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Medicaid Appeals Process: New Policy Impacts Ability of Providers to Introduce Documentation During Appeal

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Virginia Medicaid providers should be aware of a new Medicaid Memo, released on November 12, 2015, by the Department of Medical Assistance Services ("DMAS"). The Medicaid Memo introduces a new DMAS policy that will affect provider appeals of adverse audit decisions and overpayment determinations.

In the Memo, DMAS announced its interpretation of a recent Virginia Court of Appeals case, *1st Stop Health Services v. DMAS*, 63 Va. App. 266, 756 S.E.2d 183 (2014). DMAS stated that under its interpretation of the *1st Stop* case, only "documentation submitted by the provider during the course of the audit and prior to the deadline stated in the preliminary findings letter" will be considered by DMAS during the appeals process. With this new policy implementation, DMAS is signaling to providers that it will not consider documentation introduced for the first time during the informal or formal appeals process. Medicaid reimbursement appeals already pose an uphill battle for providers, and this new DMAS policy will make it more challenging for providers attempting to appeal adverse audit findings.

I. *1st Stop* Decision

On April 8, 2014, the Virginia Court of Appeals issued a decision in *1st Stop Health Services v. DMAS*. This appeal arose from an audit determination that the provider failed to maintain documentation of personal care services in compliance with specific regulatory and manual requirements. During the appeal, the provider introduced documentary evidence to establish that the services billed were furnished. The hearing officer found that this newly introduced documentation demonstrated that the provider performed the services billed, and recommended that the provider prevail on appeal. However, DMAS' Final Agency Decision rejected the hearing officer's recommendation and upheld the auditor's overpayment determination.

The Court of Appeals upheld the Final Agency Decision, emphasizing the fact that the documentation examined during the audit was so poor (the hearing officer called it "abysmal") that DMAS was unable to determine what services were rendered during the time period claimed. Citing the Virginia Administrative Process Act, the Court of Appeals stated that a provider "is certainly entitled to present evidence at a hearing." However, the Court held that the evidence presented at the hearing "cannot be used to circumvent or displace the documentation required by the clear terms of the Provider Agreement or the penalties associated with the failure to follow those contractual requirements."

While the *1st Stop* decision was a win for DMAS, it was very fact-specific, and can be distinguished from many other DMAS appeals in which providers introduce documentary evidence (such as expert reports) to demonstrate that the services in question were billed appropriately.

II. Implications of DMAS' Interpretation of the *1st Stop* Decision

In the recently issued Medicaid Memo, DMAS has interpreted the Court of Appeal's decision to mean that providers may not introduce documentation that was not available to the auditors during the appeal process. Under DMAS' interpretation, the provider is barred from introducing any documentation that DMAS believes should have been available for review or provided to the auditors during the audit. Therefore, DMAS' interpretation of the *1st Stop* decision

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prevents providers from introducing documentation during the appeals process, if the provider did not produce that documentation during the audit.

The policy set forth in DMAS' Memo has yet to be tested by the courts. The Virginia Administrative Process Act ("VAPA") requires agencies to "ascertain the fact basis for their decisions" and allow for informal fact finding conferences to allow providers to present "factual data, arguments, or proof in connection with any case." Va. Code § 2.2-4019. Similarly, the VAPA gives providers the right to a formal hearing to "submit oral and documentary evidence" and "elicit a full and fair disclosure of the facts." Va. Code § 2.2-4020. It will be up to providers to continue to appeal adverse audit determinations and push back against DMAS' new policy to ensure that they receive right to a fair hearing under the VAPA.

III. What Can Providers Do

Because DMAS has published its policy prohibiting new documentation during the appeal process, providers should be proactive during the audit process and provide all documentation that may support the services under review. If a document is not provided to the auditors during the audit process, DMAS will take the position that the documentation cannot be considered if the provider later introduces it during the appeals process.

Prohibiting the introduction of documentation during the appeal process will curtail the ability of providers to argue effectively against an audit decision or overpayment determination. Following receipt of the preliminary audit decision letter, providers should assemble all documentation they intend to rely upon to support that services were performed and billed as required, and submit the documentation to the auditors. Providers should submit the entire records for the recipients or personnel at issue in the audit, as well as any other supporting documentation. Providers should also be careful to compile a record of all documentation that was submitted to the auditor during the audit process, to verify what documentation was submitted during the audit. In addition, in cases where documentation becomes available after the audit and supports the provider's position in a DMAS appeal, it should still be introduced, despite the position taken by DMAS in the Memo.

For more information about this new DMAS policy or the proactive steps that should be taken during an audit to preserve the ability to appeal an audit decision, please contact the HDJN Reimbursement Team.

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