September 9, 2022

Executive Office of Health and Human Services
Attn: Debby Briggs
100 Hancock Street, 6th Floor,
Quincy, MA 02171

Submitted by email to masshealthpublicnotice@mass.gov

Re: Comments on Proposed Fair Hearing Rules, 130 CMR 610.000 et seq

Dear Ms. Briggs,

Thank you for the opportunity to comment on these proposed regulations which we do on behalf of the MassHealth applicants and members who our organizations regularly represent. In general, we support these proposed changes, and are particularly pleased to see the increase in the time to request an appeal. However, we have some questions and concerns about the scope of certain other changes that we hope will be clarified in the final rule. In addition, we urge you to make some long overdue updates to the fair hearing regulations to comply with 2016 federal regulatory changes that, like the proposed changes, address timing issues.

I. Comments on Proposed Changes to the Fair Hearing Regulations

§ 610.015 Time Limits
(B)(1) Timely Notice. We strongly support increasing the time to appeal from 30 to 60 days, and thank the agency for proposing this change. The notice of rulemaking anticipates the amendments will not go into effect before Nov 11, 2022. We hope the 60-day appeal period will not go into effect until the expiration of the COVID-19 PHE. More people are now aware of the temporary 120-day appeal period and ending it prior to the end of the PHE will cause confusion. We also understand that appeals from decisions made during the COVID-19 PHE will still be subject to the 120-day period in effect when the decision was made.

(D)(4)(c) Time Limits for Rendering a Decision. We support this change requiring documentation of delays excluded from the time limits.

§ 610.091 Review of Hearing Officer Decisions

(A). The proposed change adds a sentence cross-referencing to the definition of good cause for the rehearing of long-term care eligibility decisions in a proposed new subsection (E)(3). We have concerns that the language may limit good cause to only the circumstances described in (E)(3), and that the fair hearing rules do not define "long-term care" or what constitutes a long-term care eligibility decision. Therefore, we are suggesting some revisions to the language regarding rehearings to clarify the scope of the changes. We understand that the changes in this section are pursuant to the settlement of litigation regarding the treatment of trusts as countable resources. Our first suggestion is that the scope of the (E)(3) grounds for rehearing be described as eligibility appeals regarding the treatment of trusts. Our second suggestion is that subsection (E) clarify that it is not the only way to establish good cause even regarding rehearing requests involving a trust. Set out below is the language we suggest to ensure that these changes address the problem resolved by the settlement without unintentionally restricting member's access to care by limiting the scope of what constitutes good cause under current practice.

Recommended changes to subsection (A):

- "The definition of good cause in regard to the rehearing of eligibility determinations regarding the treatment of trusts includes but is not limited to the circumstances described at 130 CMR 610.091(E)(3)." [1]

We also suggest the addition of a new subsection (F) to address the timeliness of requests for rehearing. The changes to (E) by its terms only applies to long-term care appeals (or if our suggestion is adopted, it will be limited to appeals regarding trusts), but the timeliness of decisions on rehearing requests is problematic in other cases as well.

For the appellant, a request for rehearing is a useful way to challenge a decision that is not supported by the record or based on an error of law without the time and expense of judicial review. In the case of an initial denial or a termination without aid pending appeal, delays in the decision of a rehearing request leave the member with no avenue of redress. By electing to ask for a rehearing, the appellant is unable to seek judicial review until the rehearing is granted and a new hearing decision is made or until the rehearing request is denied. We urge you to give all appellants a way out of this conundrum. We suggest the rule provide that an appellant who filed a rehearing request may after the passage of 45 days, request that the rehearing be denied, and that the Medicaid director shall promptly issue a decision that the rehearing request has been denied and that this now constitutes the final decision of the agency. We think this is preferable to the approach in subsections (E)(1) and (2) because it gives the appellant more flexibility to decide how long a wait is too long and dispenses with the noticing that the proposal does not describe. We believe that due process requires the Medicaid Director to inform appellants of a rehearing denial and their right to appeal to Superior Court. The "deemed denial" process described in the proposed regulations would not offer adequate notice to members, particularly those who file rehearing requests without assistance from an attorney.

Recommended changes to subsection (E):

[1] The proposed rules cross-reference to subsection (E)(2), but the section describing good cause is in (E)(3). Both subsections (E)(1) and (2) refer to decisions taking more than 45 days.

- Change the title to: Review of Hearing Officer Decisions-Eligibility Appeals Regarding the Treatment of Trusts;
- Delete subsections (E)(1) and (2) regarding failure to act on the request within 45 days, and add a new subsection (F).

Recommended new subsection (F):

- (F) If an appellant requests a rehearing pursuant to § 610.091, and at least 45 days have elapsed since the request without a decision being issued from the Medicaid Director to grant or deny the request, the appellant may request in writing that the rehearing be denied, and the Medicaid director shall ~~promptly~~ within five days either grant the rehearing request or issue a decision that the rehearing request has been denied and that such a denial now constitutes the final decision of the agency.

II. Compliance with Federal Law

The proposed changes to the fair hearing rules all concern timelines and timeliness, as such they are an appropriate vehicle for further changes needed to comply with 2016 changes in the governing federal regulations on these topics. Specifically, we recommend that the agency also amend the rules regarding the time in which to appeal with aid pending appeal, and adopt a general standard for expedited hearings when there is a compelling medical need.

This is our recommendation regarding aid pending appeal:

> § 610.036 Continuation of Benefits Pending Appeal.
> (A) …. If such appealable action was implemented before a timely request for a hearing, such assistance will be reinstated if BOH receives the request for the fair hearing within ten days of the date the beneficiary received the notice of action. The date on which the notice is received is considered to be 5 days after the date on the notice, unless the beneficiary shows that he or she did not receive the notice within the 5-day period [this underlined text is from 42 CFR § 431.231(c)(2)]. The agency may reinstate services if a beneficiary requests a hearing not more than 10 days after the date of the action [this underlined text is from 42 CFR § 431.231(a)].[2]

The 2016 federal regulatory changes also implemented a new requirement regarding expedited appeals in 42 CFR § 431.224 that should be added to the fair hearing rules. The federal regulation on expedited appeals provides:

> **(a)** ***General rule.***
> **(1)** The agency must establish and maintain an expedited fair hearing process for individuals to request an expedited fair hearing, if the agency determines that the time otherwise permitted for a hearing under § 431.244(f)(1) could jeopardize the individual's life, health or ability to attain, maintain, or regain maximum function.

[2] The authority to reinstate services 10 days after the date of the action is not a state plan option but a power BOH has now pursuant to federal regulations that is not recognized under the current fair hearing rules.

(2) The agency must take final administrative action within the period of time permitted under § 431.244(f)(3) if the agency determines that the individual meets the criteria for an expedited fair hearing in paragraph (a)(1) of this section.
(b) ***Notice.*** The agency must notify the individual whether the request is granted or denied as expeditiously as possible. Such notice must be provided orally or through electronic means in accordance with § 435.918 of this chapter, if consistent with the individual's election under such section; if oral notice is provided, the agency must follow up with written notice, which may be through electronic means if consistent with the individual's election under § 435.918.

Thank you for the opportunity to make these comments. Please let us know if any of us can supply any further information.

Yours truly,

Massachusetts Law Reform Institute
Vicky Pulos, vpulos@mlri.org and Kate Symmonds, ksymmonds@mlri.org

Health Law Advocates
Andrew Cohen, acohen@hla-inc.org,

Greater Boston Legal Services
Nancy Lorenz, nlorenz@gbls.org and Rita Cheresnowsky, rcheresnowsky@gbls.org

Disability Law Center
Linda Landry, llandry@dlc-ma.org and Svetlana Uimenkova, suimenkova@dlc-ma.org