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**INDEPENDENT REGULATORY REVIEW COMMISSION**  
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

October 13, 2004

Honorable Estelle B. Richman, Secretary  
Department of Public Welfare  
333 Health and Welfare Building  
Harrisburg, PA 17105

Re: Regulation #14-488 (IRRC #2416)  
Department of Public Welfare  
Medical Assistance Provider Appeal Procedure

Dear Secretary Richman:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at [www.irrc.state.pa.us](http://www.irrc.state.pa.us). If you would like to discuss them, please contact my office at 783-5417.

Sincerely,

Robert E. Nyce  
Executive Director  
evp  
Enclosure

cc: Honorable George T. Kenney, Jr., Majority Chairman, House Health and Human Services Committee  
Honorable Frank L. Oliver, Democratic Chairman, House Health and Human Services Committee  
Honorable Harold F. Mowery, Jr., Chairman, Senate Public Health and Welfare Committee  
Honorable Vincent J. Hughes, Minority Chairman, Senate Public Health and Welfare Committee

# Comments of the Independent Regulatory Review Commission

on

## Department of Public Welfare Regulation #14-488 (IRRC #2416)

### Medical Assistance Provider Appeal Procedure

October 13, 2004

We submit for your consideration the following comments that include references to the criteria in the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Department of Public Welfare (Department) must respond to these comments when it submits the final-form regulation. The public comment period for this regulation closed on September 13, 2004. If the final-form regulation is not delivered within two years of the close of the public comment period, the regulation will be deemed withdrawn.

#### **1. Section 41.1. Scope. – Reasonableness; Clarity.**

##### *Subsection (b) – Other regulations*

This subsection states: “In addition to this chapter, GRAPP [General Rules of Administrative Practice and Procedure] *and other applicable departmental regulations* apply to the practice and procedures in MA provider appeals. . . .” (Emphasis added.) To give adequate notice to those subject to compliance, the Department should include specific citations to other Department regulations that will apply.

##### *Subsections (d) and (e) – Effective date*

These subsections provide that the requirements of this regulation apply to provider appeals commenced on or after December 3, 2002, but before July 1, 2003, with two exceptions. The earlier date precedes publication of the Department’s Final Practice Standing Order (Order). The Order was published in the *Pennsylvania Bulletin* on June 28, 2003. The Department should explain how these requirements can apply to appeals filed before the publication of the Order.

#### **2. Section 41.3. Definitions. – Consistency with statute; Reasonableness; Clarity.**

The definition of “senior department official” includes “. . . an individual who works in the office of the Secretary or who reports directly to the Secretary . . . .” Under this definition, an administrative assistant or a receptionist, who reports directly to the Secretary, would meet the criteria to be a “senior department official.” Therefore, the Department should delete this phrase and limit this definition to the Comptroller, the Chief Counsel of the Department, deputy secretaries, bureau directors or someone designated by the Secretary as a person with authority over a specific program.

**3. Section 41.4. Amendments to regulation. – Consistency with existing regulations; Necessity; Clarity.**

This section purports to supersede 1 Pa. Code § 31.6 of the GRAPP. Section 31.6 of Title 1 Pa. Code provides that the Joint Committee on Documents retains continuing jurisdiction under 45 Pa.C.S.A. § 723(b) to amend the GRAPP. The Department has no authority to supersede the Joint Committee’s authority in this regard. However, the Department does retain statutory authority to revise its own regulations. Because both grants of authority can and do coexist without conflict, this section is not necessary and should be deleted.

**4. Section 41.5. Jurisdiction of the bureau. – Clarity.**

Subsection (b) provides that the Bureau does not have jurisdiction to issue a final determination on a waiver request included in a request for hearing.

According to the Department, the basis for this limitation is found in Section 1105(b)(3) of Act 142 of 2002 (67 Pa.C.S.A. § 1105(b)(3)) (Act), which provides in part: “The secretary . . . may waive compliance with program requirements to promote fairness and the proper administration of the program.” However, nothing in that sentence precludes the Bureau from issuing a final decision. In fact, Section 1105(a) of the Act states: “The bureau shall issue a determination adjudicating contested issues of fact and law and any appropriate order, decree or decision.” That provision grants the Bureau authority to make a determination on any question raised in the context of a provider appeal. Therefore, the Department should clarify its rationale for this subsection in the final-form regulation.

**5. Section 41.12. Form. – Reasonableness.**

This section allows filing of legal documents by hard copy through personal delivery or first-class mail. Delivery is also authorized through filing by facsimile under certain circumstances. However, a legal document may not be filed through electronic communication. The Department should explain why filing through electronic communication is not permitted.

**6. Section 41.22. Service of pleadings and legal documents. – Clarity**

The references to “General Counsel” in paragraphs (1)(ii) and (2)(ii) should be changed to “Chief Counsel,” to avoid confusion and for consistency with Section 41.112(b).

**7. Section 41.31. Request for hearing. – Clarity.**

Subsection (d)(4)(iii) states that a provider may only request a declaratory order or an order that the Department be required to promulgate, amend or repeal a regulation in accordance with the GRAPP, 1 Pa. Code § 35.18. This paragraph should also include a reference to 1 Pa. Code § 35.19, relating to petitions for declaratory orders.

**8. Section 41.32. Timeliness and perfection of requests for hearing. – Consistency with statute; Clarity.**

*Subsection (a) – Methods for delivery of notice*

Paragraph (2) allows the Department to give written notice of an agency action “other than by mailing the notice to the provider.” We have two questions. First, in what other manner would the Department give notice to the provider? The Department should include examples of other methods of notice in the final-form regulation.

Second, when would the Department not contact a provider by mailing the notice? The Department should explain.

*Subsections (e) and (f) – Dismissal of hearing requests*

In these two subsections, the Bureau is required to dismiss requests for hearings if a number of conditions are not met. Why is the Bureau restricting its discretion in these two subsections? The Bureau should be able to make decisions on a case-by-case basis if the conditions included in these two subsections are met. Therefore, to give the Bureau more flexibility, the Department should replace the verb “will” with the verb “may.”

**9. Section 41.41. Waiver request. – Clarity.**

Subsection (c) contains one sentence that reads:

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. (Emphasis added.)

The phrase “could have been” seems to preclude a provider from seeking a waiver in the future if that waiver is not included in an earlier petition in a different case. If this is not the intent, the Department should clarify the provision to clearly indicate that the dismissal for failure to include the waiver petition will only occur in a given case.

**10. Section 41.43. Request for issuance, amendment or deletion of regulations. – Clarity.**

This section states, “[t]he 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.” This section should include citations to the GRAPP or other regulations that outline the contents of and procedures for filing a petition for relief with the Bureau.

**11. Section 41.51. General. – Clarity.**

In Subsection (f), the Department should list examples of what appropriate sanctions, other than costs, would be imposed on a party who files a petition for supersedeas in bad faith or on frivolous grounds.

**12. Section 41.53. Circumstances affecting grant or denial. – Reasonableness; Clarity.**

*Subsection (a) – Factors considered in granting supersedeas*

This subsection includes factors that will be considered in granting or denying a supersedeas. It is unclear whether the three factors listed will always be considered, or if any combination of the three will suffice. For clarity, the Department should either revise this section to state, “[t]he following factors may be considered” to make the entire list optional, or insert an “and” after the second factor to make the entire list mandatory.

*Subsection (b) – Factors for denying supersedeas*

Subsection (b) states, in part: “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.”

In the final-form regulation, the Department should include examples of or specific citations to State and Federal law that would be used as ground for denying supersedeas.

**13. Section 41.83. Withdrawal of provider appeals. – Reasonableness.**

Subsection (b) states, “When a provider appeal is withdrawn prior to adjudication, the withdrawal shall be with prejudice.” Why are withdrawals of provider appeals with prejudice in this instance? The Department should explain.

**14. Section 41.92. Expedited disposition procedure for certain appeals. – Reasonableness; Clarity.**

*“Opt-in” versus “Opt-out”*

This section allows parties to “opt-out” of the expedited appeals process. Commentators believe parties should be allowed to “opt-in” rather than “opt-out” with respect to expedited disposition. We agree. The Department should explain why it used the “opt-out” mechanism in this section.

**15. Section 41.111. Disclosures. – Reasonableness; Clarity.**

Subsection (f) states, “[a] provider whose initial mandatory disclosure identifies documents in the possession of the Department or program office, but fails to provide copies of the provider’s own records or documents in support of one or more of the issues raised in the provider’s request for hearing, will not be in compliance with this subsection.” There is no standard for compliance with this subsection imposed on the Department. The Department should make the standards for providers and the program office equivalent in the final-form regulation.

In addition, a cross-reference to Section 41.117 should be added, so that parties will have an understanding of the penalties for noncompliance.

**16. Section 41.112. Filing of position papers. – Reasonableness.**

Subsection (a) states, “[i]f the provider fails to meet the position paper due date or fails to supply the Bureau with the required documentation, the Bureau will dismiss the provider’s appeal.”

Subsection (b) states, “[i]f the program office fails to meet the position paper due date, the Bureau will schedule the case for hearing and will notify the Chief Counsel of the Department.”

Why are there different standards for providers and the program office? The Department should make the standards for providers and the program office equivalent in the final-form regulation.

**17. Section 41.115. Statement regarding expert opinions. – Clarity.**

Subsection (c) lists the requirements for expert opinion statements. This section should also include the expert’s qualifications.

**18. Section 41.117. Penalties for noncompliance. – Clarity.**

*Good cause exception*

Subsection (a) allows a party to offer testimony of a witness at a hearing if the party establishes “good cause to permit the testimony of the witness.” Subsection (b) does not have a good cause exception for documents introduced into evidence. The Department should either include a good cause exception to documents in Subsection (b), or explain why such an exception does not apply to documents.

*Impeachment*

This section should be clarified to state that testimony and documents that fall under Subsections (a) and (b) apply only to those witnesses and documents that are used for the case-in-chief. These standards should not apply to witnesses and documents that are used exclusively for impeachment purposes.

**19. Section 41.119. General scope of discovery. – Clarity.**

Subsection (b) states, “[e]xcept to the extent inconsistent with or as otherwise provided in this chapter, discovery shall be governed by the relevant Pa.R.C.P. [Pennsylvania Rules of Civil Procedure] applicable to the form of discovery authorized by this chapter.” The Department should include specific citations to the relevant Pa.R.C.P. in the final-form regulation.

**20. Section 41.122. Supplementing disclosures and responses. – Clarity.**

In Subsection (a), the word “or” should be inserted between the phrases “ordered by the Bureau” and “if the party learns.”

**21. Section 41.153. Burden of proof and production. – Consistency; Reasonableness.**

Subsection (a) states, “[t]he provider has the burden of proof to establish its case by a preponderance of the evidence and is required to make a prima facie case by the close of its case-

in-chief.” This section does not shift the burden of proof to the Department in any case. If the Department issues a rule to show cause in a provider termination action, does the burden of proof shift to the Department? If so, the Department should describe if and when this shift occurs. A good example of how to specify the shift in the burden of proof can be found in the existing rules of the Environmental Hearing Board at 25 Pa. Code § 1021.122.

**22. Section 41.162. Subpoenas. – Consistency with statute.**

Subsection (a) outlines the controlling rules for subpoenas and requests for subpoenas. Section 1104(a) of the Act (67 Pa.C.S.A. § 1104(a)) permits the Bureau to enforce its subpoenas in Commonwealth Court. For consistency with the statute, the Department should include this enforcement power in the final-form regulation.

**23. Section 41.171. Independence. – Clarity.**

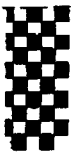
This section provides for the independence of presiding officers and restrictions on their conduct. Subsection (b) does not permit presiding officers to conduct *ex parte* communications with a party to the hearing. The Department should explain what consequences would result from non-compliance with this provision.

**24. Section 41.191. Determinations and recommendations by the Bureau. – Consistency with statute; clarity; necessity; feasibility.**

Under Section 41.191(b), the review of the Bureau is severely limited on waiver requests included in a request for hearing. For the reasons discussed in Issue No. 4 above, we object to the limitation on the Bureau’s jurisdiction to enter a final decision. The Department should delete language which restricts the Bureau’s authority to adjudicate waiver requests presented in a request for hearing, or explain its rationale for this restriction in the final-form regulation.

**25. Section 41.201. Reopening of record prior to adjudication. – Clarity.**

Subsection (b) allows reopening of records “upon the basis of recently discovered evidence” when a number of circumstances are present. If the record is reopened under this subsection, can parties then file amended pleadings and position papers? The Department should explain.



### Facsimile Cover Sheet

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**Date:** October 13, 2004  
**Pages:** 8

10/13/04 10:54 AM

**Comments:** We are submitting the Independent Regulatory Review Commission's comments on the Department of Public Welfare's regulation #14-488 (IRRC #2416). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by *Stephanie Schubert* Date: 10/13/04

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