14-488-7

Louis J. Capozzi, Jr., Esquire
Daniel K. Natirboff, Esquire

Donald R. Reavey, Esquire
Doreena C. Sloan, Esquire
Daniel J. Pedersen, Esquire
Michael B. Volk, Esquire
Joseph M. Murphy, Esquire

Bruce G. Baron, Research Coordinator
Robert G. Sobanski, Reimb. Analyst
Karen L. Fisher, Paralegal
Dollie D. Himes, Paralegal
Susan Courchesne, Paralegal

Capozzi & Associates, P.C.
Attorneys at Law

2933 North Front Street
Harrisburg, PA 17110
Telephone: (717) 233-4101
Fax: (717) 233-4103
www.capozziassociates.com

Of Counsel:
Steven T. Hanford, Esquire

15

RECEIVED
HARRISBURG OFFICE
04 SEP 20 PM 1:35
DEPT. OF PUBLIC WELFARE
BUREAU OF
HEARINGS AND APPEALS

Original: 2416

September 17, 2004

Department of Public Welfare
Attention: Randy J. Riley,
Administrative Law Judge
2330 Vartan Way (Second Floor)
Harrisburg, PA 17110

BY FAX AND U.S. MAIL

RE: WRITTEN COMMENTS, SUGGESTIONS AND OBJECTIONS
55 Pa. Code Chapter 41 (34 Pa.B. 4447, August 14, 2004)
Our Matter No. 377-03

Dear Administrative Law Judge Riley:

This supplements our written comments, suggestions and objections and addresses A GAP IN ACT 142 AND IN THE CURRENT FINAL STANDING PRACTICE ORDER AS WELL AS THE NEED FOR THE PROPOSED RULES to clarify appeal procedures related to audit findings issued by the Department of the Auditor General that are used by the Department of Public Welfare for Medical Assistance Program purposes. We are concerned that legislation may be required to resolve this problem unless the Department amends the proposed rulemaking to invoke its rulemaking authority under the Administrative Agency Law and the Public Welfare Code, as suggested in our earlier comments.

In 55 Pa. Code § 1181.101(a)(2) authorizes appeals from "the Department's decision regarding the findings of the auditors in an annual audit report" and 55 Pa. Code § 1101.84(b) provides from appeals from audit findings issued by the Department of Auditor General, Bureau of State-Aided Audits. 55 Pa. Code § 1187.141(a)(2) authorizes appeals from "the Department's decision regarding the findings issued by the Department in a desk or field audit", while 55 Pa. Code § 1187.141(b) incorporates 55 Pa. Code § 1101.84.

Act 142-2002 authorized a provider aggrieved by a decision of the Department of Public Welfare regarding the MA Program a right to request a hearing (67 Pa. C.S. § 1102(A)). In the Final Standing Practice Order entered by the Department, an "Agency Action" is defined as an action of the Department of Public Welfare or of a Program Office that is related to the administration of the MA Program, while a Program Office is

defined as a part of the Department of Public Welfare (Rule 3, relating to definitions). Neither of these provisions appear to apply to appeals from audit findings issued by the Department of the Auditor General pursuant to, for example, 62 P.S. § 443.1(1,2), relating to payments for institutional care provided by hospitals and county homes. The proposed § 41.3, relating to definitions includes actions identified in 55 Pa. Code § 1101.84(b) in its definition of "agency action".

Both Act 142 (67 P.S. § 1102(B) (relating to filing), however, and Rule 19, relating to timeliness, calculate the time for filing a request for hearing from the issuance of an action by the Department of Public Welfare, not from any action by the Department of the Auditor General. Rule 35, relating to disclosures, requires the Program Office to disclose the names of "staff" persons (meaning its staff) and documents that the Program Office relied on when issuing the agency action at issue. However, no Program Office, as defined in the Rules, issues an audit report for hospitals or county homes.

Therefore, since the current Final Standing Practice Order does not apply to appeals concerning audits issued by the Department of Auditor General, there has been confusion about applicable administrative procedures, which could lead to filing appeals with the Department of the Auditor General as well as with the Department of Public Welfare. Since the proposed rulemaking appears to recognize this problem in the language added to the definition of "agency action", we suggest that: (a) the final rulemaking expressly recognize that the definition of "agency action" includes Medical Assistance Program audit findings issued by the Department of Auditor General; (b) the final rulemaking expressly clarify whether, in such appeals, the audit staff Program Office for the Caption and for Disclosures is the Bureau of State Aided Audits or the Bureau of Long Term Care Programs; and (c) if the Bureau of State Aided Audits is to be the relevant Program Office in such matters, that the Disclosures required by the proposed § 41.111, relating to disclosures, require the disclosure of persons involved in the audit within the Bureau of State Aided Audits and the disclosure of documents relied on by that Bureau in issuing the audit.

Since the authority in Act 142-2002 for the Department to include actions by Departments other than the Department of Public Welfare within its regulations for MA provider appeals does not exist, we again urge the Department to amend the authority relied on for these rules to include not only Act 142-2002, but also the Department's

rulemaking authority under the Administrative Agency Law and its rulemaking authority under the Public Welfare Code (62 P.S. § 403).

In addition, we request that the Bureau of Hearings and Appeals to apply the same requirements to currently pending matters to require that DPW provide discovery and disclosures relating to persons and documents in the Auditor General's office in matters before the Bureau of Hearings and Appeals.

Thank you for this opportunity to provide the Department with our comments, suggestions and objections to these Proposed Rules.

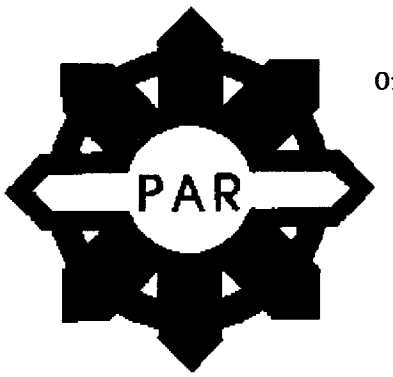
Best personal regards.

Very truly yours,

CAPOZZI & ASSOCIATES, P.C.

Louis J. Capozzi, Jr., Esquire

cc: Robert E. Nyce, Executive Director, IRRC



Original: 2416

Pennsylvania Association of Resources for People with Mental Retardation

1007 North Front Street
Harrisburg, PA 17102
Phone 717-236-2374
Fax 717-236-5625

(4)

September 13, 2004

Randy J. Riley, Administrative Law Judge
Bureau of Hearings and Appeals
Department of Public Welfare
Commonwealth of Pennsylvania
2330 Vartan Way, Second Floor
P. O. Box 2675
Harrisburg, Pennsylvania 17105-2675

Re: **Comments on behalf of the Pennsylvania Association of Resources for People with Mental Retardation ("PAR") to the Notice of Proposed Rulemaking Issued by the Department of Public Welfare and Published in the *Pennsylvania Bulletin* on August 14, 2005**

Dear Judge Riley:

On March 31, 2003, the Pennsylvania Association of Resources for People with Mental Retardation ("PAR") submitted comments regarding the standing practice order issued by the Bureau of Hearings and Appeals that was published in the Pennsylvania Bulletin on March 1, 2003. I enclose a copy of those comments.

Many of the questions raised in PAR's comments were answered by publication of the Final Standing Practice Order in the *Pennsylvania Bulletin* on June 29, 2003 and by the Notice of Proposed Rulemaking published in the *Pennsylvania Bulletin* on August 14, 2004. Nonetheless, it is our belief that an important issue remains unanswered regarding whether the processes contained in the Proposed Rulemaking will apply to resolved disputes brought by Medical Assistance providers and others who operate programs under waivers to the Medical Assistance Program.

For example, a provider or others who provide services to individuals eligible for those services under the Consolidated Waiver (of the Pennsylvania Medical Assistance Plan) whose services are funded with Medical Assistance funds that are administered through various county MH/MR offices, may have cause to bring a dispute before the Bureau of Hearings and Appeals. This could occur when the Department has made a determination that is adjudicative in nature, such as when specific costs are determined to be unallowable based upon an audit conducted by the Bureau of Financial Operations of the Department.

Clarification of the jurisdiction of the Bureau of Hearings and Appeals to resolve disputes described by this example would be very useful to those providers and others who operate such programs.

In addition, as previously provided in our comments of March 31, 2003 with regard Position Papers, PAR continues to emphasize that the disparity in sanctions that may be applied to providers as opposed to those that may be applied to the Department should be reconsidered. While those sanctions may prompt providers to redouble their efforts to ensure compliance with each procedural requirement, the Department is not under the same procedural threat of sanction. Consequently, the Department may not move as readily to respond in a timely fashion to those requirements. As both parties to any dispute need to act appropriately and timely in responding to the requirements of these rules in order to make the system operate most efficiently, PAR suggests that the Bureau consider imposing the same sanctions upon the Department as have been proposed for application to providers pursuant to the proposed rules.

Thank you for the opportunity to comment. Please feel free to contact me if you should have further questions.

Sincerely,

Shirley A. Walker

Shirley A. Walker
President and CEO

Pennsylvania Association of Resources
for People with Mental Retardation

1007 North Front Street
Harrisburg, PA 17102
Phone 717-236-2374
Fax 717-236-5625

March 31, 2003

Thomas Cheffins, Director
Bureau of Hearings and Appeals
Department of Public Welfare
2330 Vartan Way, 2nd Floor
Harrisburg, PA 17110-9721

Re: Comments by the Pennsylvania Association of Resources for People with Mental Retardation (PAR) on the Draft Standing Practice Order Issued by the Bureau of Hearings and Appeals Published in the Pennsylvania Bulletin on March 1, 2003

Dear Mr. Cheffins,

The Pennsylvania Association of Resources for People with Mental Retardation (PAR) thanks the Department of Public Welfare for the opportunity to provide written comments on the above referenced Standing Practice Order.

PAR is a statewide association whose members provide the full range of supports and services to individuals with mental retardation in over 3,000 locations in the Commonwealth in addition to numerous non-residential and in-home supports.

PAR submits the following comments to the proposed Standing Practice Order:

Filing an Appeal.

1. Rules 6 and 19. Under the Standing Practice Order, will the Bureau utilize the thirty (30) day timeframe for the filing of provider appeals found in several appeals regulations, *e.g.*, 1101.84(a),(b),(c), 6210.123 or 6211.33(b) or the timeframes provided at 67 Pa. C.S. § 1103(B)?

2. Rule 5. Will the appeals procedure under the Standing Practice Order be utilized to resolve disputes brought by providers that operate under waivers to the Medical Assistance program?

3. Rule 6. Will the Bureau accept the filing or amendment of appeals by facsimile transmission or by any other form of electronic transmission?

4. Rule 7. What forms of submission, *e.g.*, hard copy, facsimile transmission, email transmission, will be deemed to constitute a written motion for the purpose of requesting an extension of time?

Rule 32 Expedited Disposition Procedure for Certain Appeals

Although this procedure is helpful for the type of appeals listed in paragraph (a), why would an expedited appeals process not also include terminations or suspensions of medical assistance provider status which, because such hearings are held only after the effective date of the termination, ordinarily will have a greater impact on the provider than those listed in paragraph (a)?

Rule 35(c) Position Papers

1. Under the Standing Practice Order, Rule 35(c)(1), the provider is to supply the Bureau with what is described as "required documentation."

   (a) Does "required documentation" used in this section mean only those items referenced under Rule 35(c)(3) regarding the contents and amendments to position papers or some other documentation, and, if other documents, what is that documentation?

   (b) Why is no corresponding demand made upon the program office to submit "required documentation" with its position paper?

2. Under the Standing Practice Order, if the provider does not meet its position paper due date or supply the required documentation referenced above, the Bureau will dismiss the appeal; however, if the program office fails to meet its position paper due date, the Bureau will schedule the case for [from] hearing and will notify the Chief Counsel of the Department. This disparity in the proposed process raises several questions:

   (a) Why does the Bureau propose such a huge disparity in the sanction be applied to the parties simply based upon their status as provider or program office?

   In raising this question, we recognize that under the provisions of this rule regarding *Penalties for Noncompliance*, a party shall not be permitted to offer testimony or exhibits at a hearing that were not identified in its position paper filed with the Bureau. However, application of these sanctions to the program office appear to be either alternatively ineffective or inefficient because the rule may allow the program office to do one of two things the provider is not permitted to do:

   1. The program office could file and serve its position paper late because no timeframe is provided in the penalties paragraph. If this were allowed, the provider's ability to prepare and present its case would be prejudiced, but the program office could entirely avoid the imposition of the sanction. This would make the sanction ineffective, but only as to the program office.

2. If the provisions of Rule 6 requiring the timely filing of all pleadings and legal documents would eliminate a late filing by the program office, the program office would not have its position denied and the appeal decided against it as occurs to the provider. The matter would go forward, but would be a very inefficient use of time in that the program office has no ability to offer any testimony or exhibits.

(b) What is the purpose in holding a hearing in which the decision must be based upon the preponderance of the evidence pursuant to Rule 47, but the program office cannot present a case?

(c) As the provider need establish only a prima facie case by the close of its case-in-chief, and the program office cannot proceed to its case at hearing, would it also not be more practical to hold both parties, the provider and the program office, accountable under the same sanction for the same failure?

Rule 36(4) Deposition of the Secretary and Senior Department Officials

1. As the agency actions frequently are signed by the Deputy Secretary or a Bureau director, why include these individuals in the group that may not be deposed without the application of the listed findings?

2. How would a party determine whether the senior department official has knowledge which is not privileged, unless the provider has the opportunity to ask him or her?

3. How would a party determine whether the senior department official has knowledge that, even if shared with a subordinate official or employee, caused the senior department official to take the agency action he or she signed and sent to the provider, unless the provider has the opportunity to ask him or her?

Rule 44 Voluntary Mediation

67 Pa. C.S. § 1102(F) provides for the establishment of programs and procedures to promote settlements or to narrow issues through mediation and arbitration. The proposed rule establishes a procedure for mediation. Will another rule or procedure be proposed to establish a procedure for arbitration?

We welcome your questions and are available to meet with you at any time regarding our comments. Thank you for giving our comments your thoughtful consideration.

Sincerely,

Shirley A. Walker

Shirley A. Walker
President and CEO

IRRC

From: Laura Bennett [laura@par.net]

Sent: Wednesday, September 15, 2004 11:51 AM

To: IRRC

Subject: FW: PAR Comments on MA Provider Appeals Proposed Rulemaking

-----Original Message-----
From: Laura Bennett
Sent: Monday, September 13, 2004 5:22 PM
To: 'RRiley@state.pa.us'
Cc: Shirley Walker
Subject: PAR Comments on MA Provider Appeals Proposed Rulemaking

Judge Riley,
Attached are the Pennsylvania Association of Resources for People with Mental Retardation's (PAR's) comments on the proposed rulemaking regarding Medical Assistance Provider Appeals. Thank you.

Laura Bennett, Senior Policy Analyst
Pennsylvania Association of Resources
for People with Mental Retardation
717.236.2374

14-488-5

Original: 2416

LISA W. CLARK
DIRECT DIAL: 215.979.1833
E-MAIL: lwclark@duanemorris.com

www.duanemorris.com

1904-2004
DuaneMorris
100th Anniversary

FIRM and AFFILIATE OFFICES

NEW YORK
LONDON
CHICAGO
HOUSTON
PHILADELPHIA
SAN DIEGO
SAN FRANCISCO
DETROIT
BOSTON
WASHINGTON, DC
ATLANTA
MIAMI
PITTSBURGH
NEWARK
ALLENTOWN
WILMINGTON
CHERRY HILL
HARRISBURG
BANGOR
PRINCETON
WESTCHESTER

September 14, 2004

VIA FACSIMILE AND EXPRESS MAIL

The Honorable Randy J. Riley
Administrative Law Judge
Department of Public Welfare
2330 Vartan Way
Second Floor
Harrisburg, PA 17110

Re: Formal Comments to Department of Public Welfare Proposed Regulations No. 14-488 (2416)

Dear Judge Riley:

Duane Morris LLP, as counsel for The Hospital & Healthsystem Association of Pennsylvania, ("HAP"), appreciates the opportunity to comment on the DPW Proposed Regulations (the "Regulations") to govern Medical Assistance ("MA") provider appeals before the DPW Bureau of Hearings and Appeals ("BHA").[1] These comments supplement HAP's comments to the DPW Draft Standing Practice Order issued February 28, 2003 (the "Order"),[2] which were submitted on March 31, 2003, and are essentially repeated below. We are pleased that DPW has issued the Regulations through notice and comment rulemaking and has afforded interested parties and providers the opportunity to comment on these administrative procedures. However, we are concerned that, with the exception of a few minor suggestions, none of the substantive comments made by HAP to the Order is reflected in the Regulations. In order to ensure that the concerns of providers are considered by DPW and the Independent Regulatory Review Commission ("IRRC"), HAP now resubmits these comments as formal comments to the Regulations.

[1] The Regulations are authorized pursuant to Act 142 of December 3, 2002 (P.L. 1147, No. 142) ("Act 142"). The Order imposes interim rules governing provider appeals pending the adoption of final regulations by DPW. Act 142 removed jurisdiction over MA provider appeals from the Board of Claims and granted jurisdiction to the BHA. H.B. 2674, §12.2; 67 Pa.C.S. § 1724(c). The Act further provides that a provider that is "aggrieved by a decision of the DPW regarding the MA Program" may request a hearing before the BHA in accordance with the Act.
[2] 33 Pa. Bull. 1168.

Comments

1. Of primary importance is the clarification of the BHA hearing procedure, particularly with regard to the definition of "hearing," and the bifurcated process for relief (see comment 2, below). The definition of "hearing" in the Regulations departs significantly from the definition drafted by the legislature in Act 142. The Regulations define "hearing" as follows:

> (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 before a presiding officer for the purpose of resolving an interlocutory matter, including by not limited to a petition for supersedeas.

The statute defines "hearing" as:

> A proceeding commenced in accordance with this chapter by a provider concerning an adjudication of the Department relating to the administration of the Program. The term includes an action relating to a provider's enrollment in, participation in, claims for payment or damages under or penalties imposed under the Program.

While the definition has been revised from that in the Order, the Regulations still create a definition of "hearing" that is different from that in the Act. Furthermore, the inclusion of provider appeal in the definition of hearing further confuses the overall procedural issue (see below). In addition, the Act's definition of "hearing" more closely resembles the definition of "agency action" contained in the Regulations. See 55 Pa.Code §41.3. The final regulations should clarify these definitions.

2. Related to the definition of hearing in the Regulations is the bifurcated process for relief, which was contained in the Order, that does not reflect the provisions of the statute. The Regulations provide two separate procedures for the submission of a petition for relief, and a request for hearing, depending largely in part on the type of relief requested by a provider. The process does not permit, for example, the possibility that a provider might appeal an agency action and in the same document, request relief in the form of a declaratory action or the amendment of a regulation, a common exercise in a judicial proceeding. Furthermore, the Regulations permit the BHA to dismiss a petition for relief or, alternatively, a request for hearing, if the form of the document does not match the relief required. These procedures should be combined to reflect the language of the Act. Alternatively, at a minimum, the

BHA should be required to provide notice to a provider of a nonconforming petition or request, with the opportunity for revision, rather than outright dismissal. Clarification of this process is in the interest of administrative economy.

3. The Order should require BHA to resolve provider payment and reimbursement decisions within a specific time period. A suggested reasonable time period is 2-3 years.

4. § 41.14. The verification requirement is unduly burdensome and overly broad. All parties are already required to sign and certify pursuant to § 41.123(a) that the disclosures, responses, etc. are complete and correct as of the time they are made. The provisions should be amended, for example, to require the BHA to identify those documents that contain facts of such significance that they are necessary to verify.

5. § 41.21. If an agency action includes a denial of reimbursement, the basis for this type of action is not appropriate for publication in the *Pennsylvania Bulletin*, as it may raise anti-competitive concerns.

6. § 41.32(f). This provision permits the BHA to dismiss a provider's request for hearing on its own motion, or the motion of the program office where a provider fails to comply with timing, form and content requirements, after the 90 day amendment period has expired. However, the Order does not require the BHA to notify a provider of the reason for dismissal. This provision creates a potential for abuse by the BHA. The provision should be amended to provide that a request for hearing that substantially complies with technical filing requirements will not be dismissed by the BHA on its own motion, or, alternatively, to clarify that the rule to show cause required to be filed by the BHA includes the reason for dismissal.

7. § 41.81. The consolidation provisions should be amended to permit providers to consolidate requests for a hearing from the outset, to ensure efficiency. As written, for example, the provision would require all similarly situated providers in a health system aggrieved by an agency action to file separate request for hearings, all which must be considered by the BHA prior to a consolidation determination.

8. § 41.111(b). The program office should be required to submit to a provider a list identifying and describing all documents the program office has deemed privileged or protected from disclosure, so that a provider has the opportunity to object to a claim of privilege. Furthermore, the provision should permit a provider to identify documents in the provider's possession that are protectable trade secrets.

9. § 41.116. This provision is too restrictive. Parties should have the right to amend their witness list, at a minimum for "good cause shown." Good cause would include amendment in response to a witness identified by the other party.

10. § 41.113. Subsections (a) and (b) are inequitable, and should be made consistent. The provision as written permits the program office to fail to comply with filing deadlines, and does not require a program office to comply with documentation requirements; however, a provider's failure to meet these requirements results in dismissal of the provider's request for hearing.

11. § 41.120(c). This provision is unduly burdensome. This provision grants the program office complete control over a provider's depositions. Providers should be permitted to depose a senior department official if documents produced by the BHA or program office demonstrate that a senior department official was personally involved or has knowledge of the disputed action without requirement of a BHA order.

12. § 41.153. This provision should be amended to provide for instances in which the BHA or program office has the burden of proof. For example, where a provider challenges a regulation, the BHA may have the burden of proof to demonstrate the validity of the regulation. The provision should include the standard of proof required.

13. § 41.171. This provision is confusing, and needs to be clarified. The definition of a presiding officer should indicate whether these individuals appointed by the Director are required to be BHA or program office employees. The provision should be amended to read: "The presiding officers in a hearing shall not have had prior contact with employees or public officials of the Department whose actions are subject to review before the Bureau, and shall not have any reporting relationship to them." Alternatively, the Order could provide that presiding officers will be appointed by the Director from a panel of BHA employees whose sole function is to act as presiding officers.

14. § 41.212. Subsections (f) and (i) need to be clarified as to when a request is deemed denied or approved by virtue of the Secretary's inaction in response to the request. In addition, (g) should be amended to permit a provider to submit a response to the Secretary's grant for review of particular issues raised by the provider.

15. § 41.214. This provision should clearly enumerate the procedural requirements for judicial review.

1904-2004 DuaneMorris 100th Anniversary

Thank you for your consideration of the above. We hope that DPW and the IRRC are able to give meaningful attention to these important, substantive concerns of providers.

Sincerely,

Lisa W. Clark

LWC
cc: John Jewett, IRRC
Paula Bussard, HAP

Original: 2416

"The future of long term care"
PHCA
PENNSYLVANIA HEALTH CARE ASSOCIATION

Pennsylvania Health Care Association (2)
315 North Second Street • Harrisburg, PA 17101
(717) 221-1800 • (717) 221-8687 FAX • www.phca.org

September 13, 2004

Via Hand Delivery

The Honorable Randy J. Riley
Administrative Law Judge
Department of Public Welfare
Bureau of Hearings and Appeals
2330 Vartan Way, Second Floor
Harrisburg, PA 17110

Re: Proposed Rulemaking: Medical Assistance Provider Appeal Procedure

Dear Judge Riley:

The Pennsylvania Health Care Association ("PHCA") submits the following comments with respect to the proposed rules governing medical assistance provider appeals before the Bureau of Hearings and Appeals ("BHA") of the Department of Public Welfare ("DPW"), published at 34 *Pa. Bull.* 4447 (Aug. 13, 2004). As you know, PHCA represents more than 200 nursing homes across the Commonwealth that participate in the Medical Assistance Program ("Medicaid" or "MA Program"), which DPW administers. Our nursing home members provide health care and related services to more than 15,000 Medicaid recipients each day. As a consequence, PHCA and its members have a significant interest in the rules of procedure governing appeals before the BHA.

Indeed, we were intimately involved in crafting the legislation that the General Assembly ultimately enacted as the Act of December 3, 2002, P.L. 1174, No. 142, 67 Pa.C.S. Chapter 11 ("Act 142"). The overriding purpose of Act 142 is to assure that providers receive ***de novo*** review of claims raised before BHA. Act 142, moreover, requires that DPW adopt rules governing proceedings before BHA that are reasonable, balanced and consistent with settled principles of law. Unfortunately, and despite the efforts of the advisory committee, we reluctantly have concluded that the proposed rules do not achieve their intended statutory purpose and unreasonably and unnecessarily favor DPW's interests over those of providers. We therefore urge DPW to substantially revamp the proposed rules prior to final publication and implementation. To do otherwise will establish rules that directly contravene important elements of Act 142 and other settled principles of Pennsylvania law and will deprive providers of the fair hearing to which they are both constitutionally and statutorily entitled.

General Observations

PHCA is deeply troubled by the degree to which the proposed rules fail to implement the letter and intent of Act 142. We believe that the proposed rules improperly and, in some circumstances, unlawfully limit the discretion of BHA to conduct hearings in a fair and impartial manner. We offer three general observations in support of this conclusion, which will be followed by detailed comments that offer additional elaboration and specific suggested corrective amendments.

First, the proposed rules clearly contravene governing provisions of Pennsylvania law. Act 142 requires that BHA "[c]onduct ***de novo*** review of all factual and legal issues raised by a provider in the request for hearing." 67 Pa.C.S § 1102(E)(2)(VII)(emphasis supplied). The proposed rules, however, unduly restrict providers' right to such review. Governing Pennsylvania case law, moreover, clearly establishes that a party asserting a proposition bears the burden of proving it, yet the proposed rules, without statutory authority, override this principle by imposing the burden of proof on providers in all cases. The proposed rules are inconsistent with Pennsylvania law in several other areas, including limits on the providers' ability to request a hearing, to petition for relief, to seek declaratory relief and to appropriately challenge a regulation, and limits on BHA's ability to consider claims involving waivers and expedited appeals.

Second, the proposed rules improperly shift the burden of proof under common law from the party asserting a proposition to the provider in all cases. Not only is there no authority for this shift in Act 142, it underscores the inequity inherent in the overreaching scope of the proposed rules.

Third, the proposed rules are fundamentally unfair to providers. While there are a number of provisions in the proposed rules that lend support to this conclusion, all of which will be addressed subsequently, the pleading and disclosure requirements alone conclusively demonstrate this inherent unfairness.

While providers must plead complaints with detailed specificity, DPW need not answer complaints at all. While providers must identify all individuals with knowledge of the facts and circumstances under consideration, DPW need disclose only its anticipated witnesses. While providers must make detailed disclosures of factual and legal bases for appeals in their hearing requests, DPW need not reciprocate until after the close of discovery and receipt of position papers and expert reports from providers. Essentially, therefore, DPW need not provide any information concerning its factual and legal theories until discovery has ended and providers have revealed the entirety of their case. DPW also need never disclose the names of agency employees with relevant information, unless the agency intends to call them as witnesses. Obviously, this allows DPW to avoid disclosing the names of witnesses who might have information damaging to its case or helpful to its opposition. Providers, of course, lack this luxury. Such obvious and undue bias in favor of DPW hardly is consistent with fundamental fairness, much less the intent and specific provisions of Act 142.

These general observations, of course, are merely "the tip of the iceberg," and the specific comments that follow further illustrate the patent unfairness of the proposed rules. In addition, there are several provisions that require clarification, which we also will address at the conclusion of our comments.

Specific Comments

We have organized around three topics: (1) the ways in which the proposed rules are contrary to Pennsylvania law, including the enabling legislation itself; (2) the ways in which the proposed rules deny fundamental fairness to providers; and (2) the provisions of the proposed rules that require clarification. In most cases, our comments begin with a brief restatement of the language of concern followed by a discussion of the reasons why the language should be deleted or revised. Where appropriate, we have recommended specific revisions.

I. The Proposed Rules are Inconsistent with Key Provisions of Pennsylvania Law

A. The Proposed Rules Undermine the Providers' Right to *De Novo* Review

Act 142 affords Medicaid providers an unqualified right to a hearing before the BHA following an adverse decision by DPW and mandates that BHA "[c]onduct de novo review of all factual and legal issues raised by a provider." 67 Pa.C.S. § 1102(E)(2)(VII). A number of provisions contained in the proposed rules undermine this unqualified right and therefore should be stricken or amended as appropriate.

First, the proposed rules seek to deprive BHA of "jurisdiction to make a final determination on a waiver request included in a request for a hearing," Proposed Rule 41.5(b). If a provider raises the availability of a waiver as a basis for its appeal, then BHA is obligated to resolve the question presented in the same manner as any other factual or legal issue presented by the provider. *See* 67 Pa.C.S. § 1105(A) (mandating that BHA "issue a determination adjudicating contested issues of fact and law and any appropriate order, decree or decision"). Act 142, thus, does not provide, or allow, for the limitation on BHA's jurisdiction proposed in section 41.5(b).

Second, the proposed rules unduly restrict a provider's right to challenge a regulation. In particular, Proposed Rule 41.41(a) states: "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." The scope of the proposed rulemaking is limited to adopting rules to implement Act 142. As set forth in the notice of proposed rulemaking, the authority for the proposed rules is Act 142 and, in particular, 67 Pa.C.S. § 1106(A), which provides: "By July 1, 2004, the Bureau, through the Department, shall promulgate regulations establishing rules of procedure as may be necessary to carry out the provisions of this chapter." Act 142 provides for hearings before BHA initiated by providers who are aggrieved by

adjudications by DPW. Thus, Act 142 does not address, or govern, petitions for the issuance, amendment or repeal of the regulations filed with DPW under the GRAPP. Proposed rule 41.41(a) is beyond the scope of the rulemaking authorized by Act 142 and therefore should be deleted. Moreover, there is otherwise no authority for DPW's attempt to limit the scope of petitions filed under the GRAPP.

Third, the proposed rules purports to limit the scope of "petitions for relief," Proposed Rule 41.41(a). As defined in the proposed rules, a "petition for relief" is a "document filed under § 35.17, § 35.18 or § 35.19 (relating to petitions generally; petitions for issuance, amendment, waiver or deletion of regulations; and petitions for declaratory orders) of the GRAPP." On its face, therefore, proposed regulation 41.41(a) addresses matters beyond the scope of the rulemaking authority in Act 142.

Because proposed regulation 41.41(a) is beyond the scope of authority delegated to DPW by Act 142, DPW cannot rely on Act 142 as the authority for adopting the proposed regulation. This section should therefore be deleted from the proposed regulations to be adopted pursuant to Act 142. To the extent DPW seeks to impose limits on petitions for relief authorized by GRAPP, it must identify clear statutory authority for doing so and must then publish a notice of proposed rulemaking for public comment.

Fourth, the proposed rules improperly overreach in restricting a provider's ability to obtain consideration of waivers. Proposed rule 41.41(c) provides: "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." Like proposed rule 41.41(a), proposed rule 41.41(c) purports to address matters beyond the scope of Act 142. Because it will create unnecessary litigation and because no valid public purpose is served thereby proposed rule 41.41(c) should be deleted.

A provider is authorized to seek a waiver either in support of an appeal of an adjudication under Act 142 or, prospectively, by petitioning DPW in the manner provided by the GRAPP. To the extent a provider seeks a waiver by petition it is not seeking review of an adjudication pursuant to Act 142 and therefore the scope of such a petition cannot be limited by a regulation that implements Act 142.

Moreover, there is no basis in law or policy for DPW's attempt to force providers to request a hearing following nearly every action by DPW and to seek waiver requests, or find themselves forever barred from petitioning DPW for a waiver. Proposed rule 41.41(c) will almost certainly result in a flood of otherwise unnecessary appeals by providers seeking waivers that they might never need. Absent proposed rule 41.41(c), providers might not appeal adjudications of relatively minor import, even if they believe that they are entitled to a waiver of the regulation upon which DPW relied. Weighing the costs and benefits, providers might be willing to allow many actions to become final without litigation. If proposed rule 41.41(c) is adopted as proposed, however, providers will be forced to appeal every action that implements a regulation, if there is some possibility that the provider may want to petition for a waiver of that regulation in the future.

Fifth, the proposed rules create a process for handling waiver requests that do receive BHA consideration, despite the provisions designed to frustrate such consideration, that is inconsistent with Act 142. Proposed rule 41.191(b), in part, provides: "If a request for a 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." Proposed rule 41.191(b) thus builds on Proposed Rule 41.5 (jurisdiction of the Bureau) by attempting to create a process inconsistent with Act 142.

Under Act 142, the BHA is obligated to "conduct de novo review of all factual and legal issues raised by a provider" and to "issue a determination adjudicating contested issues of facts and law and any appropriate order, decree or decision." 67 Pa.C.S §§ 1102(E)(2)(VII) & 1105(A). The BHA's determination is then subject to review by the Secretary in the manner provided. 67 Pa.C.S. § 1105(B).

Act 142, by its plain terms, does not provide for or anticipate a special process for handling waiver requests that are made by providers in support of an appeal filed with BHA. There is, therefore, no legal basis for proposed section 41.191(b). Consequently, this section should be deleted so that waiver requests presented in connection with a timely appeal will be considered and resolved in the same manner as all other factual and legal issues raised by a provider in an appeal.

In a similar vein, proposed rule 41.213 outlines the process by which the Secretary reviews "recommendations" with respect to waiver requests heard by BHA in support of an appeal. As discussed above, Act 142 does not allow for differential treatment of waiver requests submitted in support of an appeal. Rather, BHA must issue a "determination" with respect to a waiver request if the availability of a waiver is an issue presented in a request for hearing. 67 Pa.C.S § 1105(A). BHA, in other words, is not empowered to make "recommendations" in the manner contemplated by proposed rule 41.213. As a result, this proposed rule is superfluous and should be deleted to avoid confusion and misunderstanding.

Sixth, the proposed rules apparently seek to deprive providers of the ability to their right to have BHA conduct ***de novo*** review of all factual and legal issues raised by a provider, 67 Pa.C.S. § 1102(E)(2)(VII). Proposed rule 41.43 states: "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." The intent of this proposed rule is unclear but, in any event, it should be deleted.

To the extent proposed rule 41.43 purports to limit BHA's ability to rule on the validity of a regulation, it conflicts with Act 142 by attempting to limit BHA's authority to conduct de novo review of all factual and legal issues raised by a provider. To the extent the proposed rule purports to address petitions for relief and not appeals of actions as authorized by Act 142, it is beyond the scope rulemaking authority conferred by Act 142. In either case, therefore, proposed section 41.43 should be deleted.

Seventh, the proposed rules deprive providers of their right to ***de novo*** review by preventing BHA from issuing final determinations on the merits of issues "properly raised" in petitions for relief. In particular, proposed rule 41.5(c) states: "The Bureau has no jurisdiction to issue a final determination on the merits of an issue properly raised in a petition for relief." A "petition for relief" is defined, in the proposed rules, as consisting of a petition filed under the GRAPP asking the Department to, among other things, issue, amend, waive or delete a regulation or otherwise seeking declaratory relief. Among the issues that could be raised in a petition for relief, therefore, is a challenge to the validity of a regulation. Accordingly, proposed rule 41.5(c) could be interpreted as precluding BHA from issuing a final determination on the merits of a challenge to all, or part of, a DPW regulation.

To the extent a provider challenges the validity or applicability of a DPW regulation in connection with its appeal of an adverse decision by DPW, then BHA has an obligation to issue a final determination resolving the issue presented, irrespective of whether or not the same issue could have been raised in a petition for relief. *See* 67 Pa.C.S. § 1102(E)(2)(VII). BHA's final determination is subject to review by the Secretary in the manner provided for by Act 142. *See* 67 Pa.C.S. § 1105(B).[1]

Because issues that could be raised by a petition for relief (as defined in the proposed rules) might also be raised by a provider seeking review of an adverse decision by DPW, proposed section 41.5(c) should be modified to provide: "Other than in connection with issues raised by providers in a timely filed request for hearing, the Bureau has no jurisdiction to issue a final determination on the merits of an issue properly raised in a petition for relief."

Eighth, the proposed rules improperly restrict a provider's ability to seek declaratory relief before BHA. Proposed rule 41.31(d)(4)(iii) provides: "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 a 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)."

As discussed above in connection with proposed rule 41.5 (jurisdiction of the Bureau), Act 142 does not provide, or allow for the restriction on the scope of hearings suggested by proposed section 41.31(d)(4)(iii). To the extent declaratory relief (in the form of an order declaring a DPW regulation invalid, for example) constitutes an "appropriate order" in a given appeal, then BHA is obligated to provide such relief. *See* 67 Pa.C.S. § 1105(A). Although such an order may be ancillary to an order invalidating agency action taken based on the invalidated regulation, it is nevertheless an appropriate order. At the same time, however, it is equally clear that Act 142 does not authorize BHA to order DPW to adopt a regulation. In this regard, BHA, as intended,

---

[1] To the extent a provider seeks to compel DPW to perform a quasi-legislative act, such as adopting a regulation, it should proceed by petition filed with the Secretary. In such a case, the provider would not be seeking review of an individualized decision of the Department regarding the Medicaid program. Such petitions, therefore, are beyond the scope of Act 142.

functions like a court in that it has the power to rule on the validity of regulations but not the power to order DPW to adopt regulations.

Ninth, the proposed rules alter the nature of proceedings based on petitions for relief and declaratory relief that exceed the scope of Act 142. Proposed rule 41.42 addresses requests for declaratory relief included in petitions for relief. As discussed above, petitions for relief filed other than as part of a request for a hearing following an adjudication by DPW are not addressed in or governed by Act 142. Rather, such petitions are addressed in, and governed by, the GRAPP. Moreover, Act 142 does not authorize DPW to modify the GRAPP applicable to petitions for relief. Accordingly, proposed rule 41.41, in its entirety, should be deleted for purposes of the now pending proposed rulemaking.

Taken individually, these nine concerns constitute a list of proposed regulatory provisions clearly inconsistent with the dictates of Act 142. Taken together, they confirm that the proposed regulations improperly deny providers their right to ***de novo*** review of all factual and legal issues guaranteed in Act 142.

B. The Proposed Rules Improperly Shift the Burden of Proof to Providers in all Cases

Proposed rule 42.153(a), in part, provides: "The provider has the burden of proof to establish its case by a preponderance of evidence and is required to make a prima facie case by the close of its case-in-chief." A rule that imposes the burden of proof on providers in all cases is inconsistent with Act 142 and with the common law in Pennsylvania governing the allocation of the burden of proof. Accordingly, proposed rule 41.153(a) should be modified to allocate the burden of proof in a manner consistent with Pennsylvania law as routinely restated by the courts and as evidenced by the practice before other Commonwealth agencies. See, e.g., 25 Pa. Code § 1021.122 (allocating the burden of proof in connection with hearings before the Environmental Hearing Board).

Act 142 directs BHA to "[c]onduct de novo review of all factual and legal issues raised by a provider in the request for hearing based on evidence presented to the Bureau." Inherent in this mandate is a requirement for a fair hearing before an impartial hearing body. One component of a fair hearing, and one indicia of impartiality, is the proper allocation of the burden of proof. For example, in a case where DPW has accused a provider of fraud or other misconduct, the provider would be denied a fair and impartial hearing if DPW can force the provider to attempt to prove the negative. This, however, would be the result if proposed 42.153(a) were adopted.

The law with respect to the proper allocation of the burden of proof could not be clearer. "The fundamental principle is that the burden of proof in any cause rests upon the party who as determined by the pleadings or the nature of the case asserts the affirmative of an issue. . . . One alleging a fact which is denied has the burden of establishing it." *Lincoln Intermediate Unit v. Bermudian Springs School Dist.*, 441 A. 2d 813, 815 (Pa. Cmwlth. 1982) (indication of quotation omitted); *see also Zenner v. Goetz*, 188 A. 124 (Pa. 1936) ("It is a well-recognized principle of evidence that he who has the positive of any proposition is the party called upon to offer proof of

it. It is seldom, if ever, the duty of a litigant to prove a negative until his opponent has come forward to prove the opposing positive.") Moreover, the Commonwealth Court has expressly recognized that the burden of proof in proceedings before BHA is allocated in accordance with general rule quoted above. *See South Hills Health System v. DPW*, 510 A.2d 934, 935 (Pa. Cmwlth. 1986) ["The [provider] contends, and we agree, that one who asserts the existence of certain facts bears the burden of proving them."]; see also 36 Standard Pa. Practice 2d, § 166.183 ("In administrative proceedings, the burden of proof generally rests with the party asserting the affirmative of any issue.")

Nothing in Act 142 purports to change settled case law. Accordingly, proposed rule 41.153(a) must be revised to properly allocate the burden of proof. With some modification necessary to reflect the types of actions taken by DPW, as compared to actions taken by the Department of Environmental Protection, we believe that the rule adopted by the Environmental Hearing Board provides an excellent model that is consistent with precedent cited above. See 25 Pa Code § 1021.122.

Proposed section 41.153 should therefore be revised to read:

> (a) In proceedings before the Bureau, the burden of proceeding and the burden of proof shall be the same as at common law in that the burden shall normally rest with the party asserting the affirmative of an issue. It shall generally be the burden of the party asserting the affirmative of the issue to establish it by a preponderance of evidence. In cases where a party has the burden of proof to establish a party's case by a preponderance of evidence, the Bureau may nonetheless require the other party to assume the burden of proceeding with the evidence in whole or in part if that party is in possession of facts or should have knowledge of facts relevant to the issue.
>
> (b) The Department has the burden of proof in the following cases:
>
> (1) When it assesses a penalty or imposes a sanction on a provider.
>
> (2) When it seeks to recoup or recover an alleged overpayment to a provider.
>
> (3) When it revokes or suspends a license, permit, approval or other authorization.
>
> (4) When it issues an order to a particular provider.
>
> (c) A provider appealing an action of the Department shall have the burden of proof in the following cases:
>
> (1) When the Department denies a license, permit, approval or other authorization.

(2) When the Department denies or reduces a payment to the provider for reasons other than a claim of provider misconduct or fraud.

(3) When a provider to whom a license, approval, authorization or financial allocation is issued protests one or more aspects of such issuance.

On a related note, proposed rule 41.181 tracks the proposed rule allocating the burden of proof in all cases to providers and requires that, in all cases, providers file the first post-hearing brief. Because the rule allocating the burden of proof must be revised to comply with the law, proposed rule 41.181 also should be revised to provide that the party with the burden of proof shall file the first post-hearing brief.

C. The Provisions Governing Expedited Disposition Must Be Modified

Proposed rule 41.92 identifies certain types of appeals that BHA will process in accordance with expedited pre-hearing procedures. The apparent justification for this rule is to allow DPW and providers to continue the established practice of resolving certain appeals using a more informal process than that specified in the proposed rules. Proposed rule 41.92 allows parties to seek to opt out of the expedited procedures, for good cause shown. See proposed rule 41.92(g).

For the reasons set forth below, proposed rule 41.92 should be revised to allow parties to "opt into" (rather than seek to opt out of) the expedited procedures upon stipulation by the parties or upon motion with good cause shown. If revised as recommended, rule 41.92 will preserve the ability of DPW and providers to resolve certain appeals using an informal or expedited process while also protecting the rights created and secured by Act 142.

By forcing certain types of appeals to be resolved using DPW's expedited process irrespective of the scope and circumstances surrounding a given appeal, proposed rule 41.92 eviscerates a provider's right to a fair hearing under Act 142. In this manner, proposed section 41.92 conflicts with Act 142 by arbitrarily limiting the rights of providers and by imposing additional burdens solely on providers, to the extent providers appeal one or several types of actions taken by DPW.

Among the rights arbitrarily cut off by proposed rule 41.92 is a provider's right to conduct "reasonable and necessary discovery." See 67 Pa.C.S. § 1102(E)(2)(V); see also proposed rule 41.92(f)(9) (discovery not allowed in connection with appeals identified in proposed rule 41.92). While a provider and DPW might agree that discovery is unnecessary in a given case, a rule that automatically precludes discovery, or that forces a provider to obtain leave in order to conduct discovery, is inconsistent with Act 142.

Providers that appeal the types of actions identified in proposed rule 41.92 also will be denied advance notice of the evidence to be presented by DPW at a hearing, thus depriving providers of the fair and impartial hearing anticipated by Act 142. Pursuant to proposed rule 41.92, DPW is

not required to file a pre-hearing position paper disclosing its witnesses, evidence and legal theories. See proposed rule 41.92(f)(8). By contrast, under proposed section 41.92, providers must continue to provide full disclosure to DPW through comprehensive hearing requests. See proposed rule 41.92(b)(1). Moreover, if an appeal comes within the scope of proposed rule 41.92, providers must also file "[r]elevant supporting documentation" with their hearing requests, thus ensuring that DPW has notice of the evidence providers will rely on at the expedited hearings. See proposed rule 41.92(b)(2). This unbalanced and inequitable approach to certain types of appeals is inconsistent with the mandate of Act 142.

Moreover, mandatory application of the proposed expedited hearing procedures is not justified by a desire to allow parties to continue to resolve certain types of appeals in an informal manner. Parties may continue to resolve appeals informally, either through settlement discussions or by opting in to the expedited procedures.

The solution is to revise proposed rule 41.92 to limit its application to appeals where the parties agree to proceed in the manner set forth therein or where a party by motion demonstrates to BHA that the expedited procedures should apply.

D. **The Provisions Concerning Supersedeas are Inconsistent with Act 142**

Proposed rule 41.53(b) provides: "A supersedeas will 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."

The second sentence of proposed rule 41.53(b) should be deleted as inconsistent with 67 Pa.C.S. § 1103(B) and as unlawfully limiting BHA's power to consider all relevant circumstances when determining whether a supersedeas should issue to protect an innocent provider from arbitrary and unlawful agency action that threatens to cause irreparable harm. The effect of the second sentence of proposed rule 41.53(b) is to make it impossible for BHA to comply with the statutory mandate that, when considering a request for supersedeas, it "shall be guided by relevant judicial precedent." 67 Pa.C.S. § 1103(B). As proposed, rule 41.53(b) usurps BHA's authority to act in accordance with judicial precedent by mandating that BHA deny a supersedeas even where a provider has proven at a hearing that: (i) it is likely to prevail on the merits; (ii) it will suffer irreparable harm; and (iii) there is no likelihood of injury to the public or other parties.

Not only does the second sentence of proposed rule 41.53(b) preclude BHA from satisfying the mandate of Act 142, it fails to serve a valid public purpose. The public interest is protected by 67 Pa.C.S. § 1103(C), which provides: "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." BHA, and the Commonwealth Court upon review, will apply this standard and protect the public interest. Consequently, the public interest is not advanced, and in any given case

might actually be harmed, by the proposed mandatory finding that the public is threatened in cases where the evidence available to BHA clearly establishes otherwise.

In sum, if a provider has proven that the public will not be injured if a supersedeas is issued, the fact that the statute or regulation at issue (which BHA must preliminarily conclude DPW misapplied) states that an action taken pursuant thereto shall take effect prior to any appeal should not provide a basis for denying a supersedeas and forcing a provider to suffer irreparable harm. The second sentence of proposed rule 41.53(b) should be deleted.

E. The Provisions Governing Chapter 275 May Conflict with Act 142

Proposed rule 41.1(c) provides: "This chapter does not apply to appeals governed by Chapter 275 (relating to appeal and fair hearing and administrative disqualification hearings)." Proposed rule 41.1(c) is either unnecessary or in conflict with Act 142. In either case, the proposed language should be deleted.[2]

As a general rule, Chapter 275 governs appeals by beneficiaries not providers. See Northwestern Institute of Psychiatry v. Department of Public Welfare, 513 A.2d 495 (Pa. Cmwlth. 1986). To the extent a recipient brings an appeal under Chapter 275, the appeal would be beyond the scope of the proposed rules because proposed rule 41.1(a) provides: "This chapter governs the practice and procedure in MA provider appeals." Thus, to the extent Chapter 275 does not apply to appeals commenced by Medicaid providers, the additional exclusion in proposed rule 41.1(c) is unnecessary and its existence will only result in confusion and uncertainty as persons attempt to give meaning to an unnecessary provision.

At the same time, to the extent Chapter 275 could, in some circumstances, apply to an appeal brought by a provider that "is aggrieved by a decision of the Department regarding the program," then Act 142 does not authorize a categorical exclusion of such appeals from the scope of the rules governing provider appeals. In this case, proposed rule 41.1(c) should be deleted as inconsistent with the statutory authorization under which it is promulgated.

II. The Proposed Rules are Fundamentally Unfair to Providers

A. The Scope of Proposed Rules Unfairly Denies Interested Parties the Right to Comment

Proposed rule 41.1(b) provides: "In addition to this chapter, [the General Rules of Administrative Practice and Procedure ("GRAPP")] and other applicable Departmental regulations apply to the practice and procedures in MA provider appeals, except as specifically superseded in relevant sections of this chapter." This provision unfairly incorporates by reference unspecified Departmental regulations, and this reference should be stricken.

---

[2] It should be noted that, by letter dated March 31, 2003, PHCA offered detailed comments concerning the SPO. One of our comments addressed this concern. We remain dismayed that those comments largely have been ignored in the proposed rules as promulgated.

This reference was not in BHA's previously issued Standard Practice Order and was not presented to or considered by the advisory committee constituted pursuant to 67 Pa.C.S. § 1106(B).[3] Moreover, if imported into the new rules of procedure, DPW's existing regulations (and, presumably, subsequently issued regulations) may interfere with the right of providers to obtain ***de novo*** review of DPW decisions in the manner, and to the extent, expressly provided for in Act 142. For example, 55 Pa. Code § 1101.84(d) lists certain "nonappealable actions." Precluding appeals in certain cases conflicts with Act 142, which states: "A provider that its aggrieved by a decision of the Department regarding the program may request a hearing before the bureau in accordance with this chapter." 67 Pa.C.S. § 1102(A). Similarly, 55 Pa. Code § 1187.141 purports to limit the scope of, and to impose additional restrictions on, appeals brought by nursing facilities in a manner that conflicts with Act 142's mandate that BHA "[c]onduct de novo review of all factual and legal issues raised by a provider in the request for hearing based on evidence presented to [BHA]." 67 Pa.C.S. § 1102(E)(2)(VII).

The ambiguous cross-reference to other applicable regulations effectively denies interested parties a meaningful opportunity to comment on the proposed regulations. It is impossible for an interested party to determine whether DPW or another party will, in the future, take the position that a particular regulation is "applicable" to provider appeals before BHA. It also is impossible for interested parties to determine the actual scope and substance of the regulations now available for comment. As a result, to the extent DPW proposes to incorporate existing regulations, these regulations should be identified with specificity and a revised proposed rule published for comment and for review by the Independent Regulatory Review Commission.

Finally, in addition to creating a conflict between DPW's existing regulations and the mandate of Act 142, the cross-reference to unidentified "other applicable Departmental regulations" is certain to result in disagreement with respect to whether or not existing or future DPW regulations are "applicable" to appeals commenced pursuant to Act 142.

B. Notice Requirements are Unfair to Providers

Proposed rule 41.21(a)(3) authorizes DPW to provide notice of agency action by publication in the *Pennsylvania Bulletin* if the action applies to a class of providers or makes system-wide changes affecting more than a single provider. "Agency action" is defined, in the proposed rules, as including an "adjudicative action of the Department." Thus, under proposed rule 41.21(a)(3), DPW appears to be authorized to give notice of adjudicative actions adversely affecting individual providers in a manner that gives rise to a right to a hearing under Act 142 merely by publishing notice in the *Pennsylvania Bulletin* if the adjudicative action happens to apply to more than a single provider. Proposed rule 41.21(a)(3) is inconsistent with the intent of Act 142 and should be deleted.

---

[3] Once again, PHCA raised this concern in its letter dated March 31, 2003 concerning the SPO.

DPW should not be permitted to give notice by publication of "adjudicative actions" that are of the type that give rise to a right of appeal under Act 142 unless, and until, it has attempted to provide written notice to the provider. If an action by DPW "aggrieves" an individual provider within the meaning of 67 Pa.C.S. § 1102(A), such that the provider is entitled to a hearing, then the provider is entitled to receive written notice of the action. See proposed rule 41.31(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."). Irrespective of whether or not an adjudicative action by the Department applies to more than one provider, proper and effective written notice is an essential element of a fair and impartial ***de novo*** hearing mandated by 67 Pa.C.S. § 1102(E)(2)(VII). Consequently, proposed section 41.21(a)(3) should be deleted.

In addition, proposed rule 41.31(e), in pertinent part, provides: "If the provider received written notice of the agency action by publication in the *Pennsylvania Bulletin*, the provider shall identify the date, volume and page number of the *Pennsylvania Bulletin* in the request for hearing." Here as well, DPW should not be permitted to provide notice of actions subject to appeal before the BHA by publishing notice of such actions in the *Pennsylvania Bulletin*. Actions that are subject to appeal under Act 142 are adjudicatory actions that adversely affect individual providers, although it is possible that DPW might take an action that adversely affects more than one provider. DPW should be required to provide individual written notice of such actions. As a result, the portion of proposed section 41.31(e) quoted above is superfluous and should be deleted to avoid unnecessary disputes.

C. Pleading Requirements are Unfair to Providers

A number of proposed rules concerning pleadings are deeply unfair to providers. First, providers must plead with detailed specificity or risk dismissal with prejudice, while DPW not only may avoid pleading with specificity, it may avoid pleadings altogether. Proposed rule 41.31(d)(2) states that a request for a hearing must include "[d]etailed reasons why the provider believes the agency action is factually or legally erroneous." Proposed rule 41.31(d)(3) states that a request for a hearing must also include an "[i]dentification of the specific issues that the provider will raise in its provider appeal." Either these proposed rules must be amended to eliminate the extensive pleading burdens imposed on providers or proposed rule 41.71(a) must be amended to require DPW to answer hearing requests. See proposed § 41.71(a) ("An answer to a pleading is not required."); *see also* proposed § 41.3 (defining "pleading" as a "request for hearing").

As a matter of fundamental fairness and due process of law, there is no basis for requiring only one of two parties to a de novo proceeding before BHA to file what amounts to a fact-pleading similar in nature and specificity to a complaint or answer filed in state court. If a provider is required to file such a pleading, then DPW should be required to file a like pleading. In the alternative, proposed rules 41.31(d)(2) and (d)(3) should be amended to allow providers to generally state their objections to the DPW action at issue, to be followed by a more specific

enumeration of the grounds for appeal in the position paper filed pursuant to proposed section 41.112. See Pa.R.A.P. 1513(a) (content of petition for review). [4]

The following example illustrates the unfairness and prejudice inherent in proposed rules 41.31(d)(3) and (d)(4). Under these proposed rules, when a provider commences an appeal, it must file and provide DPW with a detailed explanation of the factual and legal basis for the appeal. In fact, under proposed rule 41.32(d), a provider waives all factual and legal objections and issues that are not raised in either a request for a hearing or an amended request for a hearing. DPW, on the other hand, need not make an equivalent disclosure to the provider until it files its pre-hearing position paper, which is not due until well after the close of discovery and after it has received the provider's position paper and any expert reports. See proposed rule 41.112(b). As a result, DPW will be able to focus its discovery, expert analysis and position paper on the theories and facts disclosed in the provider's request for hearing while the provider will be forced to use the limited discovery available under the proposed rules to try unearthing the factual and legal basis for DPW's action.

There are two ways to eliminate the bias and prejudice introduced by proposed rules 41.31(d)(3) and (d)(4). The first option is to replace the requirement that a request for a hearing enumerate specific factual and legal objections and claims with a requirement that a request for a hearing identify general objections to the DPW action at issue known to the provider at the time the request for a hearing is filed or amended. A model for such an approach is Rule 1513(a) of the Pennsylvania Rules of Appellate Procedure, which provides that a petition for review shall include "a general statement of the objections to the order or other determination" subject to review.

The second, preferable - - and in light of Act 142 - - arguably, mandatory option is to require both parties to file full pleadings at the outset of an appeal. Although frequently characterized as "appeals," proceedings before BHA are not appellate in nature. Rather, consistent with Act 142, proceedings before BHA are like proceedings before a trial court, in that BHA is obligated to conduct a ***de novo*** hearing and to make determinations based on evidence presented to it. See 67 Pa.C.S. § 1102(E)(2)(VII). As a result, it is inappropriate to employ an appellate model, whereby parties typically are not required to "answer" petitions for review. It is even more problematic to apply the appellate model to one party (DPW) and to apply trial court pleading requirements to other parties (providers). In other words, it is inappropriate to require providers to file complaints that DPW does not have an obligation to answer.

On a related note, proposed rule 41.71(a), which concerns DPW's answer to a request for hearing, also must be modified. This proposed rule states: "An answer to a pleading is not required." As defined in the proposed rules, a "pleading" is a request for a hearing. Proposed rule 41.71(a) thus provides that DPW need not answer requests for hearings.

---

[4] On a related note, proposed rule 41.82, in pertinent part, provides that a request for a hearing may not be amended except as specified in proposed rules 41.32(c) and 41.33(b). Given the text of proposed rules 41.32(c) and 41.33(b), proposed rule 41.82 is superfluous and should be deleted to avoid confusion and uncertainty.

Fundamental fairness certainly demands that, if providers are obligated to file hearing requests that are nearly identical in scope and detail to complaints filed in state court (as proposed rule 41.31 appears to suggest), then DPW should be obligated to answer hearing requests in the same way that a defendant answers a complaint. Proceedings before BHA must be conducted in an equitable manner and the rules of procedure should not provide either party an unwarranted procedural advantage. It is clear, however, that by forcing one party, but not the other, to disclose the factual and legal bases of its claims, the proposed rules introduce significant bias and partiality into proceedings before BHA.

Act 142 contemplates a fair process. There is no justification for forcing providers to disclose the facts and legal theories upon which they rely at the outset of an appeal - - or face waiver of claims and issues not clearly raised or even dismissal - - while allowing DPW to avoid a similar disclosure until after discovery is complete and until after providers have prepared their expert reports and filed their position papers. Similarly, there is no justification for forcing providers, but not DPW, to use the discovery process to identify the facts that are truly in dispute and the legal points on which the parties actually differ. It is wasteful and inefficient to proceed in this manner.

A better process would be to compel DPW to answer provider allegations and contentions so that the parties are similarly situated with respect to their ability to engage in thoughtful, focused discovery and pre-hearing preparation. This can be accomplished by revising proposed rule 41.71(a) to require that DPW must answer hearing requests with the same degree of specificity required of providers. By doing so, DPW and providers would be placed on equal footing and discovery would then be conducted in a more efficient and focused manner.

A less efficient, but still fairer, alternative would be to allow providers to preserve issues and claims by way of general objections to the action subject to appeal. If DPW is able to avoid complete and binding articulation of its position until it files a position paper after the close of discovery, then providers should be afforded similar flexibility, without the need to seek special relief from BHA. In sum, for the process to be fair, and for the mandate of Act 142 to be satisfied, DPW and providers should be treated as equals throughout the entire process. In this manner, parties to hearings before BHA would be placed in positions similar to plaintiffs and defendants in proceedings in court and the right to a ***de novo*** hearing before the BHA will be preserved.

Second, the proposed provisions governing amendment or withdrawal of pleadings also potentially interferes with provider rights. Proposed rule 41.25(b) provides: "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." This proposed rule may be interpreted as interfering with the right of a provider to withdraw its appeal [see proposed rule 41.83(a)(1)] and will result in unnecessary motion practice before BHA. Parties to proceedings before BHA should be able to withdraw any and all filings at any time without seeking leave to do so. In this regard, there are no standards for BHA to apply if asked to rule on a request to withdraw a filing. Nor are there standards for a court to apply if asked to review a decision by BHA either granting or denying a request to withdraw a filing. In sum, proposed rule 41.25(b)

serves no purpose other than to impose additional obligations on BHA and to create unnecessary motion practice, could be interpreted as improperly impinging on provider rights and therefore should be stricken.

Third, the proposed rules unduly restrict the ability of providers to amend requests for a hearing. Proposed rule 41.32(c)(2)(ii) states that a provider may amend a request for hearing more than 90 days after filing if the amendment is based on additional information acquired after the 90-day period that contradicts information previously disclosed by DPW or that provides entirely new information not previously disclosed by DPW. This right to amend is conditioned by subsection (B), however, upon establishing that DPW will not be prejudiced if the amendment is allowed.

There is no justification for precluding an amendment that might prejudice DPW where the amendment results from the discovery of information that either contradicts information previously disclosed by DPW or consists of information that was not previously disclosed by DPW. The rules of practice should not operate to reward DPW for failing to provide full and accurate disclosure of all relevant information. Yet this is the result of proposed rule 41.32(c)(2)(ii)(B), because DPW almost certainly will be able to articulate a claim of some prejudice when a provider seeks to amend a request for hearing outside of the 90-day period. Accordingly, proposed rule 41.32(c)(2)(ii)(B) should be deleted.

Fourth, the expedited pre-hearing procedures are potentially prejudicial to providers. Proposed rule 41.92 identifies certain types of appeals that BHA will process in accordance with expedited pre-hearing procedures. The apparent justification for this rule is to allow DPW and providers to continue the established practice of resolving certain appeals using a more informal process than that specified in the proposed rules. Proposed rule 41.92 allows parties to seek to opt out of the expedited procedures, for good cause shown. See proposed rule 41.92(g).

Proposed rule 41.92 should be revised to allow parties to "opt into" (rather than seek to opt out of) the expedited procedures upon stipulation by the parties or upon motion with good cause shown. If revised as recommended, proposed rule 41.92 will preserve the ability of DPW and providers to resolve certain appeals using an informal or expedited process while also protecting the rights created and secured by Act 142.

By forcing certain types of appeals to be resolved using DPW's expedited process irrespective of the scope and circumstances surrounding a given appeal, however, proposed rule 41.92 eviscerates a provider's right to a fair hearing under Act 142. In this manner, proposed rule 41.92 conflicts with Act 142 by arbitrarily limiting the rights of providers and by imposing additional burdens on providers (but not on DPW), to the extent providers appeal one or several types of actions taken by DPW.

Among the rights arbitrarily cut off by proposed rule 41.92 is a provider's right to conduct "reasonable and necessary discovery." See 67 Pa.C.S. § 1102(E)(2)(V); see also proposed rule 41.92(f)(9) (discovery not allowed in connection with appeals identified in § 41.92). While a provider and DPW might agree that discovery is unnecessary in a given case, a rule that

automatically precludes discovery, or that forces a provider to obtain leave in order to conduct discovery, is inconsistent with Act 142.

Providers that appeal the types of actions identified in proposed rule 41.92 also will be denied advance notice of the evidence to be presented by DPW at a hearing, thus depriving providers of the fair and impartial hearing anticipated by Act 142. Pursuant to proposed rule 41.92, DPW is not required to file a pre-hearing position paper disclosing its witnesses, evidence and legal theories. See proposed § 41.92(f)(8). By contrast, under proposed rule 41.92, providers must continue to provide full disclosure to DPW through comprehensive hearing requests. See proposed rule 41.92(b)(1). Moreover, if an appeal comes within the scope of proposed rule 41.92, providers must also file "[r]elevant supporting documentation" with their hearing requests, thus ensuring that DPW has notice of the evidence providers will rely on at the expedited hearings. See proposed rule 41.92(b)(2). This unbalanced and inequitable approach to certain types of appeals is inconsistent with the mandate of Act 142.

Moreover, mandatory application of the proposed expedited hearing procedures is not justified by a desire to allow parties to continue to resolve certain types of appeals in an informal manner. Parties may continue to resolve appeals informally, either through settlement discussions or by opting in to the expedited procedures.

The solution is to revise proposed rule 41.92 to limit its application to appeals where the parties agree to proceed in the manner set forth therein or where a party by motion demonstrates to BHA that the expedited procedures should apply.

Finally, the provisions governing petitions to intervene are unduly narrow. Proposed rule 41.61 provides that petitions to intervene may not be filed later than 60 days from the filing date on the provider's request for a hearing, expect upon good cause shown. This proposed rule appears inconsistent with 1 Pa. Code § 35.30, which provides that petitions to intervene may be filed at any time unless an order fixing an earlier deadline has been entered in a particular case. To avoid confusion, proposed rule 41.61 should be revised expressly to be consistent with 1 Pa. Code § 35.30.

D. **Disclosure and Discovery Provisions are Unfair to Providers**

The provisions governing disclosure and discovery also contain a number of provisions unduly favoring DPW's interests and unduly undermining providers' interests. First, providers must disclose the names of all persons having knowledge of the facts and circumstances at issue, while DPW need only disclose the names of its witnesses. In particular, proposed rule 41.111(b)(1), in part, provides that DPW must disclose the identity of "officials or staff designated to testify on its behalf." This requirement should be revised to compel DPW to disclose the identity of "each individual likely to have discoverable information, identifying the subjects of the information." See Fed. R. Civ. P. 26(a)(1)(A).

While parties to proceedings before BHA are certainly interested in, and entitled to know, the identity of persons to be called as witnesses against them, for purposes of discovery parties also

should know the identity of persons who are likely to have discoverable information. It is the people who have discoverable information (who may or may not be called as witnesses), that the party is most interested in deposing. Moreover, in a typical proceeding, a party will not call as witnesses everyone who has discoverable information. To the contrary, a party may, for strategic reasons, affirmatively decide not to call a particular person as a witness, even though that person might have the most complete understanding and knowledge of the relevant facts. Thus, by requiring disclosure of witnesses, but not of all persons with relevant knowledge, proposed rule 41.111(b)(1) does not further the objective of a full and fair hearing on the merits.

In addition, it is unreasonable to require DPW merely to identify witnesses while simultaneously requiring providers to identify "each person who provided facts, opinions or other information that were relied upon in drafting the request for hearing," proposed rule 41.111(c)(1). Act 142 offers no basis for such a distinction. Accordingly, disclosures mandated by section 41.111 should be coextensive, thus helping to ensure the fair and impartial hearing anticipated by Act 142. In order to achieve this end, proposed rules 41.111(b)(1) should be revised based on the language of Federal Rule of Civil Procedure 26(a)(1)(A).[5]

Second, provisions governing mandatory disclosures are unfair to providers. Proposed rule 41.111(f) provides that a party cannot take discovery until it has made the mandatory disclosures enumerated in proposed rule 41.111. The last sentence of proposed rule 41.111(f) states: "A provider whose initial mandatory disclosure identifies documents in the possession of the Department of program office, but fails to provide copies of the provider's own record or documents in support of one or more issues raised in the provider's request for hearing, will not be in compliance with this subsection."

This provision is inconsistent with proposed rule 41.111(c)(2) and imposes unwarranted obligations on providers but not on DPW. Proposed rule 41.11(c)(2) provides for disclosure of documents by either providing copies of relevant documents or by describing the categories and identifying the location of relevant documents. Similarly, DPW may satisfy its disclosure obligations by describing the categories and identifying the location of relevant documents. See proposed rule 41.111(b)(2). Proposed rule 41.111(f), however, changes the rule, but only with respect to providers, by forcing providers to provide DPW with copies of documents in the provider's possession.

There is no reasonable basis for compelling one party, but not the other, to provide copies of documents as part of initial disclosures. If providers must furnish DPW with copies of documents, then DPW should be obligated to furnish providers with copies of documents.

More importantly, in a given case, it may be absurd to preclude a provider from conducting discovery unless, and until, the provider gives DPW copies of documents to support issues raised in the provider's notice of appeal. For example, under proposed rule 41.111(f), a provider would

---

[5] Indeed, proposed rule 41.111(c)(1) also should be modified consistent with the language of Fed. R. Civ. P 26(a)(1)(A).

be unable to conduct discovery if the issues it raised in its request for hearing are such that the provider does not have any relevant documents in its possession.

On a related note, provisions governing documents protected from disclosure should be modified. Proposed rules 41.111(b)(2) and 41.111(c)(2) require disclosure of relevant documents. Both except from disclosure documents "privileged or protected from disclosure." To ensure that the discovery proceeds in an orderly manner, parties should be obligated to identify documents withheld from disclosure under a claim of privilege or protection. Early articulation and resolution of claims of privilege will allow parties to complete discovery within the time allowed by the proposed rules and will also serve as check on misplaced claims of privilege. Federal Rule of Civil Procedure 26(b)(5), modified as necessary to reflect the context of proposed rule 41.111, should be incorporated as follows: "When a party withholds information otherwise discoverable under this rule by claiming that it is privileged or subject to protection, the party shall make the claim expressly and shall describe the nature of the documents not produced or disclosed in a manner that, without revealing the information itself that may be privileged or protected, will enable other parties to assess the applicability of the privilege or protection."

Third, in addition to allowing DPW to avoid disclosure of persons with relevant knowledge, the proposed rules unduly restrict a provider's ability to depose DPW staff members. Proposed rule 41.120(b) provides: "Unless the Secretary has been identified as a witness by the program office, a party may not depose the Secretary." There is no basis in law for a rule that would automatically preclude the deposition of the Secretary if he or she is likely to have knowledge of discoverable information and if such a deposition is otherwise within the scope of discovery, as governed by the Pennsylvania Rules of Civil Procedure. Fundamental fairness demands that DPW be obligated to disclose the identity of persons with discoverable information, not just persons identified as witnesses. If the Secretary is identified as a person with discoverable information, then a provider is entitled to depose the Secretary, provided, of course, that the request is otherwise reasonable and not made for improper purposes. See proposed rule 41.119(b) (discovery otherwise governed by Pennsylvania Rules of Civil Procedure).

Pennsylvania Rule of Civil Procedure 4011 ("Limitations of Scope of Discovery and Deposition") adequately protects the Secretary and others from unwarranted depositions. Rule 4011 provides that a deposition shall not be permitted if, among other things, the deposition either: (a) is sought in bad faith; or (b) would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party. Moreover, any party may seek a protective order if an unwarranted deposition is sought. *See* Pa.R.Civ.P. 4012.

As discussed throughout these comments, there being no legal justification for a different result, the rules governing appeals before BHA must treat providers and DPW as equals. In this regard, the Secretary is similarly situated to the Chief Executive Office of a large, corporate provider. The rules do not purport to automatically protect a provider's CEO from deposition and, therefore, should not automatically protect the Secretary from deposition. Rather, the need for depositions of senior executives should be evaluated on a case-by-case basis subject, of course,

to the limitations found in, and sanctions available under, the governing rules of civil procedure. As a result, proposed rule 41.120(b) should be deleted.

Proposed rule 41.120(c) similarly requires modification. This proposed rule attempts to limit the extent to which providers may depose "senior Department officials." As discussed above, if a senior DPW official is likely to have discoverable information then, subject to the rules of procedure governing discovery, the senior DPW official should be obligated to appear for deposition.

Fourth, the proposed provisions governing position papers are prejudicial to providers. Proposed rule 41.112 directs the parties to file pre-hearing position papers. Providers will file their position papers first, and then DPW may file its position papers up to 60 days later.

As a matter of fundamental fairness, there is no justification for a general rule that compels providers to file position papers in advance of DPW. Rather, the order in which position papers are to be filed should depend on the allocation of the burden of proof, with the party that would bear the burden of proof at common law (*i.e.*, the party asserting the affirmative of a proposition) being obligated to file first. In the alternative, the parties should file their position papers at the same time and then each party should be permitted to supplement its position paper, but only to the extent it is necessary to do so in order to rebut matters raised in the other party's filing.

In connection with **de novo** proceedings before independent tribunals and the courts, issues with respect to the order in which position paper or similar pre-trial statements are filed are intertwined with issues regarding the allocation of the burden of proof. In the proposed rules, rule 41.112 apparently reflects proposed rule 41.153, which imposes the burden of proof on providers in all cases. As discussed separately, it is contrary to law to impose the burden of proof on providers in all cases and proposed rule 41.153, therefore, should be revised to follow settled law. Consequently, proposed rule 41.112 also must be revised to address appeals wherein DPW bears the burden of proof. If DPW bears the burden of proof, then DPW should file its position paper first.

The revisions to proposed rule 41.112 necessary to reflect a proper allocation of the burden of proof can be accomplished by replacing subsections 41.112(a) and (b) with a requirement that the party with the burden of proof (as per a revised rule 41.153) file and serve its position paper within 60 days of the close of discovery and that the other party file its position paper 60 days later. An alternative equitable approach would be to require the parties to file their position papers at the same time. Simultaneous exchange, with an opportunity for limited supplementation, eliminates bias in the process.

Proposed rules 41.112(a) and (b) should also be revised to impose equivalent sanctions on both DPW and providers for any failure to file position papers. If a provider fails to file and the sanction is automatic dismissal then the provider's appeal should be automatically sustained if DPW fails to file. There is, in other words, no justification for allowing DPW to proceed to hearing if it fails to file a position paper while at the same time dismissing a provider's appeal if it fails to file its position paper.

Finally, the proposed provisions limiting discovery upon consolidation of appeals are unfair to providers. Proposed rule 41.81(j) states: "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 the scope of discovery)." Because proposed rule 41.81(c) provides that consolidation will not be appropriate if it will prejudice the ability of the nonmoving party to perform discovery, proposed rule 41.81(j) should be revised to limit the discovery available to both providers and DPW upon consolidation. If a collection of appeals involves issues that give rise to the need for discovery directed at individual providers by DPW, then DPW should object to consolidation on the basis that its ability to conduct necessary discovery will be impeded. Once appeals are consolidated, however, all parties should be entitled to the same discovery, unless the Bureau directs otherwise for good cause shown.

E. Artificial Limitations on BHA's Authority Prejudice Provider Interests

The proposed rules also impose artificial limitations on BHA's discretionary authority that redound to the detriment of providers. In particular:

- **Proposed Rule 41.32(f):** This proposed rule purports to divest BHA of its inherent discretion by providing that the BHA "**will** dismiss a request for hearing . . . if the following conditions are met" (emphasis added). BHA's inherent authority should not be limited unnecessarily by regulations that compel it to dismiss or limit an appeal without consideration of all relevant facts and circumstances. BHA's authority to dismiss an appeal when the circumstances warrant can be clearly established by stating that BHA "may" dismiss appeal under certain circumstances. It is therefore unnecessary, and inappropriate, to mandate that BHA "will" dismiss an appeal under certain circumstances.

- **Proposed Rule 41.83(b):** This proposed rule provides: "When a provider appeal is withdrawn prior to adjudication, the withdrawal shall be with prejudice." To preserve BHA's independence, it is important to avoid the use of mandatory language or to otherwise expressly recognize BHA's inherent authority to depart from the rules of procedure where there is good cause to do so. Accordingly, proposed rule 41.83(b) should be revised to recognize this inherent authority. This can be accomplished by amending rule 41.83(b) to read: "When a provider appeal is withdrawn prior to adjudication, the withdrawal shall be with prejudice unless otherwise indicated by the Bureau." See 25 Pa. Code § 1021.141(b) (governing withdrawal of appeals filed with Environmental Hearing Board).

- **Proposed Rule 41.32(e):** This proposed rule purports to divest BHA of its inherent discretion by providing that the BHA "**will** dismiss a request for hearing . . . if a provider fails to file its request in accordance with the time limits specified in subsection (a)" (emphasis added). Once again, BHA's inherent authority should not be limited unnecessarily by regulations that compel it to dismiss or limit an appeal without

consideration of all relevant facts and circumstances. BHA's authority to dismiss an appeal when the circumstances warrant can be clearly established by stating that BHA "may" dismiss appeal under certain circumstances. It is therefore unnecessary and inappropriate to mandate that BHA "will" dismiss an appeal under certain circumstances.

- **Proposed Rule 41.32(d):** This proposed rule provides in part: "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." The provision is overly broad and inappropriately divests BHA of its inherent discretion. This provision should either be deleted or substantially rewritten.

As proposed, this rule appears to state that a provider that includes a general objection in a request for a hearing actually waives all objections, including those presented with sufficient specificity. Assuming that this is not the intent behind the provision, the text should be revised to eliminate any uncertainty.

More importantly, it is unreasonable and inappropriate to use the mandatory "shall" to force BHA to rule that providers that raise "general objections" have, in all cases, waived all objections and issues. In order for BHA to carry out its responsibilities under Act 142, it must be authorized to consider all relevant circumstances, including the conduct and knowledge of DPW, when determining whether a provider has waived objections and issues. Under Act 142, the BHA is to operate as an independent tribunal and conduct de novo review of all factual and legal issues raised by a provider in a request for a hearing. *See* 67 Pa.C.S. § 1102(E). BHA cannot fulfill its statutory mandate if it lacks the authority commonly vested in independent tribunals or if its inherent authority is effectively limited by regulation.

To avoid unnecessarily limiting BHA's authority, proposed rule 41.32(d) should be revised to replace "shall" with "may." A revised rule 41.32(d) would provide BHA with clear authority to find waiver when the circumstances warrant, without unnecessarily limiting BHA's discretion.

III. The Proposed Rules Require Greater Clarity

There are a number of proposed rules that should be clarified to avoid confusion. In particular:

- **Proposed Rule 41.2:** This proposed rule, which governs overall construction and application, is incomplete in that it fails to provide BHA with authority to waive strict compliance with the proposed rules. Although it could be argued that BHA has the inherent authority to waive compliance with its rules when appropriate, as other state agencies have done, the better approach is to expressly provide such a right. See 25 Pa. Code § 1021.4. Accordingly, proposed rule 41.2(a) should be amended to add: "The Bureau at every stage of a proceeding before it may disregard any error or defect of procedure which does not affect the substantive rights of the parties."

- **Proposed rule 41.5(e)**: This proposed rule provides: "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." This proposed rule is unnecessary and should be deleted to avoid confusion.

  Under Act 142, Medicaid providers are entitled to a hearing before BHA if they are aggrieved by a decision by DPW regarding the Medicaid program. Thus, on its face, Act 142 does not apply to actions taken by federal agencies that would be appealed pursuant to federal appeal procedures. Accordingly, to the extent proposed rule 41.5(e) is intended to address appeals by Medicaid providers of actions taken by federal agencies, it is unnecessary and should be deleted to avoid confusion and potential litigation.[6]

- **Proposed Rule 41.14(a)**: This proposed rule provides: "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)." This section should be clarified to eliminate a latent ambiguity. As written, proposed rule 41.14(a) requires a verification if a legal document (such as a brief) contains a denial of fact, even if the denial is otherwise supported by evidence in the record. This result will be eliminated if proposed rule 41.14(a) is revised to read: "A pleading or legal document that contains an averment or denial of fact not supported by evidence in the record must be verified as specified in subsection (b)."

- **Proposed Rule 41.15(c):** This proposed rule provides that documents filed with BHA are available for inspection and copying, except to the extent information therein is protected from disclosure. It fails, however, to provide a process by which protected information will be identified and redacted. Proposed rule 41.15(c) should be amended to provide such a process.

  As drafted, this proposed rule appears to require BHA staff to review all documents prior to providing public access in order to determine whether the documents contain protected information. BHA staff should not bear this burden. Rather, parties submitting documents to the BHA should be instructed to redact all protected information (such as patient information) before filing documents with the BHA or serving documents on other parties. To the extent confidential information must be considered by the BHA in order to resolve a dispute, then any documents filed with the BHA containing such information should be filed under seal. In this manner, all documents filed with the BHA, other than documents filed under seal, will be immediately available for public inspection and copying.

  To accomplish the foregoing, proposed rule 41.15 should be revised as follows. In addition, proposed rule 41.15(d) should be renumbered as 41.15(f), in order to accommodate the following revisions.

---

[6] In the alternative, to the extent that proposed section 41.5(e) is intended to address matters other than appeals of actions by federal agencies, the types of appeals to which this section applies should be specified.

(c) Documents filed with the Bureau, other than documents filed under seal in the manner provided below, are available for inspection and copying at the Bureau's offices.

(d) Except as provided below, persons filing documents with the Bureau must first redact all information protected by law from disclosure.

(e) To the extent a party concludes that it is necessary to provide the Bureau with information that is otherwise protected by law from disclosure, the party should make its filing under seal and should separately bind, label and file documents containing such protected information.

- **Proposed Rules 41.113 and 41.114:** Both proposed rules 41.113 and 41.114 are incomplete in that they fail expressly to supersede the inconsistent requirements of 1 Pa. Code §§ 35.164 and 35.165. Section 35.164 addresses the submission into evidence of documents on file with agency and section 35.165 addresses the submission of "public documents," such as official reports, decisions or opinions of executive departments and legislative agencies. By allowing certain documents to be received into evidence without actually being physically offered at a hearing, these provisions of the GRAPP are inconsistent with the requirements of proposed sections 41.113 and 41.114, in that the proposed rules require parties to file and provide the other party with copies of all documents to be submitted as evidence. As a result, proposed rules 41.113 and 41.114 should be revised either expressly to supersede or expressly to be consistent with 1 Pa. Code §§ 35.164 & 35.165 or to expressly to be consistent with

- **Proposed Rule 41.117:** Proposed rule 41.117 provides that, at a hearing, a party will not be permitted to offer the testimony of witnesses, or offer documents, not identified in the party's position paper. Consistent with practice before courts and other agencies conducting ***de novo*** hearings, proposed rule 41.117 should be revised to clarify that this rule applies only to a party's case-in-chief and not to rebuttal testimony or documents used solely for impeachment.

- **Proposed Rule 41.122:** Proposed rule 41.122(a) should be revised to insert the word "or" between "ordered by the Bureau" and "if the party learns." As currently drafted, this provision appears to obligate parties to supplement responses only if ordered to so do by the Bureau.

- **Proposed Rule 41.132:** Proposed rule 41.132 should be revised to expressly supersede the part of 1 Pa. Code § 35.180(a) that states: "A presiding officer may refer any motion to the agency head for ultimate determination." Such a referral before determination by BHA, as would appear to be authorized by the GRAPP, would be inconsistent with Act 142. See 67 Pa.C.S. § 1105.

- **Proposed Rule 41.161:** Proposed rule 41.161(a) allows for written testimony in lieu of oral testimony. This allowance for written testimony appears inconsistent with 1 Pa. Code § 35.137, which allows written testimony only with respect to expert witnesses. In order to avoid confusion, proposed rule 41.161(a) should be revised to expressly supersede 1 Pa. Code § 35.137.

* * * * * * * * * *

In conclusion, PHCA firmly believes that the proposed rules are inconsistent with Act 142 and other key requirements of Pennsylvania law, articulate a procedural framework that denies providers fundamental fairness in contravention of the letter and intent of Act 142 and contain ambiguous provisions that require greater clarity. We urge substantial modifications to the proposed rules before they are issued as final regulations.

Thank you in advance for considering our comments and recommendations. Please do not hesitate to contact me if you have any questions regarding this submission.

Very truly yours,

Alan G. Rosenbloom
President and CEO

AGR/jlh

cc: Honorable Harold F. Mowery, Jr.
Honorable Vincent J. Hughes
Honorable George T. Kenney, Jr.
Honorable Frank L. Oliver

Original: 2416

PENNSYLVANIA HEALTH CARE ASSOCIATION
Office of the President and CEO

TO:	
Mr. John R. McGinley, Jr., Chairman, IRRC	✓
CC:	
Ms. Mary Lou Harris, Senior Regulatory Analyst, IRRC	

PLEASE NOTE: **The attached letter is forwarded for your information.**

It outlines PHCA's comments on the Proposed Rulemaking regarding the Medical Assistance Provider Appeal Procedure.

From: Judi L. Hummel, Executive Assistant	Date: 9/14/04