resident.

(B) The process is designed to secure and protect the interests of both the appellant and appropriate MassHealth agency or Connector personnel and to ensure equitable treatment for all involved.

(C) A hearing is conducted by an impartial hearing officer of BOH.

(1) The decision of the hearing officer is based only on those matters that are presented at the hearing.

(2) The hearing officer examines the facts, the applicable law, the MassHealth agency's rules, regulations, contracts, and Policy Memoranda, and the other circumstances of the case presented by the parties to determine the legality and appropriateness of the MassHealth agency's or MassHealth agency employee's action, the action of a managed care contractor or nursing facility, or the action of the Connector.

(3) The hearing officer is impartial in that he or she:

(a) attempts to secure equitable treatment for all parties;

(b) must have no prior involvement in any matter over which he or she conducts a hearing, except in a capacity as a hearing officer; and

(c) must have no direct or indirect financial interest, personal involvement, or bias pertaining to such matter.

(D) The final decision is binding upon the MassHealth agency, managed care contractors, and the Connector, except that appeals may be subject to review as provided in 130 CMR 610.091.

(E) Appeals involving transfers or discharges from nursing facilities are binding only on the facility and the resident.

(F) Final decisions of the hearing officer are subject to judicial review in accordance with 130 CMR 610.092.

610.031: Notification of the Right to Request a Hearing

(A) Upon being notified of any appealable action, the applicant or member will be informed in writing of his or her right to a hearing, of the method by which a hearing may be requested, and of the right to use an appeal representative (see 130 CMR 610.016).

(B) If an applicant or member indicates disagreement with an appealable action, the acting entity will provide the applicant or member with an appeal form and, if requested, help complete the form. The MassHealth agency may not restrict the applicant's or member's freedom to request a fair hearing.

(C) If there is an individual or organization that provides free legal representation, the person requesting a hearing will be informed of the availability of that service.

(D) At the time that a nursing facility notifies a resident that he or she is to be discharged or transferred, the nursing facility must inform the resident that he or she has the right to request a hearing before the MassHealth agency.

(E) At the time the MassHealth agency or its agent notifies an employer in writing that it is being denied or terminated from the Insurance Partnership, or there has been a written reconciliation about the amount of the Insurance Partnership payment, the employer will be informed of its right to a hearing before the MassHealth agency.

610.032: Grounds for Appeal

(A) Applicants and members have a right to request a fair hearing for any of the following reasons:

(1) denial of an application or request for assistance, or the right to apply or reapply for such assistance;

(2) the failure of the MassHealth agency to give timely notice of action on an application for assistance in accordance with the requirements of M.G.L. c. 118E, § 21;

(3) any MassHealth agency action to suspend, reduce, terminate, or restrict a member's assistance;

(4) MassHealth agency actions to recover payments for benefits to which the member was not entitled at the time the benefit was received;

(5) individual MassHealth agency determinations regarding scope and amount of assistance (including, but not limited to, level-of-care determinations);

(6) coercive or otherwise improper conduct as defined in 130 CMR 610.033 on the part of any MassHealth agency employee directly involved in the applicant's or member's case;

(7) any condition of eligibility imposed by the MassHealth agency for assistance or receipt of assistance that is not authorized by federal or state law or regulations;

(8) the failure of the MassHealth agency to act upon a request for assistance within the time limits required by MassHealth regulations;

(9) the MassHealth agency's determination that the member is subject to the provisions of 130 CMR 508.000;

(10) the MassHealth agency's denial of an out-of-area provider under 130 CMR 508.002(F);

(11) the MassHealth agency's disenrollment of a member from a managed-care provider under 130 CMR 508.002(G) or 508.008(E);

(12) the MassHealth agency's determination to enroll a member in the Controlled Substance Management Program under the provisions of 130 CMR 406.442;

(13) the MassHealth agency's determination of eligibility for low-income subsidies under Medicare Part D, as set forth in the Medicare Prescription Drug and Improvement and Modernization Act of 2003; and

(14) the MassHealth agency's determination on behalf of the Connector as set forth in 956 CMR 3.17.

(B) Members enrolled in a managed care contractor have a right to request a fair hearing for any of the following actions or inactions by the managed care contractor, provided the member has exhausted all remedies available through the managed care contractor's internal appeals process (except where a member is notified by the managed care contractor that exhaustion is unnecessary):

(1) failure to provide services in a timely manner, as defined in the information on access standards provided to members enrolled with the managed care contractor;

(2) a decision to deny or provide limited authorization of a requested service, including the type or level of service;

(3) a decision to reduce, suspend, or terminate a previous authorization for a service;

(4) a denial, in whole or in part, of payment for a service where coverage of the requested service is at issue, provided that procedural denials for services do not constitute appealable actions. Notwithstanding the foregoing, members have the right to request a fair hearing where there is a factual dispute over whether a procedural error occurred. Procedural denials include, but are not limited to, denials based on the following:

(a) failure to follow prior-authorization procedures;

(b) failure to follow referral rules; and

(c) failure to file a timely claim;

(5) failure to act within the time frames for resolution of an internal appeal as described in 130 CMR 508.010;

(6) a decision by an MCO to deny a request by a member who resides in a rural service area served by only one MCO to exercise his or her right to obtain services outside the MCO's network under the following circumstances, pursuant to 42 CFR 438.52(b)(2)(ii):

610.049: Dismissal for Failure to Prosecute

When the record discloses the failure of the appellant to file documents required by 130 CMR 610.000, to respond to notices or correspondence, or to comply with orders, or when the appellant otherwise indicates an intention not to continue with the prosecution of his or her appeal, BOH may issue an order requiring the appellant to show cause why the matter should not be dismissed for lack of prosecution. The show cause determination will be made by the Director; however, in cases where the hearing has been scheduled and a hearing officer has been designated to conduct the hearing, the determination will be made by the hearing officer. If the appellant is found to have failed to show such cause, the appeal will be dismissed with prejudice.

610.050: Right to Examine Case File and Documents, or "Discovery"

The appellant and his or her appeal representative will have reasonable opportunity to examine the entire contents of the appellant's case file, as well as all documents and records to be used by the MassHealth agency or the Connector at the hearing. An appointment must be scheduled in advance with the appropriate MassHealth Enrollment Center (MEC) for examination of the case file.

610.051: Adjustment Procedures and Mediation

(A) MassHealth Agency or Connector Representative. The MassHealth agency or Connector representative is primarily responsible for dealing with complaints from applicants or members. Dissatisfaction on the part of applicants or members may result from a lack of knowledge or understanding of the regulations that govern MassHealth or Connector policies and procedures. Ordinarily, complaints may be resolved with an explanation of the regulations by the representative. If the representative's explanation is not satisfactory, the representative's immediate supervisor will be available to respond to the complaint. If the complaint cannot be resolved, the MassHealth agency or the Connector will remind the applicant or member of the right to request a fair hearing.

(B) Adjustments Resolving Issues. The MassHealth agency or the Connector may make an adjustment in the matters at issue before or during a hearing. If the parties agree that the adjustment resolves one or more of the issues in dispute, the hearing officer, by written order, will dismiss the appeal as to all resolved issues, noting as the reason for such dismissal that the parties have reached agreement. BOH will not delay a fair hearing because a possible adjustment is under consideration unless the appellant requests or agrees to such a delay.

(C) Mediation. BOH may offer to the parties the opportunity to resolve one or more of the appeal issues in dispute through mediation, and such mediation may proceed only if, and as long as, both parties agree to such mediation that will be conducted substantially in accordance with M.G.L. c. 233, § 23C. If such mediation resolves one or more of the issues in dispute, the hearing officer, by written order, will dismiss the appeal, without prejudice, as to all resolved issues, noting as the reason for such dismissal that the parties have reached agreement. Either party may elect to terminate mediation at any time and proceed to a fair hearing that BOH will schedule accordingly. Any party may request that a different hearing officer be assigned to conduct such fair hearing.

610.081: Reopening Before Decision

After the close of the hearing and before a decision, the hearing officer may reopen the record or, if appropriate, the hearing if he or she finds need to consider further testimony, evidence, materials or legal rules before rendering his or her decision. If the hearing officer decides to reopen the record, he or she shall notify all parties accordingly and all parties shall have the opportunity to submit such additional testimony, evidence, materials, or legal argument as the hearing officer may describe in such notice and within such time period that the hearing officer may so establish. All such additional submissions shall be sent to the other party or parties who shall have the opportunity to respond to such submissions within such time period as the hearing officer may establish. If the hearing officer decides to reopen the hearing, he or she must send seven days' written notice to all parties of the reopening and his or her reasons therefore, including the date, time, and location of the resumed hearing, which shall be held at a location accessible to the appellant. Before a hearing decision, any party to a hearing may request in writing that the hearing officer exercise his or her power hereunder, which request shall become part of the record.

610.082: Basis of Fair Hearing Decisions

(A) The hearing officer's decision is based upon evidence, testimony, materials, and legal rules, presented at the hearing, including the MassHealth agency's or the Connector's interpretation of its rules, policies, and regulations. Any evidence, testimony, materials, legal rules, or arguments presented after the close of the hearing will be excluded unless the record or hearing is reopened by the hearing officer pursuant to 130 CMR 610.081, or the parties stipulate procedures for response, or the parties otherwise waive the right to respond.

(B) The decision shall be based upon a preponderance of evidence.

(C) The decision must be rendered in accordance with the law.

(1) The law includes the state and federal constitutions, statutes, and duly promulgated regulations, as well as decisions of the state and federal courts.

(2) Notwithstanding 130 CMR 610.082(C)(1), the hearing officer shall not render a decision regarding the legality of federal or state law including, but not limited to, the MassHealth or Connector regulations. If the legality of such law or regulations is raised by the appellant, the hearing officer shall render a decision based on the applicable law or regulation as interpreted by the MassHealth agency or the Connector. Such decision shall include a statement that the hearing officer cannot rule on the legality of such law or regulation and shall be subject to judicial review in accordance with 130 CMR 610.092.

(3) The hearing officer shall give due consideration to Policy Memoranda and any other MassHealth agency or Connector representations and materials containing legal rules, standards, policies, procedures, or interpretations as a source of guidance in applying a law or regulation.