

Regulatory Analysis Form

This space for use by IRRC

2004 AUG - W AM 11:00

REVIEW COMMISSION

(1) Agency
Department of Public Welfare, Bureau of Hearings and Appeals

(2) I.D. Number (Governor's Office Use)

IRRC Number: 2416

(3) Short Title
Medical Assistance Provider Appeal Procedures

(4) PA Code Cite
55 Pa.Code Chapter 41

(5) Agency Contacts & Telephone Numbers
Primary Contact: Thomas E. Cheffins, 717-783-3950
Secondary Contact: Randy J. Riley, 717-783-3950

(6) Type of Rulemaking (check one)
 Proposed Rulemaking
 Final Order Adopting Regulation
 Final Order, Proposed Rulemaking
 Omitted

(7) Is a 120-Day Emergency Certification Attached?
 No
 Yes: By the Attorney General
 Yes: By the Governor

(8) Briefly explain the regulation in clear and nontechnical language.

The proposed regulation provides a framework for the Medical Assistance (MA) provider appeal process that mandates, among other things, prompt adjudications, reasonable and necessary discovery and impartial adjudications. The goal of the regulation is to ensure the just and speedy determination of MA provider appeals.

(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

The statutory authority for the regulation is the act of December 3, 2002 (P. L. 1147, No. 142), § 20.1, 67 Pa.C.S. § 1106.

Regulatory Analysis Form

(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

The MA provider appeal procedure regulation is authorized by the act of December 3, 2002 (P. L. 1147, No. 142), § 20.1, 67 Pa.C.S. § 1106. The deadline for issuing regulations is July 1, 2004.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

The proposed regulation will enable MA providers, attorneys, and other parties to be better informed of their rights, responsibilities and expectations in appeals and proceedings before the Bureau of Hearings and Appeals.

(12) State the public health, safety, environmental or general welfare risks associated with nonregulation.

The proposed regulation provides clarifications as to the rights, responsibilities, and expectations in MA provider appeals and proceedings before the Bureau of Hearings and Appeals.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

All parties that litigate MA provider appeals before the Bureau of Hearings and Appeals will benefit. Last year, there were more than 1,342 medical assistance provider appeals filed under the jurisdiction of the Bureau of Hearings and Appeals. The Bureau of Hearings and Appeals has seen an increase in the number of MA provider appeals over the last 6 months since Act 2002-142 removed the jurisdiction of the Pennsylvania Board of Claims in these types of appeals.

Regulatory Analysis Form

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effects as completely as possible and approximate the number of people who will be adversely affected.)

No one will be adversely affected by this proposed regulation.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

The Department of Public Welfare, MA providers, and attorneys who practice before the Bureau of Hearings and Appeals will be required to comply with this proposed regulation.

(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

An Advisory Committee was established in July 2003 to meet and recommend whether regulations should be promulgated governing MA provider appeals litigated before the Bureau of Hearings and Appeals. The Advisory Committee members included private law firms, MA provider organizations, government attorneys, and administrative law judges. The Advisory Committee had a series of discussions over a period of 6 months and made several recommendations, some of which are included in the proposed regulation.

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

Not applicable.

Regulatory Analysis Form

(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

Not applicable.

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required.

No additional staffing costs are anticipated since the Bureau of Hearings and Appeals has realigned current staffing to handle any increase in workload resulting from the regulation change.

Steve K... 4-19-04

Regulatory Analysis Form

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

(Dollar Amounts In Thousands)

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:						
Regulated Community						
Local Government						
State Government	\$0	\$0	\$0	\$0	\$0	\$0
Total Savings	\$0	\$0	\$0	\$0	\$0	\$0
COSTS:						
Regulated Community						
Local Government						
State Government						
Total Costs	\$0	\$0	\$0	\$0	\$0	\$0
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses	\$0	\$0	\$0	\$0	\$0	\$0

(20a) Explain how the estimates listed above were derived.

Litigating all Medical Assistance provider appeals before the Bureau of Hearings and Appeals as opposed to the Board of Claims will have no fiscal impact.

Regulatory Analysis Form

(20b) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -3	FY -2	FY -1	Current FY
MA-Inpatient	\$418,707	\$417,512	\$407,104	\$411,042
MA-Long Term Facility	\$722,565	\$761,877	\$777,084	\$768,030
MA-Outpatient	\$668,586	\$705,750	\$666,832	\$740,075

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

Not applicable.

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

No nonregulatory alternative were considered.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

Various regulatory schemes were considered based upon the adherence to all, some, or none of the General Rules of Administrative Practice and Procedure set forth in 1 Pa.Code Chs. 31, 33 and 35 (GRAPP). The Department of Public Welfare is proposing to adopt portions of the GRAPP that are applicable to the MA provider appeal process along with new requirements specified in the proposed regulation, which are based on Act 2002-142.

Regulatory Analysis Form

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

No provisions are more stringent than federal standards.

(25) How does this regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

Almost all states regulate the practice and procedures for litigating before their administrative tribunals. There would be no competitive disadvantage with any other state if the regulations were adopted.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

There is no direct affect on existing or proposed regulations of other state agencies.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

No, however, the Advisory Committee will continue to meet quarterly to review and recommend any changes to the regulation.

Regulatory Analysis Form

(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

The proposed regulation will not change existing reporting, record keeping or other paperwork requirements.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

The regulation is designed to provide a fair and impartial hearing before the Bureau of Hearings and Appeals in MA provider appeals.

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The regulation will be effective upon final publication in the Pennsylvania Bulletin.

(31) Provide the schedule for continual review of the regulation.

The Advisory Committee will continue to meet quarterly to review and recommend any changes to the regulations. The Bureau of Hearings and Appeals internal committee will continue to meet quarterly to review and recommend any changes to the regulation.

CDL-1

RECEIVED
2004 AUG -4 AM 11:00
REVIEW COMMISSION

**FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU**

(Pursuant to Commonwealth Documents Law)

A 2416

DO NOT WRITE IN THIS SPACE

<p>Copy below is hereby approved as to form and legality. Attorney General <i>Anthony J. Elliott</i> By: _____ (Deputy Attorney General) JUL 26 2004 _____ Date of Approval</p> <p><input type="checkbox"/> Check if applicable Copy not approved. Objections attached.</p>	<p>Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:</p> <p>DEPARTMENT OF PUBLIC WELFARE (Agency)</p> <p>LEGAL COUNSEL: _____</p> <p>DOCUMENT/FISCAL NOTE NO. <u>14-488</u></p> <p>DATE OF ADOPTION: _____</p> <p>BY: <i>Estelle B. Richman</i></p> <p>TITLE: <u>SECRETARY OF PUBLIC WELFARE</u> (Executive Officer, Chairman or Secretary)</p>	<p>Copy below is hereby approved form and legality. Executive Independent Agencies. BY: _____</p> <p><u>5/27/04</u> Date of Approval</p> <p>(Deputy General Counsel, Independent) (Strike inapplicable title)</p> <p><input type="checkbox"/> Check if applicable. No Attorney General approval or objections within 30 days after submission.</p>
---	---	--

NOTICE OF PROPOSED RULEMAKING

DEPARTMENT OF PUBLIC WELFARE

OFFICE OF ADMINISTRATION

[55 Pa.Code Chapter 41]

Medical Assistance Provider Appeal Procedures

Statutory Authority

Notice is hereby given that the Department of Public Welfare (Department), under the Authority of the act of December 3, 2002 (P. L. 1147, No. 142), section 20.1, 67 Pa.C.S. § 1106, intends to adopt the regulation set forth in Annex A to this notice.

Purpose of Regulation

The purpose of the proposed rulemaking is to ensure the just and prompt determination of Medical Assistance (MA) provider appeals.

Background

The act of December 3, 2002 (P. L. 1147, No. 142) created 67 Pa.C.S. Chapter 11 (relating to Medical Assistance hearings and appeals). This chapter establishes a statutory framework for a provider appeal process and authorizes the Department to adopt regulations establishing rules of procedure by July 1, 2004 as may be necessary to implement the act. The Bureau of Hearings and Appeals (Bureau) published a Standing Practice Order (Order) on June 28, 2003 that imposes interim rules governing provider appeals pending the adoption of final regulations. See 33 Pa.B. 3053 (June 28, 2003).

Under 67 Pa.C.S. § 1106(b), the Bureau established an Advisory Committee to provide assistance and guidance in the development and modification of any such regulations. The Advisory Committee included 15 attorneys experienced in

proceedings before the Bureau and other administrative agencies. The Advisory Committee members represented private law firms, MA provider organizations, and government attorneys. The Advisory Committee recommended that the regulations be promulgated using the Bureau's Order as the basis for a proposed rulemaking.

Need for Regulation

The proposed rulemaking will assist MA providers, attorneys, and other parties in proceedings before the Bureau.

Requirements

The proposed rulemaking meets the important goals embodied in 67 Pa.C.S. Chapter 11 by providing, among other things, for the mandatory disclosure of information by both parties, a 120-day discovery period and the filing of detailed position papers by each party. The proposed rulemaking includes many of the procedural rules of the General Rules of Administrative Practice and Procedure (GRAPP) See 1 Pa.Code, Chs. 31, 33 and 35. However, significant modifications have been made to accommodate the specific requirements of 67 Pa.C.S. Chapter 11 within the framework of a prompt adjudication. In addition, the Bureau has drawn upon the procedural rules used by the Federal Provider Reimbursement Review Board and the discovery rules set forth in Title 231 Pa.Code (relating to Rules of Civil Procedure). The proposed rulemaking also

contains a procedure for the expedited disposition of certain appeals that traditionally have been handled in a less formal manner.

Based upon discussions and recommendations of the Advisory Committee, changes from the Order include:

- Automatically including position papers as part of the record.
- Mandating that 20 days prior to the hearing that the parties submit a joint statement of undisputed facts.
- Requiring supplementation of discovery responses for appeals filed between December 3, 2002 and June 28, 2003.
- Ensuring that the parties have at least 3 weeks notice of the date of the hearing.

Finally, the Bureau is also proposing to establish reasonable copying rates based upon the Right to Know Law, 65 P.S. §§ 66.1-66.9.

The proposed rulemaking has been renumbered and reformatted from the Order published at 33 Pa.B. 3053 (June 28, 2003), in order to conform to the Pennsylvania Code requirements for regulatory style and format. The regulations are organized to allow a reader to follow the basic order in GRAPP. Similarly, the cross-references to the GRAPP are included in the proper location within the specific sections of the proposed rulemaking, which are superceded by this rulemaking.

Affected Organizations and Individuals

The proposed rulemaking will affect the Department, the Bureau, MA providers, private law firms and government attorneys who practice before the Bureau.

Accomplishments/Benefits

Parties who appear before the Bureau will be better informed of their rights, responsibilities, and expectations in MA provider appeals and proceedings that are litigated before the Bureau.

Fiscal Impact

Public Sector

The proposed rulemaking will not impose additional costs on State and local governments.

Private Sector

The proposed rulemaking will not impose additional costs on the public sector.

General Public

The proposed rulemaking will not impose additional costs on the general public.

Paperwork Requirements

The proposed rulemaking will not require the completion of additional forms, reports and other paperwork.

Cross References

The GRAPP and other applicable Departmental regulations apply to the practice and procedures in MA provider appeals, except as specifically superceded in relevant subsections of the proposed rulemaking.

Effective Date

The proposed rulemaking will be effective upon final publication in the Pennsylvania Bulletin.

Sunset Date

The Department is not establishing a sunset date for the proposed rulemaking. The Department will continually monitor the regulations for effectiveness.

Public Comments

Interested persons are invited to submit written comments, suggestions, or objections regarding the proposed rulemaking to the Department of Public Welfare, Randy J. Riley, Administrative Law Judge, 2330 Vartan Way, Second Floor, Harrisburg, PA 17110, within 30 calendar days after the date of publication of this Notice in the Pennsylvania Bulletin.

Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users).

Regulatory Review

Under § 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on AUG 04 2004 the Department submitted a copy of this proposed rulemaking to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Health and Human Services and the Senate Committee on Public Health and Welfare. In addition to submitting the proposed rulemaking, the Department has provided the IRRC and the Committees with a copy of a Regulatory Analysis Form prepared by the Department. A copy of this form is available to the public upon request.

Under § 5(g) of the Regulatory Review Act, if the IRRC has any comments, recommendations or objections to any portion of the proposed regulation, it may notify the Department and the Committees within 30 days after the close of the public comment period. Such notification shall specify the regulatory review criteria that have not been met. The Regulatory Review Act specifies detailed procedures for review by the Department, the General Assembly and the Governor, of any comments, recommendations or objections raised, prior to final publication of the regulation.

ANNEX A

Title 55. PUBLIC WELFARE PART I. DEPARTMENT OF PUBLIC WELFARE SUBPART D. HEARINGS AND APPEALS

CHAPTER 41. MEDICAL ASSISTANCE PROVIDER APPEAL PROCEDURES

GENERAL PROVISIONS

§ 41.1. Scope.

(a) This chapter governs the practice and procedures in medical assistance provider appeals.

(b) In addition to this chapter, the General Rules of Administrative Practice and Procedure set forth in Title 1 of the *Pennsylvania Code* (GRAPP) and other applicable Departmental regulations apply to the practice and procedures in medical assistance provider appeals, except as specifically superseded in relevant sections of this chapter.

(c) This chapter does not apply to appeals governed by 55 Pa.Code Chapter 275 (relating to appeal and fair hearing and administrative disqualification hearings).

(d) This chapter does not apply to provider appeals commenced before December 3, 2002.

(e) This chapter applies in cases filed on or after December 3, 2002 but before July 1, 2003, except as follows:

(1) Nonconformity of a pleading or legal document with this chapter shall not in itself be a basis for objection.

(2) Except for the time limits, schedules and periods specified in § 41.32 (relating to timeliness and perfection of requests for hearing), the time limits, schedules and periods specified in this chapter do not apply. When this chapter sets forth a time limit, schedule or period, the parties may agree to an alternative time limit, schedule or period or the Department's Bureau of Hearing and Appeals (Bureau) may issue an order specifying an alternative time limit or period as the Bureau deems appropriate.

(3) Sections 41.111 – 41.117 and § 41.122 (relating to supplementing disclosures and responses) do not apply.

§ 41.2. Construction and application.

(a) This chapter shall be liberally construed to secure the just, speedy and inexpensive determination of provider appeals.

(b) To the extent that GRAAP applies in medical assistance provider appeals, the term "agency" as used in 1 Pa.Code Part II shall mean "Bureau"; the term "participant" as used in 1 Pa.Code Part II shall mean "party" and the term "presiding officer" as used in 1 Pa.Code Part II shall mean "presiding officer".

§ 41.3. Definitions.

(a) The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Agency action--An adjudicative action of the Department or a program office that relates to the administration of the Medical Assistance (MA) Program. The term includes the actions

identified in §§ 1101.84(a)-(c) and 1187.141(a) (relating to provider right of appeal and nursing facility's right to appeal and to a hearing) and other actions relating to a provider's enrollment in, participation in, claims for payment or damages under or penalties imposed under the MA Program.

Bureau--The Bureau of Hearings and Appeals of the Department.

Department--The Department of Public Welfare.

Dispositive motion—

(i) A motion that seeks a final determination of one or more of the issues in a provider appeal without the need for hearing or further hearing. The term includes the following:

(A) A motion to quash the provider appeal.

(B) A motion to dismiss the provider appeal.

(C) A motion for summary judgment.

(D) A motion for partial summary judgment.

(ii) The term does not include a motion in limine.

GRAPP--The General Rules of Administrative Practice and Procedure set forth at 1 Pa. Code Part II (relating to general rules of administrative practice and procedure).

Hearing--One of the following:

(i) A provider appeal.

(ii) A proceeding before a presiding officer for the purpose of creating a factual evidentiary record relative to the merits of one or more issues raised in a request for hearing.

(iii) A proceeding conducted by a presiding officer for the purpose of resolving an interlocutory matter, including but not limited to a petition for supersedeas.

Legal document--A motion, answer, brief, petition to intervene, request for reconsideration of an interlocutory chapter, request for review by the Secretary or other paper filed with the Bureau in a provider appeal, other than a pleading. The term does not include attachments or exhibits.

Pa.R.C.P.--Pennsylvania Rules of Civil Procedure.

Party--A provider, a program office or an intervener.

Person--An individual, partnership, association, corporation, political subdivision, municipal authority or other entity.

Petition for relief--A document filed under §§ 35.17, 35.18 or 35.19 of the GRAPP.

Pleading--A request for hearing, including amendments thereto.

Program office--An office within the Department that is managed and operated by an individual who reports directly to the Secretary, including a deputy secretary, or a bureau or other administrative unit of an office within the Department that is managed and operated by an individual who reports directly to a deputy secretary. The term does not include the Bureau.

Provider—One of the following:

- (i) A person currently enrolled in the MA Program as a provider of services.
- (ii) A person who has applied for enrollment in the MA Program as a provider of services.
- (iii) A person whose enrollment in the MA Program as a provider of services has been suspended or terminated by the Department.

Provider appeal--A proceeding to obtain review of an agency action that is commenced by a provider by filing a request for hearing.

Request for hearing--The pleading filed by a provider in order to commence a provider appeal.

Secretary--The Secretary of Public Welfare.

Senior department official--The Comptroller, the Chief Counsel of the Department, an individual who works in the office of the Secretary or who reports directly to the Secretary, including a deputy secretary or a director of a bureau within a program office.

Supersedeas--An order suspending the effect of an agency action pending the Bureau's determination in a provider appeal.

Waiver request--A request that the Secretary waive the application of a provision set forth in a Department regulation.

(b) The definition of “pleading” in subsection (a) supersedes the definition of “pleading” in 1 Pa.Code § 31.3 (relating to definition of pleading).

§ 41.4. Amendments to regulation.

(a) The Department retains continuing jurisdiction under 67 Pa.C.S. § 1106 (relating to regulations) to adopt and amend regulations establishing practice and procedure as may be necessary to govern provider appeals.

(b) The Bureau may establish forms as may be required to implement this chapter.

(c) Subsections (a) and (b) supersede 1 Pa.Code § 31.6 (relating to amendments to rules).

§ 41.5. Jurisdiction of the Bureau.

(a) Except as provided in subsections (b), (c) and (d), the Bureau has exclusive original jurisdiction over provider appeals.

(b) The Bureau has no jurisdiction to make a final determination on a waiver request included in a request for hearing. The Bureau will create a record and make a recommendation to the Secretary regarding the waiver request as specified in § 41.191(b) (relating to determinations and recommendations by the bureau).

(c) The Bureau has no jurisdiction to issue a final determination on the merits of an issue properly raised in a petition for relief.

(d) The Bureau's jurisdiction in provider appeals is subject to § 41.211 (relating to reconsideration of interlocutory orders) and § 41.212 (relating to review of bureau determinations).

(e) The Bureau has no jurisdiction in a provider appeal involving an agency action if Federal law or Federal regulations require the aggrieved provider to use Federal appeal procedures in order to contest the agency action.

(f) Subsections (a)-(e) supersede 1 Pa.Code § 35.103 (relating to preliminary notice to Department of Justice).

§ 41.6. Timely filing required.

(a) Pleadings and legal documents required or permitted to be filed under this chapter, the regulations of the Department or another provision of law must be received for filing at the Bureau within the time limits permitted for the filing.

(b) Except as provided in § 41.32(b) (relating to timeliness and perfection of requests for hearing), the filing date is the date of receipt by the Bureau, and not the date of mailing.

(c) Subsections (a) and (b) supersede 1 Pa.Code § 31.11 (relating to timely filing required).

§ 41.7. Extensions of time.

(a) Except when necessitated by the circumstances of the Bureau, no order or pre-hearing order shall continue a provider appeal or extend the time for doing an act required by this chapter except upon written motion by a party filed in accordance with this chapter.

(b) Where this chapter establishes a standard for an extension of time, a motion seeking an extension shall be resolved by the application of that standard. In the event that this chapter does not otherwise establish a standard, the motion shall be resolved by the application of 1 Pa.Code § 31.15 (relating to extensions of time).

DOCUMENTARY FILINGS

§ 41.11. Title of document.

(a) Legal documents in a provider appeal commenced by a request for hearing, other than the initial pleading, shall display a caption at the top of the first page in the following form:

**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
BUREAU OF HEARINGS AND APPEALS**

[Name of Provider] v. [Name of Program Office]

BHA I.D. No.:

Docket No.:

[Descriptive Title of Document]

(b) The descriptive title of a legal document must identify the party on whose behalf the filing is made.

(c) Subsections (a) and (b) supersede 1 Pa.Code § 33.1 (relating to title).

§ 41.12. Form.

(a) Printed documents may not be less than 12-point font.

(b) An original hard copy of a pleading bearing an original signature must be filed with the Bureau by personal delivery or first-class mail.

(c) A legal document may be filed with the Bureau in hard copy by first-class mail or personal delivery.

(d) A legal document may be filed by facsimile if the document does not exceed 20 pages in length, including attachments and exhibits. An executed hard copy of a document filed by facsimile must be maintained by the filing party and produced at the request of the Bureau or other party.

(e) Subsection (a) supersedes 1 Pa.Code § 33.2(b) (relating to form) as it relates to font size of printed documents.

§ 41.13. Incorporation by reference.

(a) A legal document on file with the Bureau in a provider appeal, and the exhibits or attachments thereto, may be incorporated by reference into another legal document that is subsequently filed in the same provider appeal.

(b) A document may be incorporated by reference to the specific document and prior filing in which it was physically filed, but not by reference to another document that incorporates it by reference.

(c) Subsections (a) and (b) supersede 1 Pa.Code § 33.3 (relating to incorporation by reference).

§ 41.14. Verification.

(a) A pleading or legal document that contains an averment of fact not appearing of record or that contains a denial of fact must be verified as specified in subsection (b).

(b) A verification of a pleading or legal document must substantially conform to the following:

I, (name of person signing verification), in my capacity as (title or statement describing relationship to the party submitting the document), hereby state that I am authorized to make this verification on behalf of (party submitting the document) and that the facts set forth in the (document being verified) filed in this matter are true and correct to the best of my knowledge, information, and belief, and that this verification is being made subject to 18 Pa.C.S. § 4904, (relating to unsworn falsification to authorities.)

(c) Subsections (a) and (b) supersede 1 Pa.Code § 33.12 (relating to verification).

§ 41.15. Copies of documents.

(a) Unless otherwise ordered by the Bureau, only the original of a pleading or a legal document shall be filed with the Bureau.

(b) One copy of a pleading or legal document filed with the Bureau will be served on each of the other parties to the provider appeal unless otherwise specified in this chapter.

(c) A document filed with the Bureau in a provider appeal is available for inspection and copying except that, if a document contains information protected by law against public disclosure, the document shall not be available unless and until the protected information has been redacted. When redaction is required, the person seeking access to or a copy of the document shall be required to pay the actual cost of redaction prior to the document being made available.

(d) Documents in the files of the Bureau shall not be removed from the Bureau's custody. At the discretion of the Bureau, a person provided with access to a document under subsection (c) may make a copy using equipment available at the Bureau, or the Bureau may make a copy and provide it to the person requesting access. The rates for copies will be identical to the rates charged by the Department under the Right to Know Law (65 P.S. §§ 66.1 *et seq.*).

(e) Subsections (a)-(d) supersede 1 Pa.Code § 33.15 (relating to number of copies), § 33.21 (relating to filing fees), § 33.22 (relating to mode of payment of fees), § 33.23 (a) (relating to copy fees) and § 33.37 (relating to number of copies).

SERVICE AND AMENDMENT OF DOCUMENTS

§ 41.21. Notice of agency actions.

(a) In the absence of a Department regulation specifying the method in which notice of an agency action is given, the Department or a program office may give notice of an agency action by one of the following methods:

(1) Mailing a written notice of the action to a provider at the provider's most recent business address on file with the Department.

(2) Serving notice of the action in the manner provided in Pa.R.C.P. Nos. 400--441.

(3) By publication in the *Pennsylvania Bulletin* if the agency action applies to a class of providers or makes system-wide changes affecting more than a single provider.

(b) In the absence of a Department regulation specifying the content of a notice of an agency action, notice of an agency action must include the following:

(1) The effective date of the agency action.

(2) The basis for the agency action.

(3) The date the notice was deposited in the mail or otherwise served on the provider.

§ 41.22. Service of pleadings and legal documents.

Service of pleadings and legal documents must be made on the same day the pleading or legal document is filed with the Bureau as follows:

(1) *Pleading*. The provider that files a pleading must serve a copy on:

(i) The program office that initiated the agency action in dispute.

(ii) The Department's Office of General Counsel.

(2) *Petition for supersedeas.* The provider that files a petition for supersedeas must serve a copy of the petition on:

(i) The program office that initiated the agency action in dispute.

(ii) The Department's Office of General Counsel.

(3) *Legal document.* The party that files a legal document in a provider appeal must serve a copy of the document on each other party to the appeal.

(4) *Method of service.*

(i) Service must be made by delivering in person or by mailing, properly addressed with postage prepaid, one copy of the pleading or legal document.

(ii) When a legal document is filed by facsimile, service must be made by facsimile in addition to the method set forth in subparagraph (i).

§ 41.23. Proof of service.

(a) A certificate of service in the form prescribed in § 41.24 (relating to certificate of service) must accompany and be attached to a pleading or legal document filed with the Bureau.

(b) Subsection (a) supersedes 1 Pa.Code § 33.31 (relating to service by the agency), § 33.32 (relating to service by a participant), § 33.35 (relating to proof of service) and § 33.36 (relating to form of certificate of service).

§ 41.24. Certificate of service.

(a) Each certificate of service must substantially conform to the following:

I hereby certify that I have this day served the foregoing document upon:

(Identify name and address of each person served) by (Indicate method of service).

(b) Subsection (a) supersedes 1 Pa.Code § 33.31 (relating to service by the agency) and § 33.32 (relating to service by a participant), § 33.35 (relating to proof of service) and § 33.36 (relating to form of certificate of service).

§ 41.25. Amendment or withdrawal of legal documents.

(a) A party may amend a legal document, other than a position paper, by filing an amendment with the Bureau unless the Bureau otherwise orders.

(1) An amendment to a legal document shall be deemed filed as of the date of receipt by the Bureau, unless the Bureau otherwise orders.

(2) A position paper may be amended as specified in § 41.116 (relating to amendments to position papers).

(b) A party may withdraw a legal document by filing a motion for leave to withdraw the document. The motion will be granted or denied by the Bureau as a matter of discretion.

(c) Subsections (a) and (b) supersede 1 Pa.Code § 33.41 (relating to amendments), § 33.42 (relating to withdrawal or termination) and § 33.51 (relating to docket).

**REQUESTS FOR HEARING, PETITIONS FOR RELIEF AND OTHER PRELIMINARY
MATTERS**

§ 41.31. Request for hearing.

(a) A provider that is aggrieved by an agency action may appeal and obtain review of that action by the Bureau by filing a request for hearing in accordance with this chapter.

(b) A provider is aggrieved by an agency action if the action adversely affects the personal or property rights, privileges, immunities, duties, liabilities or obligations of the provider.

(c) When a provider files a request for hearing to contest an agency action, the program office that issued the notice of the agency action is a party to the provider appeal.

(d) A request for hearing must include the following:

(1) The name, address and telephone number of the provider.

(2) Detailed reasons why the provider believes the agency action is factually or legally erroneous.

(3) Identification of the specific issues that the provider will raise in its provider appeal.

(4) Specification of the relief that the provider is seeking.

(i) If the provider is challenging the validity of a regulation or statement of policy in its provider appeal, the provider must state the challenge expressly and with particularity and identify the regulation or statement of policy involved.

(ii) If the provider is seeking relief from an agency action, in whole or in part, through waiver of the application of a regulation, the provider must state its waiver request expressly and with particularity and identify the regulation involved.

(iii) A provider may not request a declaratory order or an order that the Department should be required to promulgate, amend or repeal a regulation as relief in a request for hearing. The requests shall be set forth in a petition for relief in accordance with 1 Pa.Code § 35.18 (relating to petitions for issuance, amendment, waiver or deletion of regulations).

(e) If the provider received written notice of the agency action by mail or personal service, the provider must attach to the request for hearing a copy of the transmittal letter forwarding the written notice and the first page of the written notice, or, if there is no transmittal letter, a copy of the entire written notice. If the provider received written notice of the agency action by publication in the *Pennsylvania Bulletin*, the provider must identify the date, volume and page number of the *Pennsylvania Bulletin* in the request for hearing.

(f) Subsections (a)-(e) supersede 1 Pa.Code § 35.1 - § 35.11 and § 35.20 (relating to appeals from actions of the staff).

§ 41.32. Timeliness and perfection of requests for hearing.

(a) Except as permitted in § 41.33 (relating to appeals nunc pro tunc), the Bureau lacks jurisdiction to hear a request for hearing unless the request for hearing is in writing and is filed with the Bureau in a timely manner, as follows:

(1) If the program office gives notice of an agency action by mailing the notice to the provider, the provider must file its request for hearing with the Bureau within 33 days of the date of the written notice of the agency action.

(2) If written notice of an agency action is given in a manner other than by mailing the notice to the provider, a provider must file its request for hearing with the Bureau within 30 days of the date of the written notice of the agency action.

(b) If a provider files a request for hearing by first-class mail, the United States postmark appearing upon the envelope in which the request for hearing was mailed shall be considered the filing date of that request for hearing. If the provider files a request for hearing in another manner, or if the envelope in which the provider's request for hearing was mailed bears a postmark other than a United States postmark, the date the request for hearing is received in the Bureau will be considered the filing date.

(c) Except as permitted in § 41.33 (b) (relating to appeals nunc pro tunc), a request for hearing may be amended only as follows:

(1) A provider may amend a request for hearing as a matter of right within 90 days of the filing date of the request for hearing.

(2) Upon motion of the provider or in response to a rule or order to show cause issued under subsection (f). The Bureau may permit a provider to amend a request for hearing more than 90 days after the filing of a request for hearing if the provider establishes either of the following:

(i) The amendment is necessary because of fraud or breakdown in the administrative process.

(ii) Both of the following conditions are met:

(A) The amendment is based upon additional information acquired after the expiration of the 90-day period that contradicts information previously disclosed by the Department or provides entirely new information not previously disclosed by the Department.

(B) The program office and other parties to the appeal will not be prejudiced if the amendment is allowed.

(d) A legal or factual objection or issue not raised in either a request for hearing filed within the time prescribed in subsection (a) or in an amended request for hearing filed under subsection (c) shall be deemed waived. A general objection to an agency action shall be deemed a failure to object and shall constitute a waiver of the objections and issues relating to an action.

(e) The Bureau will dismiss a request for hearing, either on its own motion or on motion of a program office, if a provider fails to file its request in accordance with the time limits specified in subsection (a).

(f) The Bureau will dismiss a request for hearing on its own motion or a motion of the program office if the following conditions are met:

(i) The provider's request for a hearing fails to conform to the requirements of § 41.31(d) – (e) (relating to request for hearing).

(ii) The 90-day time period for amendments specified in paragraph (c)(1) has expired.

(iii) The provider fails to establish that an amendment should be permitted under paragraph (c)(2).

(g) If the dismissal is based upon motion of the Bureau, the Bureau will issue a rule or order to show cause, with a date certain listed therein, and serve that rule or order to show cause upon the parties to the appeal.

(h) Subsections (a)-(g) supersede 1 Pa.Code § 35.1 - § 35.11, § 35.105 (relating to notice of nonrulemaking proceedings) and § 35.106 (relating to contents of notice of nonrulemaking proceedings).

§ 41.33. Appeals nunc pro tunc.

(a) The Bureau, upon written motion and for good cause shown, may grant leave to a provider to file a request for hearing nunc pro tunc under the common law standard applicable in analogous cases in courts of original jurisdiction.

(b) The Bureau, upon written motion and for good cause shown, may grant leave to a provider to file an amendment to a request for hearing nunc pro tunc under the common law standard applicable in analogous cases in courts of original jurisdiction.

(c) The Secretary, upon written motion and for good cause shown, may grant leave to a party to file a request for review of a Bureau determination by the Secretary nunc pro tunc under the common law standard applicable in analogous cases in courts of original jurisdiction.

(d) Subsections (a)-(c) supersede 1 Pa.Code § 35.1 - § 35.11.

PETITIONS

§ 41.41. Waiver request.

(a) A provider may include a waiver request in a petition for relief only if the regulation that is the subject of the waiver request is not a basis for an agency action involving the provider.

(b) If an agency action involving the provider depends, in whole or in part, upon the application of a regulation of the Department, a provider aggrieved by that agency action may only present a waiver request pertaining to that regulation in the context of a request for hearing filed in accordance with § 41.31 (relating to request for hearing).

(c) To the extent that the waiver sought by a provider in a petition for relief has been or could have been included in a request for hearing, the Bureau will dismiss the petition for relief.

(d) Subsections (a)-(c) supersede 1 Pa.Code § 35.18 (relating to petitions for issuance, amendment, waiver or deletion of regulations) to the extent that an appealable agency action is involved.

§ 41.42. Request for declaratory relief.

(a) A provider may include a request for declaratory relief in a petition for relief only if the relief sought by the provider would not modify or alter an agency action involving the provider.

(b) If the requested relief would modify an agency action involving the provider, the provider may only seek the relief in the context of a request for hearing filed in accordance with § 41.31 (relating to request for hearing).

(c) To the extent that a request for declaratory relief is sought by a provider in a petition for relief has been or could have been included in a request for hearing, the Bureau will dismiss the petition for relief.

(d) Subsections (a)-(c) supersede 1 Pa.Code § 35.19 (relating to petitions for declaratory orders) to the extent that an appealable agency action is involved.

§ 41.43. Request for issuance, amendment or deletion of regulations.

The sole means by which a provider may formally petition the Department for the issuance, amendment or deletion of a regulation or statement of policy is by filing a petition for relief.

§ 41.44. Transfer of petition for relief.

(a) If a provider filed a petition for relief prior to the date of an agency action in which it has sought relief in connection with or relating to that agency action, the provider may file a motion to have the petition for relief transferred to the Bureau and deemed a request for hearing. The motion must be filed within the time allowed for the filing of a request for a hearing specified in § 41.32(a) (relating to timeliness and perfection of requests for hearing).

(b) Subsection (a) supersedes 1 Pa.Code § 35.17 (relating to petitions generally) to the extent that an appealable agency action is involved.

SUPERSEDEAS

§ 41.51. General.

(a) The filing of a request for hearing does not act as an automatic supersedeas. However, a provider who has filed a request for hearing may petition the Bureau to grant a supersedeas of the agency action. The Bureau may, upon good cause shown, grant a provider's petition for supersedeas in accordance with § 41.53 (relating to circumstances affecting grant or denial).

(b) A petition for supersedeas must be set forth in writing and may be filed during a provider appeal.

(c) The Bureau will not issue a supersedeas without first conducting a hearing, but a hearing may be limited under subsection (e). The Bureau, upon motion or sua sponte, may direct that a prehearing conference be held before scheduling or holding a hearing on a supersedeas.

(d) A hearing on a supersedeas, if necessary, will be held expeditiously, if feasible within 2 weeks of the filing of the petition. In scheduling the hearing the Bureau will take into account the availability of the presiding officer and program office staff and the urgency and seriousness of the problem to which the order or action of the Department applies. If good cause is shown, the hearing will be held as soon as possible after the filing of the petition.

(e) If necessary to ensure prompt disposition, and at the discretion of the Bureau, a supersedeas hearing may be limited in time and format, with parties given a fixed amount of time to present their entire case, and with restricted rights of discovery or of cross-examination.

(f) The Bureau may impose costs or other appropriate sanctions on a party that files a petition for supersedeas in bad faith or on frivolous grounds.

§ 41.52. Contents of petition for supersedeas.

(a) A petition for supersedeas must plead facts with particularity and be supported by one of the following:

(1) Affidavits prepared as specified in Pa.R.C.P. No. 76 and 1035.4 (relating to definitions and motion for summary judgment), setting forth facts upon which issuance of the supersedeas may depend.

(2) An explanation of why affidavits have not accompanied the petition if no supporting affidavit is submitted with the petition for supersedeas.

(b) A petition for supersedeas must state with particularity the citations of legal authority the petitioner believes form the basis for the grant of supersedeas.

(c) A petition for supersedeas may be denied upon motion made before a supersedeas hearing or during the proceedings, or sua sponte, without hearing, for one of the following reasons:

(1) Lack of particularity of the facts pleaded.

(2) Lack of particularity or inapplicability of the legal authority cited as the basis for the grant of the supersedeas.

(3) An inadequately explained failure to support factual allegations by affidavit.

(4) A failure to state grounds sufficient for the granting of a supersedeas.

§ 41.53. Circumstances affecting grant or denial.

(a) The Bureau, in granting or denying a supersedeas, will be guided by relevant judicial precedent. Factors to be considered include the following:

- (1) Irreparable harm to the provider.
- (2) The likelihood of the provider prevailing on the merits.
- (3) The likelihood of injury to the public or other parties.

(b) A supersedeas shall not be issued if injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. If state law or Federal law or regulation require that an action take effect prior to the final determination of an appeal, injury to the public health, safety or welfare shall be deemed to exist.

(c) In granting a supersedeas, the Bureau may impose conditions that are warranted by the circumstances, including the filing of a bond or the posting or provision of other security.

INTERVENTION

§ 41.61. Filing of petitions to intervene.

(a) Petitions to intervene and notices of intervention in a provider appeal may be filed following the filing of a request for hearing but in no event later than 60 days from the

filing date on the provider's request for hearing, unless for extraordinary circumstances and for good cause shown, the Bureau authorizes a late filing.

(b) Subsection (a) supersedes 1 Pa.Code § 35.23 (relating to protest generally), § 35.24 (relating to effect of protest), § 35.39 (relating to replies to respondents seeking affirmative relief), § 35.40 (relating to answers to amendments of pleadings) and § 35.41 (relating to satisfaction of complaints).

ANSWERS

§ 41.71. Answers generally.

(a) No answer to a pleading is required.

(b) Answers to legal documents, if permitted or required by this chapter, must be filed with the Bureau within 20 days after the date of service of the legal document, unless either of the following occurs:

(1) A different period is specifically required in this chapter.

(2) For cause, the Bureau with or without motion prescribes a different time, but in no case may an answer be required in less than 10 days after the date of service.

(c) Answers must be in writing and conform to the requirements of this chapter. Answers must admit or deny in detail each material fact asserted in the legal document answered and state clearly and concisely the facts and law relied upon.

(d) Subsections (a)-(c) supersede 1 Pa.Code § 35.35 (relating to answers to complaints and petitions).

§ 41.72. Answers to petitions to intervene.

(a) A party may file an answer to a petition to intervene, and in default thereof, may be deemed to have waived an objection to the granting of the petition.

(b) Answers must be filed within 20 days after the date of service of the petition, unless for cause the Bureau with or without motion prescribes a different time.

(c) Subsections (a) and (b) supersede 1 Pa.Code § 35.36 (relating to answers to petitions to intervene).

CONSOLIDATION, AMENDMENT AND WITHDRAWAL OF APPEALS

§ 41.81. Consolidation of provider appeals.

(a) Each provider that wishes to appeal an agency action must file an individual request for hearing in its own name, without joining another provider.

(b) The Bureau, on timely motion, may order that a provider appeal be consolidated with one or more other provider appeals if the Bureau determines that the provider appeals in question involve substantially similar or materially related issues of law or fact and that consolidation is otherwise appropriate.

(c) Consolidation is appropriate if it will not prejudice the ability of the non-moving party to perform adequate discovery or to adequately present its claim or defense, and if it will not unduly delay the adjudication of the earlier-filed matter.

(d) No provider appeal will be consolidated except upon motion filed by one or more parties.

(e) In addition to the general requirements for motions set forth in § 41.131 - § 41.136 (relating to motions), a motion for consolidation must include the following:

(1) Identification of the issues of law raised in each provider appeal and the extent to which each is shared or distinct.

(2) Identification of the material facts that serve as a basis for each appeal and the extent to which each of these facts is shared or distinct.

(3) Justification or advantages to support consolidation.

(f) In addition to the general requirements for answers to motions set forth in § 41.72 (relating to answers to petitions to intervene), an answer to a motion for consolidation must explain how consolidation would, if allowed, adversely affect the non-moving party's ability to conduct and complete discovery, or its ability to present its claims or defenses.

(g) A motion to consolidate will be considered untimely as to a provider appeal if it is filed after the date set for the conclusion of discovery in that provider appeal. An untimely motion to consolidate will only be granted with the consent of the non-moving parties.

(h) In the event that a provider seeks to consolidate its provider appeal with a provider appeal filed by a different provider, the motion for consolidation shall be deemed to be opposed by the other provider unless an affirmative statement to the contrary is set forth in the motion.

(i) A motion for consolidation and an answer thereto must be served on each person that is a party to the other provider appeals for which consolidation is sought.

(j) If the Bureau grants a provider's motion to consolidate, the discovery available to the providers in the consolidated appeals must, in the aggregate, comply with the limitations specified in § 41.120 (relating to limitations on scope of discovery).

(k) Subsections (a)-(j) supersede 1 Pa.Code § 35.45 (relating to consolidation) and § 35.122 (relating to consolidation of formal hearings).

§ 41.82. Amendments of requests for hearing.

(a) No amendments to a request for hearing shall be permitted except as specified in § 41.32(c) (relating to timeliness and perfection of requests for hearing) and § 41.33(b) (relating to appeals nunc pro tunc).

(b) Subsection (a) supersedes 1 Pa.Code § 35.48 (relating to amendments of pleadings generally), § 35.49 (relating to amendments to conform to the evidence) and § 35.50 (relating to directed amendments).

§ 41.83. Withdrawal of provider appeals.

(a) A provider may withdraw or end its provider appeal prior to adjudication by one of the following:

(1) The provider notifies the Bureau in writing that it is withdrawing its provider appeal.

(2) The parties to a provider appeal sign a written stipulation of settlement in which the provider agrees to withdraw the provider appeal.

(b) When a provider appeal is withdrawn prior to adjudication, the withdrawal shall be with prejudice.

(c) Unless the written notice or stipulation of settlement provides otherwise, a withdrawal of a provider appeal under this section shall be effective on the date the written notice or stipulation of settlement is received by the Bureau.

(d) Subsections (a)-(c) supersede 1 Pa.Code § 35.51 (relating to withdrawal of pleadings).

PREHEARINGS PROCEDURES AND HEARINGS

§ 41.91. Waiver of hearings.

A hearing need not be held if one of the following occur:

(a) The provider waives its right to hearing.

(b) The parties stipulate to the material facts or agree to submit direct and rebuttal testimony or documentary evidence in affidavit form (sworn or affirmed on personal knowledge) or by deposition.

(c) The Bureau determines that there are no material facts in dispute.

(d) Subsections (a)-(c) supersede 1 Pa.Code § 35.101 (relating to waiver of hearing).

§ 41.92. Expedited disposition procedure for certain appeals.

(a) This section applies to provider appeals involving the denial of claims for payment through the prior authorization process, the denial of requests for pre-certification, the recovery of overpayments or improper payments through the utilization review process, the denial of claims upon prepayment review, the denial of claims for payment pursuant to 55 Pa.Code § 1101.68 (relating to invoicing for services), the denial, termination or suspension of an exceptional DME grant as defined in 55 Pa.Code § 1187.2 (relating to definitions) and the denial of a program exception request filed under 55 Pa.Code § 1150.63 (relating to waivers).

(b) A request for hearing in a provider appeal subject to this section must be submitted in writing to the Bureau within the time limits specified in accordance with § 41.32(a) (relating to timeliness and perfection of requests for hearing) and include both of the following:

(1) The information specified in § 41.31(d) (relating to request for hearing).

(2) Relevant supporting documentation.

(c) The provider must send a copy of its request for hearing to the program office issuing the notice of the agency action at the same time it files its request with the Bureau.

(d) Unless the information has already been exchanged, each party shall give to the other parties a document that it will introduce as an exhibit and a list of the persons, including medical or other experts, which it will call as a witness at the hearing.

(e) The Bureau will promptly schedule a hearing taking into due consideration the availability of expert witnesses. The Bureau will provide at least 3 weeks notice of a hearing from the date of notice.

(f) The following sections of this chapter do not apply to appeals subject to this section:

(1) § 41.11 (relating to title of document).

(2) § 41.12 (relating to form).

(3) § 41.14 (relating to verification).

(4) § 41.22(1)(ii) (relating to service of pleadings and legal documents).

(5) § 41.23 (relating to proof of service).

(6) § 41.24 (relating to certificate of service).

(7) § 41.101 (relating to prehearing procedure in certain provider appeals).

(8) § 41.111 - § 41.117.

(9) § 41.118 - § 41.121.

(10) § 41.122 (relating to supplementing disclosures and responses).

(11) § 41.123 (relating to signing of disclosures, discovery requests, responses and objections)

(12) § 41.134 (relating to discovery motions).

(13) § 41.135 (relating to dispositive motions), except for a motion to dismiss based upon timeliness.

(14) § 41.141 (relating to voluntary mediation).

(15) § 41.151 (relating to initiation of hearings).

(16) § 41.181 (relating to post hearing briefs).

(g) Upon motion of a party, and for good cause shown, the Bureau may order that a provider appeal identified in subsection (a) be exempt from this section or may order that one or more of the sections identified in subsection (f) apply in whole or in part to the appeal. In the case of a motion seeking an order to apply § 41.111 - § 41.117 and § 41.118 - § 41.121 to a provider appeal identified in subsection (a), in order to show good cause, the moving party shall establish that the disclosures or discovery will not prevent the prompt and efficient adjudication of the appeal and are reasonable and necessary given the facts involved in the appeal.

(h) Upon joint motion of the parties to a provider appeal, the Bureau may order that this section applies to a provider appeal not identified in subsection (a).

(i) A motion to exempt an appeal from this section under subsection (g) and a joint motion to apply this section to an appeal under subsection (h) may be filed with the request for hearing, but must be filed no later than 30 days from the filing date of the request for hearing in the provider appeal.

PREHEARING PROCEDURES AND PREHEARING CONFERENCES

§ 41.101. Prehearing procedure in certain provider appeals.

(a) Upon the filing of a request for hearing, the Bureau will issue a prehearing order specifying the following:

(1) The parties shall make disclosures in accordance with § 41.111 - § 41.117.

(2) Discovery requests must be served within 90 days of the date of the prehearing chapter and discovery must be concluded within 120 days of the date of the prehearing order.

(3) Motions to compel discovery must be filed within 30 days of the close of discovery.

(4) Other miscellaneous prehearing motions, including motions in limine, must be filed within 60 days of the date of filing of the program office's position paper.

(5) Dispositive motions must be filed within 60 days of the date of the filing of the program office's position paper.

(b) The parties may, within 30 days of the date of the prehearing order, submit a joint proposed case management order to the Bureau that proposes alternative dates for

completion of the matters specified in subsection (a), or that agrees to discovery beyond the limitations set forth in § 41.120 (relating to limitations on discovery).

(c) The Bureau may issue subsequent prehearing orders incorporating the alternate dates and discovery limitations proposed by the parties or specifying other dates and discovery limitations that the Bureau deems appropriate, except that the Bureau will not establish dates or impose limitations that are more restrictive than the dates or limitations otherwise provided for in this chapter without the agreement of each party to the appeal.

(d) Subsections (a)-(c) supersede 1 Pa.Code § 35.111 (relating to conferences to adjust, settle or expedite proceedings).

§ 41.102. Conferences.

(a) The Bureau, on its own motion or on motion of a party, may hold a conference either prior to or during a hearing for the purpose of facilitating settlement, adjustment of the proceeding or another issue therein, or other matters to expedite the orderly conduct and disposition of a hearing.

(b) A stipulation of the parties or order of the Bureau as a result of the conference shall be binding upon the parties.

DISCLOSURES AND DISCOVERY

§ 41.111. Disclosures.

(a) A party to a provider appeal commenced by a request for hearing shall, without awaiting a discovery request, disclose information to each other party as specified in this section.

(b) The program office shall disclose the following:

(1) The name, title, business address and telephone number of each staff person directly involved in the agency action, and, if different, the name, title, business address and telephone number of the officials or staff designated to testify on its behalf regarding the agency action and the issues on which the designated individual will testify. In the case of an audit appeal, the program office will at a minimum identify every auditor involved in the audit and every audit supervisor and audit manager who reviewed the audit report.

(2) A copy of, or a description by category and location of, the documents, data compilations and tangible things, not privileged or protected from disclosure, that were relied upon in issuing the agency action, or that formed the basis for the agency action.

(c) The provider shall disclose the following:

(1) The name, title, business address and telephone number of each person who provided facts, opinions or other information that were relied upon in drafting the request for hearing or petition for supersedeas or that support or form the basis for, the allegations contained therein; and, if different, the name, title, business address and telephone number of the officials or staff designated to testify on its behalf regarding the agency action and the issues on which designated person will testify.

(2) A copy of, or a description by category and location of, the documents, data compilations and tangible things, not privileged or protected from disclosure, that were relied upon in drafting the request for hearing or petition for supersedeas or that support or form the basis for, the allegations contained therein. In a case where a provider alleges in its request for hearing that its costs or its claim for payment is supported by documents, the provider shall disclose the supporting documents.

(d) The parties shall make their initial mandatory disclosures within 45 days of the date of the Bureau's initial prehearing order, unless a different time is set by stipulation of the parties or by the prehearing order of the Bureau.

(e) A party shall make its initial disclosures based on the information in its possession or otherwise then reasonably available to it. A party shall not be excused from making its disclosures because it has not fully completed its investigation of the case, because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(f) An opposing party is not obligated to respond to a discovery request made under § 41.118 - § 41.121 until the party that propounded the request has made its mandatory initial disclosures in compliance with this section. A provider whose initial mandatory disclosure identifies documents in the possession of the Department or program office, but fails to provide copies of the provider's own records or documents in support of one or more of the issues raised in the provider's request for hearing, shall not be in compliance with this subsection.

§ 41.112. Filing of position paper.

(a) The provider must file its position paper and required documentation with the Bureau and serve it on the program office within 60 days of the close of discovery or another date as may be specified in the Bureau's prehearing order. If the provider fails to meet the position paper due date or fails to supply the Bureau with the required documentation, the Bureau will dismiss the provider's appeal.

(b) The program office will file its position paper and required documentation with the Bureau and serve it on the provider within 60 days of the date of service of provider's position paper or another date as may be specified in the Bureau's prehearing order. If the program office fails to meet the position paper due date, the Bureau will schedule the case for hearing and will notify the Chief Counsel of the Department.

(c) The Bureau disfavors requests for extensions of time to file position papers. The Bureau may grant an extension if the following conditions are met:

(1) A party submits a written request for extension.

(2) The request is received by the Bureau in time for it to review the matter prior to the due date.

(3) The party establishes that good cause exists to warrant an extension.

(d) Failure to complete discovery before the due date of the position paper will ordinarily not be considered sufficient cause to extend the deadline, unless the failure is due to the non-cooperation of the other side. A request for extension should be considered denied unless the Bureau affirmatively grants the extension in writing before the papers are due.

§ 41.113. Content of provider position paper.

(a) For each issue identified in its request for hearing or amended request for hearing, the provider's position paper must state the relevant facts and present arguments setting forth the provider's position.

(b) For each issue identified in its request for hearing or amended request for hearing, the provider must include the following:

- (1) A summary of the pertinent facts and circumstances.
- (2) Citations to the relevant statutory provisions, regulations and other controlling authorities.
- (3) The monetary amount in dispute.
- (4) An explanation showing how the monetary amount was computed.
- (5) Other relief sought by the provider in connection with the issue.
- (6) The name and business address of every witness whose testimony the provider will present.
- (7) A copy of every document that the provider will offer into evidence to support its position with respect to the issue.

§ 41.114. Content of program office position paper.

(a) For each issue identified in the provider's position paper, the program office's position paper must state whether the program office accepts or disputes the provider's statements regarding the following:

(1) Summary of the pertinent facts and circumstances.

(2) Citations to the relevant statutory provisions, regulations and other controlling authorities.

(3) Computation of the monetary amount in dispute.

(b) If the program office disputes the facts, citations or monetary amount, the program office must provide a counterstatement of the items in dispute.

(c) The program office's position paper must identify those additional issues not addressed by the provider that the program office believes should be determined by the Bureau.

(d) For each disputed issue, the program office must include a summary of the pertinent facts, circumstances and citations to the relevant statutory provisions, regulations and other controlling authorities.

(e) The program office must provide the name and business address of every witness whose testimony the program office will present and a copy of every document that the program will offer into evidence to support its position on each issue identified in its position paper.

§ 41.115. Statement regarding expert opinions.

(a) For each issue in dispute, a party's position paper must address the party's reliance upon an expert. The party shall state whether its position depends, in whole or in part, upon the judgment, opinion or testimony of a person who, if called to testify, would be called as an expert.

(b) Where a party's position depends, at least in part, upon the judgment, opinion or testimony of an expert, the party's position paper must include a "statement of expert opinion."

(c) Consistent with the requirements of Pa.R.C.P. No. 4003.5 (relating to discovery of expert testimony, trial preparation material), and unless the Bureau orders to the contrary, each expert opinion statement must include the following:

(1) Identification of the expert by name and address.

(2) The subject matter on which the expert is expected to testify.

(3) Identification of the substance of the facts and opinions to which the expert is expected to testify.

(4) A summary of the grounds for each opinion to which the expert is expected to testify.

(5) The signature of the expert.

(d) The parties shall submit a joint statement of undisputed facts at least 20 days prior to the hearing.

§ 41.116. Amendments to position papers.

The Bureau may permit a party to amend its position paper upon motion of the party and for good cause shown except that no amendment to a position paper shall be permitted within 30 days of the commencement of the hearing in the provider appeal.

§ 41.117. Penalties for noncompliance.

(a) A party shall not be permitted to offer the testimony of a witness at a hearing on a provider appeal unless either the party disclosed the identity of the witness in the party's position paper or the party establishes that there is good cause to permit the testimony of the witness.

(b) A party shall not be permitted to introduce a document into evidence at a hearing on a provider appeal unless the party identified the document as an exhibit and served the other parties to the provider appeal with a copy of the document at the time the party filed its position paper with the Bureau.

§ 41.118. Authorized forms of discovery.

Once the time period for mandatory disclosures has elapsed, a party to a provider appeal commenced by a request for hearing may obtain discovery by one or more of the following methods:

- (1) Interrogatories.
- (2) Requests for the production of documents.
- (3) Expert reports.

(4) Requests for admission.

(5) Depositions of witnesses and designees of parties.

§ 41.119. General scope of discovery.

(a) Parties may obtain discovery regarding a matter, not privileged, that is relevant to the claim or defense of another party in a provider appeal, including the existence, description, nature, custody, condition and location of the books, documents or other tangible things and the identity and location of persons having knowledge of a discoverable matter.

(b) Except to the extent inconsistent with or as otherwise provided in this chapter, discovery shall be governed by the relevant Pa.R.C.P applicable to the form of discovery authorized by this chapter. The term "court" as used in the Pa.R.C.P. shall mean "Bureau"; the term "prothonotary" or "clerk of court" as used in the Pa.R.C.P. shall mean "Formal Docketing Unit".

§ 41.120. Limitations on scope of discovery.

(a) In addition to the general limitation on the scope of discovery and deposition set forth in Pa.R.C.P. No. 4011 (relating to limitation of scope of discovery and deposition), the following limitations on discovery apply:

(1) Interrogatories to a party, as a matter of right, shall not exceed ten in number. Interrogatories inquiring as to the names and locations of witnesses, or the existence, location and custodian of documents or physical evidence each shall be construed as one interrogatory.

(i) Other interrogatories, including subdivisions of one numbered interrogatory, shall be construed as separate interrogatories.

(ii) If counsel for a party believes that more than ten interrogatories are necessary, counsel shall consult with opposing counsel promptly and attempt to reach a written stipulation as to a reasonable number of additional interrogatories.

(iii) Counsel are expected to comply with this requirement in good faith. In the event the parties cannot agree on a written stipulation, the Bureau, upon motion of a party, may permit the party to serve additional interrogatories if the party establishes to the Bureau's satisfaction that additional interrogatories are reasonable and necessary in light of the particular facts involved and that they will not prevent the prompt and efficient adjudication of the provider appeal.

(2) Request for admissions to a party, as a matter of right, shall not exceed ten in number.

(i) Requests for admissions, including subdivisions of one numbered request, shall be construed as a separate request.

(ii) If counsel for a party believes that more than ten requests for admission are necessary, counsel shall consult with opposing counsel promptly and attempt to reach a written stipulation as to a reasonable number of additional requests.

(iii) Counsel are expected to comply with this requirement in good faith. In the event the parties cannot agree on a written stipulation, the Bureau, upon motion of a party, may permit the party to serve additional requests for admission if the party establishes to the Bureau's

satisfaction that additional requests for admission are reasonable and necessary in light of the particular facts involved and that they will not prevent the prompt and efficient adjudication of the provider appeal.

(3) Depositions, as a matter of right, shall not exceed three in number.

(i) A deposition of a person shall not be permitted if the person has already been deposed in the appeal.

(ii) If counsel for a party believes that more than three depositions or that the deposition of a person who has already been deposed are necessary, counsel shall consult with opposing counsel promptly and attempt to reach a written stipulation as to a reasonable number of additional depositions.

(iii) Counsel are expected to comply with this requirement in good faith. In the event the parties cannot agree on a written stipulation, the Bureau, upon motion of a party, may permit the party to take additional depositions if the party establishes to the Bureau's satisfaction that additional depositions are reasonable and necessary in light of the particular facts involved and that they will not prevent the prompt and efficient adjudication of the provider appeal.

(b) Unless the Secretary has been identified as a witness by the program office, a party may not depose the Secretary.

(c) Unless a senior department official has been identified as a witness by the program office or agrees to submit to a deposition, a party may not depose a senior department official regardless of the number of depositions taken, except that the Bureau, upon motion of a party,

may permit the party to depose a senior department official if the party establishes to the Bureau's satisfaction that the following apply:

(1) The senior department official was personally involved in the disputed agency action.

(2) The deposition of the senior department official is reasonable and necessary in light of the particular facts involved and will not prevent the prompt and efficient adjudication of the provider appeal.

(d) The Bureau may issue protective orders limiting or precluding discovery in accordance with § 41.120 (a) – (c) (relating to limitations on scope of discovery) or as specified in Pa.R.C.P. No. 4012 (relating to protective orders).

(e) Subsections (a)-(d) supersede 1 Pa.Code § 35.145-152 as the sections relate to discovery only.

§ 41.121. Timing and sequence of discovery.

Unless the Bureau upon motion, for the convenience of parties and witnesses and in the interest of justice, orders otherwise, methods of discovery may be used regardless of sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay another party's discovery.

§ 41.122. Supplementing disclosures and responses.

(a) A party has a duty to supplement or correct a disclosure under § 41.111 - § 41.117 to include information thereafter acquired if ordered by the Bureau, if the party learns that in

some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(b) A party is under a duty to supplement responses made to discovery requests as set forth in Pa.R.C.P. No. 4007.4 (relating to supplementing responses).

§ 41.123. Signing of disclosures, discovery requests, responses and objections.

(a) Every disclosure shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(b) Every discovery request, response or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the signer's address.

(c) The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the request, response or objection is:

(1) Consistent with this chapter and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

(2) Not interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(3) Not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

(d) If a request, response or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection, and a party shall not be obligated to take action with respect to it until it is signed.

(e) If without substantial justification a certification is made in violation of this section, the Bureau, upon motion or upon its own initiative, shall impose upon the individual who made the certification, the party on whose behalf the disclosure, request, response or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney fees.

MOTIONS

§ 41.131. Motions in general.

(a) This section applies to every motion, except oral motions made during the course of a hearing.

(b) Motions and responses to motions must be in writing, signed by a party or its attorney and accompanied by a proposed order.

(c) Unless the time is extended by the Bureau, a response to a dispositive motion must be filed within 30 days of service of the motion, and a response to other motions must be filed within 20 days of service of the other motions.

(d) Except in the case of a dispositive motion, the Bureau will deem a party's failure to respond to a motion to be the party's lack of opposition to the motion.

(e) Except in the case of a dispositive motion, the moving party may not file a reply to a response to its motion, unless the Bureau orders otherwise.

(f) Subsections (a)-(e) supersede 1 Pa.Code § 35.54 (relating to motions as to complaint), § 35.55 (relating to motions as to answer) and § 35.179 (relating to objections to motions).

§ 41.132. Actions on motions.

(a) The Bureau will rule on dispositive motions within 60 days after the moving party's reply to the non-moving party's response, if a reply is filed. If the moving party does not file a reply, the Bureau will rule on a dispositive motion within 60 days after the date on which the non-moving party's response is due.

(b) The Bureau will rule on motions other than dispositive motions within 30 days after the date on which the non-moving party's response is due.

(c) Notwithstanding subsections (a) and (b), the Bureau will rule on each outstanding pre-hearing motion no later than 20 days prior to the commencement of the hearing.

§ 41.133. Procedural motions.

(a) This section applies to motions that pertain to the procedural aspects of a case, including motions for continuance, expedited consideration, extensions of time in which to file documents and stays of proceedings.

(b) Procedural motions must contain a statement indicating the nonmoving party's position on the relief requested or a statement that the moving party, after a reasonable effort, has been unable to determine the nonmoving party's position.

(c) If the parties consent to the relief requested, the request may be embodied in a letter, provided the letter indicates the consent of the other parties.

(d) Requests for extensions or continuances, whether in letter or motion form, must be accompanied by a proposed order.

(e) Procedural motions and responses may not be accompanied by supporting memoranda of law unless otherwise ordered by the Bureau.

§ 41.134. Discovery motions.

(a) This section applies to motions filed to resolve disputes arising from the conduct of discovery under § 41.118 - § 41.121.

(b) A motion to compel discovery must contain as exhibits the discovery requests and answers giving rise to the dispute.

(c) A party may file a memorandum of law in support of its discovery motion or its response to a discovery motion. The supporting memorandum of law must be filed at the same time the motion or response is filed.

§ 41.135. Dispositive motions.

(a) This section applies to dispositive motions.

(b) Motions for summary judgment or partial summary judgment and responses to those motions must conform to Pa.R.C.P. No. 1035.1--1035.5 (relating to motion for summary judgment).

(c) Dispositive motions must be accompanied by a supporting memorandum of law. The Bureau may deny a dispositive motion if a party fails to file a supporting memorandum of law.

(d) An affidavit or other document relied upon in support of a dispositive motion, response or reply, that is not already a part of the record, must be attached to the motion, response or reply or it will not be considered by the Bureau in ruling thereon.

§ 41.136. Miscellaneous motions.

(a) This section applies to a motion not otherwise addressed in § 41.133 - § 41.135 (relating to procedural motions, discovery motions and dispositive motions), including a motion in limine, a motion to strike and a motion for recusal.

(b) A memorandum of law in support of a miscellaneous motion or response to a miscellaneous motion must be filed with the miscellaneous motion or response.

MEDIATION

§ 41.141. Voluntary mediation.

(a) Upon request by the parties, the Bureau may stay a provider appeal commenced by a request for hearing for up to 120 days to allow the parties to utilize voluntary mediation services through the Office of General Counsel Mediation Program.

(b) The parties shall file their request for stay with the Bureau at least 14 days before initiation of hearings by the Bureau.

(c) At the end of the initial stay, the parties shall jointly file a statement that sets forth the status of mediation activities conducted. The parties may request an additional stay if necessary to complete the mediation process.

(d) The grant of an additional stay for mediation is in the Bureau's discretion and the Bureau may impose limitations the Bureau deems appropriate.

(e) A party's participation in voluntary mediation may not be used as evidence in a proceeding before the Bureau.

(f) Communications between the parties during the mediation period shall be regarded as offers of settlement and are neither discoverable nor admissible as evidence in a proceeding before the Bureau.

HEARINGS

§ 41.151. Initiation of hearings.

(a) If, after the Bureau has ruled on a dispositive motion, a hearing is required to determine the remaining issues, the Bureau will, after consultation with the parties, schedule a formal evidentiary hearing and send a notice of hearing to each of the parties to the provider appeal.

(b) A hearing may, if permitted by this chapter or by agreement of the parties, be conducted via telephone.

(c) Subsections (a) and (b) supersede 1 Pa.Code § 35.121 (relating to initiation of hearings).

§ 41.152. Continuance of hearings.

(a) A hearing may not be continued except for compelling reasons.

(b) A motion for continuance of a hearing must be submitted to the Bureau in writing with a copy served upon the other parties to the proceedings, except that during the course of a hearing in a proceeding, the requests may be made by oral motion in the hearing.

(c) In the event that the parties are engaged in good faith settlement negotiations, the Bureau may grant a joint continuance request for a period of not more than 60 days.

§ 41.153. Burden of proof and production.

(a) The provider has the burden of proof to establish its case by a preponderance of the evidence and is required to make a prima facie case by the close of its case-in-chief. The provider has the burden of production, unless otherwise directed by the presiding officer, upon a determination included in the record by the presiding officer that the evidence is peculiarly

within the knowledge or control of another party or participant, in which case the order of presentation may be varied by the presiding officer.

(b) Each party shall have the right to an opening statement, presentation of evidence, cross-examination, objection, motion and argument and closing argument.

(c) A pleading or a position paper must, without further action, be considered part of the record. In no event, however, shall a pleading or a position paper be considered as evidence of a fact other than that of the filing thereof, unless offered and received into evidence under this chapter.

(d) Subsections (a)-(c) supersede 1 Pa.Code § 35.125 (relating to order of procedure) and § 35.126 (relating to presentation by the parties).

EVIDENCE AND WITNESSES

§ 41.161. Written testimony.

(a) Written testimony of a witness, including an expert witness, on numbered lines in question and answer form, may be admitted into evidence provided the witness is present for cross-examination at the hearing or the parties agree that the witness' presence at the hearing is not required.

(b) Written testimony must be filed concurrently with the proffering party's position paper unless a different time is prescribed by the Bureau. Objections to written testimony that can be reasonably anticipated prior to hearing must be in writing and filed within the time prescribed for prehearing motions in limine, unless otherwise ordered by the Bureau.

(c) If a party desires to file written testimony prior to the close of the record, it may do so only upon motion approved by the Bureau for good cause. This approval must include the scope of the written testimony and the time for filing the testimony and service upon opposing counsel.

(d) Subsections (a)-(c) supersede 1 Pa.Code § 35.138 (relating to expert witnesses) and § 35.139 (relating to fees of witnesses).

§ 41.162. Subpoenas.

(a) Except as otherwise provided in this chapter or by order of the Bureau, requests for subpoenas and subpoenas shall be governed by Pa.R.C.P. No. 234.1--234.4 (relating to subpoena to attend and testify, subpoena, issuance, service, compliance fees, prisoners, notice to attend, notice to produce, subpoena, notice to attend, notice to produce, relief from compliance, motion to quash) and 234.6--234.9 (relating to form of subpoena, form of notice to attend, form of notice to produce, notice and acknowledgment of receipt of subpoena by mail). The term "court" as used in Pa.R.C.P shall mean "Bureau"; the term "Prothonotary" or "clerk of court" as used in Pa.R.C.P shall mean "Formal Docketing Unit".

(b) Proof of service of the subpoena need not be filed with the Bureau.

(c) Subsections (a) and (b) supersede 1 Pa.Code § 35.142 (relating to subpoenas).

PRESIDING OFFICERS

§ 41.171. Independence.

(a) The presiding officers shall act independently of employees or public officials of the Department whose actions are subject to review before the Bureau.

(b) The presiding officers shall not engage in ex parte communications concerning a hearing with a party to the hearing.

POSTHEARING PROCEDURES

§ 41.181. Post hearing briefs.

(a) The initial post hearing brief of each party shall be as concise as possible and may not exceed 50 pages. An initial post hearing brief must contain proposed findings of fact, with references to the appropriate exhibit or page of the transcript, an argument with citation to supporting legal authority and proposed conclusions of law.

(b) The provider must file its initial post hearing brief first and within the time specified by the presiding officer, which shall not be less than 30 days from the closing of the record unless the provider consents to a shorter period of time. The program office must file its initial post hearing brief within 30 days of the date of service of the provider's brief.

(c) The provider may file a reply brief within 20 days of service of the program office post hearing brief. A reply brief must be as concise as possible and may not exceed 25 pages.

(d) Longer briefs and surreply briefs may be permitted at the discretion of the presiding officer.

(e) A party may waive the filing of a post-hearing brief.

(f) If a party files a post hearing brief, a disputed issue or legal theory that is not argued in the party's post hearing brief shall be deemed waived.

(g) Subsections (a)-(f) supersede 1 Pa.Code § 35.191 (relating to proceedings in which briefs are to be filed), § 35.192 (relating to content and form of briefs) and § 35.193 (relating to filing and service of briefs).

AGENCY ACTION

§ 41.191. Determinations and recommendations by the Bureau.

(a) The Bureau will conduct a de novo review of the factual and legal issues that are timely raised and properly preserved in a provider appeal. Except as provided in subsection (b), the Bureau will issue a determination adjudicating the contested issues of law and fact within its jurisdiction, and issue an appropriate order, decree or decision.

(b) In the event that a request for hearing includes a waiver request, the Bureau will make a written recommendation for consideration by the Secretary proposing that the waiver be either granted or denied and stating the Bureau's reasoning in support of its position. If the request for hearing raises factual and legal issues in addition to the waiver request, the Bureau will issue its written recommendation together with its final determination adjudicating the remaining factual and legal issues, as specified in subsection (c). If the request for hearing

does not raise other issues, the Bureau's written recommendation on the waiver request will be issued within the time limits and served on the parties as specified in subsection (c).

(c) The Bureau will issue a determination in a provider appeal within 30 days of the filing of the post hearing briefs, or, if the parties waive the filing of post hearing briefs, within 30 days of the close of the record or receipt of the transcript, whichever is later. The Bureau will serve a copy of its determination on the parties to the proceeding or their representatives.

(d) A party aggrieved by a determination of the Bureau may request the Secretary to review the determination under § 41.212 (relating to review of bureau determinations). For purposes of this section, a program office shall be deemed to be aggrieved if the Bureau determination does one or more of the following:

(1) Sustains the provider's appeal in whole or in part.

(2) Interprets a statute, regulation, statement of policy or bulletin applied by the program office in a manner inconsistent with the interpretation of that office.

(3) Alters a policy of the program office or purports to impose a new or different rule or policy on the program office.

(e) The Secretary will review written recommendations of the Bureau issued under subsections (b) or (c) under § 41.213 (review of bureau recommendations).

(d) Subsections (a)-(e) supersede 1 Pa.Code § 35.201 – 221.

REOPENING OF RECORD

§ 41.201. Reopening of record prior to adjudication.

(a) After the conclusion of the hearing on the merits and before the Bureau issues an adjudication, the Bureau, upon its own motion or upon a motion filed by a party, may reopen the record as provided in this section.

(b) The record may be reopened upon the basis of recently discovered evidence when each of the following circumstances are present:

(1) Evidence is discovered that conclusively establishes a material fact of the case or that contradicts a material fact that had been assumed or stipulated by the parties to be true.

(2) Evidence is discovered after the close of the record and could not have been discovered earlier with the exercise of due diligence.

(3) Evidence is not cumulative.

(c) The record may also be reopened to consider evidence that has become material as a result of a change in legal authority occurring after the close of the record. A motion to reopen the record on this basis must specify the change in legal authority and demonstrate that it applies to the matter pending before the Bureau. The motion need not meet the requirements of paragraphs (2) and (3) of subsection (d).

(d) A motion seeking to reopen the record must:

(1) Identify the evidence that the moving party seeks to add to the record.

(2) Describe the efforts that the moving party had made to discover the evidence prior to the close of the record.

(3) Explain how the evidence was discovered after the close of the record.

(e) A motion filed under subsection (b) must be verified and motions to reopen must contain a certification by counsel that the motion is being filed in good faith and not for the purpose of delay. The motion must be served upon the parties to the proceedings.

(f) Subsections (a)-(e) supersede 1 Pa.Code § 35.231 (relating to reopening of application of party) and § 35.232 (relating to reopening by presiding officer).

RECONSIDERATION AND REVIEW BY THE SECRETARY

§ 41.211. Reconsideration of interlocutory orders.

(a) A motion for reconsideration by the Secretary of an interlocutory order or ruling of the Bureau must be filed within 10 days of the order or ruling. The petition must demonstrate that extraordinary circumstances justify immediate consideration of the matter by the Secretary. A party may file a memorandum of law at the time the motion or response is filed.

(b) A copy of the motion must be served upon the parties. A party wishing to file an answer may do so within 10 days of service or as ordered by the Bureau or the Secretary.

(c) The failure of a party to file a motion under this section will not result in a waiver of an issue.

(d) Subsections (a)-(c) supersede 1 Pa.Code § 35.241 (relating to application for rehearing or reconsideration).

§ 41.212. Review of Bureau determinations.

(a) A determination of the Bureau will be deemed the final adjudication of the Department effective upon expiration of the 30-day time period specified in subsection (b) unless an aggrieved party requests review by the Secretary within that 30-day time period.

(b) A request for review must be filed within 30 days of the mailing date of the Bureau determination. An untimely request for review shall be dismissed as of course unless the filing party can satisfy the requirements of § 41.33 (relating to appeals nunc pro tunc).

(c) A request for review must be in writing, state concisely the alleged errors in the Bureau determination and identify the particular relief sought. If the party requesting review is seeking relief by reason of matters that have arisen since the hearing and Bureau determination, or by reason of a matter that would arise from compliance with the Bureau determination, the party shall specifically identify those matters in its request.

(d) If an aggrieved party timely requests review of a Bureau determination, the Secretary may enter an order granting or denying the request for review within 30 days of receipt of the request. No party has a right to have a Bureau determination reviewed by the Secretary, but only a right to request this review. The decision to grant or deny such a request lies within the discretion of the Secretary.

(e) If the Secretary enters an order denying a request for review within 30 days of receipt of the request, the Bureau's determination shall be deemed the final adjudication of the Department effective on the date of the order denying the request for review.

(f) If the Secretary fails to act on a request for review within 30 days of receipt of the request, the request for review shall be deemed denied. The Bureau's determination shall be deemed the final adjudication of the Department effective on the date on which the request for review is deemed denied.

(g) No answers to a request for review will be considered by the Secretary unless the Secretary has granted review. If, and to the extent the Secretary has granted review, a response in the nature of an answer may be filed by a party, other than the party requesting review. The response must be confined to the issues upon which the Secretary has granted review.

(h) If the Secretary grants review, the Secretary will enter a final order within 180 days of the date of the order granting review. The final order may affirm, reverse or modify the findings of fact, conclusions of law or the relief set forth in the Bureau's determination, and may, in order to promote fairness and the proper administration of the Medical Assistance Program, waive compliance with program requirements.

(i) If the Secretary fails to act within 180 days of the order granting review, the determination of the Bureau shall be deemed approved by, and the final order of, the Secretary effective the date it is deemed approved.

§ 41.213. Review of Bureau recommendations.

(a) The Secretary will review and issue a final order adopting, rejecting or modifying a recommendation of the Bureau issued under § 41.191(b) (relating to determinations and recommendations by the bureau).

(b) A party to the provider appeal in which the Bureau's recommendation was issued may file a brief with the Secretary setting forth its position regarding the recommendation at the same time the party requests review of the Bureau's related determination under § 41.212 (relating to review of bureau determinations) or, if the party is not seeking review of the Bureau's determination, within 30 days of the date of the mailing date of the Bureau recommendation.

(c) A brief supporting or opposing the Bureau's recommendation must state concisely the reasons for the party's position on the recommendation, set forth proposed findings of fact and conclusions of law for consideration by the Secretary and specify what relief should be granted or denied by the Secretary. The brief must not exceed 25 pages.

(d) The Secretary's final order regarding a recommendation issued under § 41.191(b) (relating to determinations and recommendations by the bureau) will be issued in accordance with the following:

(1) If review is granted under § 41.212 (relating to review of bureau determinations), the date on which the Secretary issues a final order.

(2) If review is not granted under § 41.212 (relating to review of bureau determinations), 180 days from the date of receipt of the written recommendation.

(e) If the Secretary does not issue a final order regarding a recommendation issued under § 41.191(b) (relating to determinations and recommendations by the bureau) within the time frames specified in subsection (d), the recommendation of the Bureau shall be deemed adopted by, and the final order of, the Secretary effective the date it is deemed adopted.

§ 41.214. Appeals.

A provider aggrieved by a final adjudication of the Department issued under § 41.212(a), (e) or (f) (relating to review of bureau determinations), or a final order of the Secretary issued under § 41.212 (e), (h) or (i) (relating to review of bureau determinations) or § 41.213(a) or (d) (relating to review of bureau recommendations) may petition for judicial review in accordance with 2 Pa.C.S. Ch.7 subch. A (relating to judicial review of commonwealth agency action).

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO
REGULATORY REVIEW ACT**

**IRRC
14th Floor
HARRISTOWN II**

I.D. NUMBER: 14-488
SUBJECT: Medical Assistance Provider Appeal Procedure
AGENCY: DEPARTMENT OF PUBLIC WELFARE

2004 AUG -4 AM 11:00

REGULATORY REVIEW ACT

TYPE OF REGULATION

- Proposed Regulation
- Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolled Regulation
 - a. With Revisions
 - b. Without Revisions

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
8/4/04	J. J. Chan	HOUSE COMMITTEE ON HEALTH & HUMAN SERVICES
8/4/04	Karen Shaffer	
8/4/04	Krista Kreiser	SENATE COMMITTEE ON PUBLIC HEALTH & WELFARE
8/4/04	Lorraine Cole	
8/4/04	St. Helwell	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL (for Final Omitted only)
7/17/04	[Signature]	LEGISLATIVE REFERENCE BUREAU (for Proposed only)