

PROPOSED RULEMAKING

DEPARTMENT OF PUBLIC WELFARE

[55 PA. CODE CH. 41]

Medical Assistance Provider Appeal Procedure

The Department of Public Welfare (Department), under the authority of 67 Pa.C.S. § 1106 (relating to regulations), proposes to add Chapter 41 (relating to Medical Assistance provider appeal procedure) to read as set forth in Annex A.

Purpose of the Proposed Rulemaking

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

Background

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

Under 67 Pa.C.S. § 1106(b), the Bureau established an advisory committee to provide assistance and guidance in the development and modification of regulations. The advisory committee included 15 attorneys experienced in proceedings before the Bureau and other administrative agencies. The advisory committee members represented private law firms, MA provider organizations and government attorneys. The advisory committee recommended that the regulations be promulgated using the Bureau's Order as the basis for a proposed rulemaking.

Need for the Proposed Rulemaking

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

Requirements

The proposed rulemaking meets the important goals in 67 Pa.C.S. Chapter 11 by providing, among other things, for the mandatory disclosure of information by both parties, a 120-day discovery period and the filing of detailed position papers by each party. The proposed rulemaking includes many of the procedural rules in 1 Pa. Code Part II (relating to the General Rules of Administrative Practice and Procedure) (GRAPP). However, significant modifications have been made to accommodate the specific requirements of 67 Pa.C.S. Chapter 11 within the framework of a prompt adjudication. In addition, the Bureau has drawn upon the procedural rules used by the Federal Provider Reimbursement Review Board and the discovery rules in 231 Pa. Code (relating to rules of civil procedure). The proposed rulemaking also contains a procedure for the expedited disposition of certain appeals that traditionally have been handled in a less formal manner.

Based upon discussions and recommendations of the advisory committee, changes from the Order include:

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

Finally, the Bureau is also proposing to establish reasonable copying rates based upon the Right-to-Know Law (65 P. S. §§ 66.1—66.4).

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

Affected Organizations and Individuals

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

Accomplishments/Benefits

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

Fiscal Impact

Public Sector

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

Private Sector

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

General Public

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

Paperwork Requirements

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

Cross References

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

Effective Date

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

Sunset Date

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

Public Comments

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed rulemaking to the Department of Public Welfare, Randy J. Riley, Administrative Law Judge, 2330 Vartan Way, Second Floor, Harrisburg, PA 17110 within 30 calendar days after the date of publication in the *Pennsylvania Bulletin*. Persons with a disability may use the AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users).

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on August 4, 2004, the Department submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Health and Human Services and the Senate Committee on Public Health and Welfare. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Department, the General Assembly and the Governor of comments, recommendations or objections raised.

ESTELLE B. RICHMAN,
Secretary

Fiscal Note: 14-488. No fiscal impact; (8) recommends adoption.

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GENERAL PROVISIONS**§ 41.1. Scope.**

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

(b) In addition to this chapter, 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.

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

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

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

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

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

(3) Sections 41.111—41.117 and 41.122 do not apply.

§ 41.2. Construction and application.

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

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

§ 41.3. Definitions.

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

Agency action—

(i) An adjudicative action of the Department or a program office that relates to the administration of the MA Program.

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

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

Department—The Department of Public Welfare.

Dispositive motion—

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

(ii) The term includes the following:

(A) A motion to quash the provider appeal.

(B) A motion to dismiss the provider appeal.

(C) A motion for summary judgment.

(D) A motion for partial summary judgment.

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

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

Hearing—One of the following:

(i) A provider appeal.

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

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

Legal document—

(i) A motion, answer, brief, petition to intervene, request for reconsideration of an interlocutory chapter, request for review by the Secretary or other paper filed with the Bureau in a provider appeal, other than a pleading.

(ii) The term does not include attachments or exhibits.

MA—Medical Assistance.

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

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

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

Petition for relief—A document filed under § 35.17, § 35.18 or § 35.19 (relating to petitions generally; petitions for issuance, amendment, waiver or deletion of regulations; and petitions for declaratory orders) of the GRAPP.

Pleading—A request for hearing, including amendments thereto.

Program office—

(i) An office within the Department that is managed and operated by an individual who reports directly to the Secretary, including a deputy secretary, or a bureau or other administrative unit of an office within the Department that is managed and operated by an individual who reports directly to a deputy secretary.

(ii) The term does not include the Bureau.

Provider—One of the following:

(i) A person currently enrolled in the MA Program as a provider of services.

(ii) A person who has applied for enrollment in the MA Program as a provider of services.

(iii) A person whose enrollment in the MA Program as a provider of services has been suspended or terminated by the Department.

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

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

Secretary—The Secretary of Public Welfare.

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

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

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

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

§ 41.4. Amendments to regulation.

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

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

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

§ 41.5. Jurisdiction of the Bureau.

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

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

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

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

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

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

§ 41.6. Timely filing required.

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

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

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

§ 41.7. Extensions of time.

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

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

DOCUMENTARY FILINGS

§ 41.11. Title of document.

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

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

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

BHA I.D. No.:

Docket No.:

[Descriptive Title of Document]

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

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

§ 41.12. Form.

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

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

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

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

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

§ 41.13. Incorporation by reference.

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

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

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

§ 41.14. Verification.

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

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

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

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

§ 41.15. Copies of documents.

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

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

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

(d) Documents in the files of the Bureau may not be removed from the Bureau's custody. At the discretion of the Bureau, a person provided with access to a document under subsection (c) may make a copy using equipment available at the Bureau, or the Bureau may make a copy and provide it to the person requesting access. The rates for copies will be identical to the rates charged by the Department under the Right-to-Know Law (65 P. S. §§ 66.1—66.4).

(e) Subsections (a)—(d) supersede 1 Pa. Code §§ 33.15, 33.21, 33.22, 33.23 and 33.37.

SERVICE AND AMENDMENT OF DOCUMENTS

§ 41.21. Notice of agency actions.

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

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

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

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

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

(1) The effective date of the agency action.

(2) The basis for the agency action.

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

§ 41.22. Service of pleadings and legal documents.

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

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

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

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

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

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

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

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

(4) *Method of service.*

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

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

§ 41.23. Proof of service.

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

(b) Subsection (a) supersedes 1 Pa. Code §§ 33.31, 33.32, 33.35 and 33.36.

§ 41.24. Certificate of service.

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

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

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

(b) Subsection (a) supersedes 1 Pa. Code §§ 33.31, 33.32, 33.35 and 33.36.

§ 41.25. Amendment or withdrawal of legal documents.

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

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

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

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

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

REQUESTS FOR HEARING, PETITIONS FOR RELIEF AND OTHER PRELIMINARY MATTERS

§ 41.31. Request for hearing.

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 41.32. Timeliness and perfection of requests for hearing.

(a) Except as permitted in § 41.33 (relating to appeals nunc pro tunc), the Bureau lacks jurisdiction to hear a

request for hearing unless the request for hearing is in writing and is filed with the Bureau in a timely manner, as follows:

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

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

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

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

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

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

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

(ii) Both of the following conditions are met:

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

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

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

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

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

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

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

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

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

(h) Subsections (a)—(g) supersede 1 Pa. Code §§ 35.1—35.11, 35.105 and 35.106.

§ 41.33. Appeals nunc pro tunc.

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

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

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

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

PETITIONS

§ 41.41. Waiver request.

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

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

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

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

§ 41.42. Request for declaratory relief.

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

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

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

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

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

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

§ 41.44. Transfer of petition for relief.

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

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

SUPERSEDEAS

§ 41.51. General.

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

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

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

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

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

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

§ 41.52. Contents of petition for supersedeas.

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

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

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

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

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

(1) Lack of particularity of the facts pleaded.

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

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

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

§ 41.53. Circumstances affecting grant or denial.

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

(1) Irreparable harm to the provider.

(2) The likelihood of the provider prevailing on the merits.

(3) The likelihood of injury to the public or other parties.

(b) A supersedeas 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.

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

INTERVENTION

§ 41.61. Filing of petitions to intervene.

(a) Petitions to intervene and notices of intervention in a provider appeal may be filed following the filing of a request for hearing but in no event later than 60 days from the filing date on the provider's request for hearing, unless for extraordinary circumstances and for good cause shown, the Bureau authorizes a late filing.

(b) Subsection (a) supersedes 1 Pa. Code §§ 35.23, 35.24 and 35.39—35.41.

ANSWERS

§ 41.71. Answers generally.

(a) An answer to a pleading is not required.

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

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

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

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

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

§ 41.72. Answers to petitions to intervene.

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

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

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

CONSOLIDATION, AMENDMENT AND WITHDRAWAL OF APPEALS

§ 41.81. Consolidation of provider appeals.

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

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

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

(d) A provider appeal will not be consolidated except upon motion filed by one or more parties.

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

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

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

(3) Justification or advantages to support consolidation.

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

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

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

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

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

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

§ 41.82. Amendments of requests for hearing.

(a) Amendments to a request for hearing will not be permitted except as specified in §§ 41.32(c) and 41.33(b) (relating to timeliness and perfection of requests for hearing; and appeals nunc pro tunc).

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

§ 41.83. Withdrawal of provider appeals.

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

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

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

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

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

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

PREHEARINGS PROCEDURES AND HEARINGS

§ 41.91. Waiver of hearings.

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

(1) The provider waives its right to hearing.

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

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

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

§ 41.92. Expedited disposition procedure for certain appeals.

(a) This section applies to provider appeals involving the denial of claims for payment through the prior authorization process, the denial of requests for precertification, the recovery of overpayments or improper payments through the utilization review process, the denial of claims upon prepayment review, the denial of claims for payment under § 1101.68 (relating to invoicing for services), the denial, termination or suspension of an exceptional DME grant as defined in § 1187.2 (relating to

definitions) and the denial of a program exception request filed under § 1150.63 (relating to waivers).

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

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

(2) Relevant supporting documentation.

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

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

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

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

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

(2) § 41.12 (relating to form).

(3) § 41.14 (relating to verification).

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

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

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

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

(8) §§ 41.111—41.117.

(9) § 41.118—41.121.

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

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

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

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

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

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

(16) § 41.181 (relating to posthearing briefs).

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

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

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

PREHEARING PROCEDURES AND PREHEARING CONFERENCES

§ 41.101. Prehearing procedure in certain provider appeals.

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

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

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

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

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

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

(b) The parties may, within 30 days of the date of the prehearing order, submit a joint proposed case management order to the Bureau that proposes alternative dates for completion of the matters specified in subsection (a), or that agrees to discovery beyond the limitations set forth in § 41.120 (relating to limitations on discovery).

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

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

§ 41.102. Conferences.

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

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

DISCLOSURES AND DISCOVERY

§ 41.111. Disclosures.

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

(b) The program office will disclose the following:

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

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

(c) The provider shall disclose the following:

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

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

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

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

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

§ 41.112. Filing of position paper.

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

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

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

- (1) A party submits a written request for extension.
- (2) The request is received by the Bureau in time for it to review the matter prior to the due date.
- (3) The party establishes that good cause exists to warrant an extension.
- (d) Failure to complete discovery before the due date of the position paper will ordinarily not be considered sufficient cause to extend the deadline, unless the failure is due to the noncooperation of the other side. A request for extension should be considered denied unless the Bureau affirmatively grants the extension in writing before the papers are due.

§ 41.113. Content of provider position paper.

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

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

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

§ 41.114. Content of program office position paper.

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

- (1) Summary of the pertinent facts and circumstances.
- (2) Citations to the relevant statutory provisions, regulations and other controlling authorities.
- (3) Computation of the monetary amount in dispute.
- (b) If the program office disputes the facts, citations or monetary amount, the program office will provide a counterstatement of the items in dispute.

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

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

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

§ 41.115. Statement regarding expert opinions.

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

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

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

- (1) An identification of the expert by name and address.
- (2) The subject matter on which the expert is expected to testify.
- (3) An identification of the substance of the facts and opinions to which the expert is expected to testify.
- (4) A summary of the grounds for each opinion to which the expert is expected to testify.
- (5) The signature of the expert.
- (d) The parties shall submit a joint statement of undisputed facts at least 20 days prior to the hearing.

§ 41.116. Amendments to position papers.

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

§ 41.117. Penalties for noncompliance.

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

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

§ 41.118. Authorized forms of discovery.

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

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

- (3) Expert reports.
- (4) Requests for admission.
- (5) Depositions of witnesses and designees of parties.

§ 41.119. General scope of discovery.

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

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

§ 41.120. Limitations on scope of discovery.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Unless a senior Department official has been identified as a witness by the program office or agrees to submit to a deposition, a party may not depose a senior Department official regardless of the number of depositions taken, except that the Bureau, upon motion of a party, may permit the party to depose a senior Department official if the party establishes to the Bureau's satisfaction that the following apply:

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

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

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

(e) Subsections (a)—(d) supersede 1 Pa. Code §§ 35.145—35.152 as the sections relate to discovery only.

§ 41.121. Timing and sequence of discovery.

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

§ 41.122. Supplementing disclosures and responses.

(a) A party has a duty to supplement or correct a disclosure under §§ 41.111—41.117 to include information thereafter acquired if ordered by the Bureau, if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

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

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

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

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

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

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

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

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

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

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

MOTIONS

§ 41.131. Motions in general.

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

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

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

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

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

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

§ 41.132. Actions on motions.

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

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

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

§ 41.133. Procedural motions.

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

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

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

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

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

§ 41.134. Discovery motions.

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

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

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

§ 41.135. Dispositive motions.

(a) This section applies to dispositive motions.

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

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

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

§ 41.136. Miscellaneous motions.

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

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

MEDIATION**§ 41.141. Voluntary mediation.**

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

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

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

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

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

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

HEARINGS**§ 41.151. Initiation of hearings.**

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

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

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

§ 41.152. Continuance of hearings.

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

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

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

§ 41.153. Burden of proof and production.

(a) The provider has the burden of proof to establish its case by a preponderance of the evidence and is required to make a prima facie case by the close of its case-in-

chief. The provider has the burden of production, unless otherwise directed by the presiding officer, upon a determination included in the record by the presiding officer that the evidence is peculiarly within the knowledge or control of another party or participant, in which case the order of presentation may be varied by the presiding officer.

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

(c) A pleading or a position paper must, without further action, be considered part of the record. A pleading or a position paper will never be considered as evidence of a fact other than that of the filing thereof, unless offered and received into evidence under this chapter.

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

EVIDENCE AND WITNESSES**§ 41.161. Written testimony.**

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

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

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

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

§ 41.162. Subpoenas.

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

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

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

PRESIDING OFFICERS**§ 41.171. Independence.**

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

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

POSTHEARING PROCEDURES

§ 41.181. Posthearing briefs.

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

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

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

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

(e) A party may waive the filing of a posthearing brief.

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

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

AGENCY ACTION

§ 41.191. Determinations and recommendations by the Bureau.

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

(b) If a request for hearing includes a waiver request, the Bureau will make a written recommendation for consideration by the Secretary proposing that the waiver be either granted or denied and stating the Bureau's reasoning in support of its position. If the request for hearing raises factual and legal issues in addition to the waiver request, the Bureau will issue its written recommendation together with its final determination adjudicating the remaining factual and legal issues, as specified in subsection (c). If the request for hearing does not raise other issues, the Bureau's written recommendation on the waiver request will be issued within the time limits and served on the parties as specified in subsection (c).

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

(d) A party aggrieved by a determination of the Bureau may request the Secretary to review the determination

under § 41.212 (relating to review of bureau determinations). For purposes of this section, a program office will be deemed to be aggrieved if the Bureau determination does one or more of the following:

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

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

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

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

(f) Subsections (a)—(e) supersede 1 Pa. Code §§ 35.201—35.221.

REOPENING OF RECORD

§ 41.201. Reopening of record prior to adjudication.

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

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

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

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

(3) Evidence is not cumulative.

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

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

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

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

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

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

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

RECONSIDERATION AND REVIEW BY THE SECRETARY

§ 41.211. Reconsideration of interlocutory orders.

(a) A motion for reconsideration by the Secretary of an interlocutory order or ruling of the Bureau must be filed

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

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

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

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

§ 41.212. Review of Bureau determinations.

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

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

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

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

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

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

(g) Answers to a request for review will not be considered by the Secretary unless the Secretary has granted review. If, and to the extent the Secretary has granted review, a response in the nature of an answer may be filed by a party, other than the party requesting review. The response must be confined to the issues upon which the Secretary has granted review.

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

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

§ 41.213. Review of Bureau recommendations.

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

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

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

(d) The Secretary's final order regarding a recommendation issued under § 41.191(b) will be issued in accordance with the following:

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

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

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

§ 41.214. Appeals.

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

[Pa.B. Doc. No. 04-1490. Filed for public inspection August 13, 2004, 9:00 a.m.]

**[55 PA. CODE CH. 1187]
MA Day of Care Definition**

The Department of Public Welfare (Department), under the authority of sections 201(2), 206(2), 403(b) and 443.1 of the Public Welfare Code (62 P.S. §§ 201(2), 206(2), 403(b) and 443.1), proposes to amend § 1187.2 (relating to definitions).

Purpose of the Proposed Rulemaking

The proposed rulemaking expands the definition of "MA day of care" under § 1187.2 to include additional categories of days of care provided to Medical Assistance (MA)

nursing facility residents. In addition, the proposed rulemaking adds definitions for “LTCCAP—Long Term Care Capitated Assistance Program” and “MA MCO—Medical Assistance Managed Care Organization,” as these terms are included in the amended definition of “MA day of care.”

Need for the Proposed Rulemaking

Currently, § 1187.2 defines an MA day of care as “a day of care for which the Department pays 100% of the MA rate for an MA resident or a day of care for which the Department and the resident pay 100% of the MA rate for the MA resident’s care.” Under the case-mix payment system in Chapter 1187 (relating to nursing facility services), the Department uses the definition of “MA day of care” for two purposes. First, the Department uses the definition to determine which residents are included in the calculation of every nursing facility’s quarterly MA Case-Mix Index (CMI) under § 1187.93 (relating to CMI calculations). Under § 1187.93(2), a nursing facility’s MA CMI is “the arithmetic mean of the individual CMIs for residents for whom the Department paid an MA day of care on the [quarterly] picture date.” The Department uses the MA CMI to adjust a nursing facility’s case-mix per diem rate every quarter during the rate year as specified in § 1187.95(b)(1) (relating to general principles for rate and price setting).

Second, the Department uses the definition of “MA day of care” to determine which nursing facilities are eligible to receive a disproportionate share incentive payment under § 1187.111 (relating to disproportionate share incentive payments). To qualify for a disproportionate share incentive payment, a nursing facility must maintain an annual overall occupancy rate of at least 90% along with an annual MA occupancy rate of at least 80%. A nursing facility’s MA occupancy rate is determined by dividing the MA days of care paid by the Department by the total actual days of care provided by the nursing facility.

As it is presently written, the definition only recognizes as an “MA day of care” days for which payment is made under the Department’s Fee-For-Service Program (Program). While most MA nursing facility residents receive nursing facility services through the Program, some MA recipients may receive nursing facility services through the HealthChoices Program, the Department’s managed care program, and the Long Term Care Capitated Assistance Program (LTCCAP), the Department’s community-based managed care program for the frail and elderly. When a HealthChoices managed care organization under contract with the Department (MA MCO) or an LTCCAP provider authorizes nursing facility services for an enrolled MA recipient, the MA MCO or LTCCAP provider, and not the Department, pays the nursing facility for the days of care which the nursing facility provides to the MA recipient. Since these days of care do not meet the current definition of “MA day of care,” they are not counted in calculating the nursing facility’s MA CMI or in determining whether the nursing facility qualifies for a disproportionate share incentive payment.

During the past several years, the number of MA recipients receiving services under the HealthChoices Program and the LTCCAP has grown. As these managed care programs continue to expand, more MA recipients who are admitted to nursing facilities will likely be enrolled in either an MA MCO or the LTCCAP and more days of care provided in nursing facilities will be paid for by MA MCOs and LTCCAP providers. In anticipation of this change in circumstance, MA nursing facility providers have asked the Department to modify its policies to

recognize these days as MA days of care. Upon consideration of this request, the Department agrees that expanding the current definition of “MA day of care” is appropriate and in the best interest of the MA Program.

Requirements

The Department is proposing to expand the definition of “MA day of care” to include days of care for which an MA MCO or an LTCCAP provider pays 100% of its negotiated rate or fee for the MA resident’s care in a nursing facility and days of care for which the resident and an MA MCO or an LTCCAP provider pays 100% of their negotiated rate or fee for the MA resident’s care in a nursing facility. The Department is also proposing to amend the definition to clarify that days of care provided to an MA resident receiving hospice services in a nursing facility which are paid for by the Department are also considered as MA days of care.

In addition, the definitions for “LTCCAP” and “MA MCO” are being added to clarify the terms included in the revised definition of “MA day of care.” LTCCAP is the Department’s community-based managed care program for the frail elderly based on the Federal Program of All-Inclusive Care for the Elderly. MA MCO is an entity under contract with the Department that manages the purchase and provision of health services, including nursing facility services, for MA recipients who are enrolled as members in the entity’s health service plan.

The intent of the proposed rulemaking is to define an MA day of care in a manner that fully recognizes the services that nursing facilities are providing to MA recipients. This proposed rulemaking is consistent with the Department’s ongoing efforts to ensure that MA recipients continue to receive access to medically necessary nursing facility services.

Affected Organizations

The proposed rulemaking will affect nursing facilities enrolled in the MA Program.

Accomplishments and Benefits

Consistent with the recommendation of nursing facility providers, the proposed rulemaking will amend the current regulation to expand the definition of “MA day of care.” The proposed rulemaking may result in increased reimbursement and, therefore, benefit both nursing facility providers and residents who will be assured continued access to medically necessary nursing facility services.

Fiscal Impact

Public Sector

Commonwealth

By expanding the definition of “MA day of care,” more nursing facilities may qualify for disproportionate share incentive payments and nursing facilities that currently receive disproportionate share incentive payments may experience an increase in those payments. Nursing facilities may also experience an increase in their case-mix per diem rates as a result of an increase in the MA CMI used to establish the nursing facility’s case-mix per diem rate.

Political Subdivisions

The amendment to the definition of “MA day of care” may result in increased disproportionate share incentive payments to county operated nursing facilities that provide nursing facility services to MA recipients. County operated nursing facilities may also experience an increase in their case-mix per diem rates as a result of an

increase in the MA CMI used to establish the nursing facility's case-mix per diem rate.

Private Sector

The amendment to the definition of "MA day of care" may result in increased disproportionate share incentive payments to qualified privately owned and operated nursing facilities that provide nursing facility services to MA recipients. Privately owned and operated nursing facilities may also experience an increase in their case-mix per diem rates as a result of an increase in the MA CMI used to establish the nursing facility's case-mix per diem rate.

General Public

Although the proposed rulemaking amends policies that may result in increased disproportionate share incentive payments and case-mix per diem rates to MA nursing facilities, there will be no fiscal impact on the general public.

Paperwork Requirements

There are no new or additional paperwork requirements.

Effective Date

The Department proposes that the amendment to the definition of "MA day of care" should take effect January 1, 2004, and apply to disproportionate share incentive payments for fiscal periods ending on and after December 31, 2003, and to the MA CMI for picture dates beginning February 1, 2004.

Sunset Date

There is no sunset date. The Department will review the effectiveness of this regulation on an ongoing basis and evaluate the need for further amendments.

Public Comments

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed rulemaking to the Department of Public Welfare, Division of Long Term Care Client Services, P. O. Box 2675, Harrisburg, PA 17105, Attn: Gail Weidman within 30 calendar days after the date of publication in the *Pennsylvania Bulletin*. Persons with a disability may use the AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users).

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on August 3, 2004, the Department submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Health and Human Services and the Senate Committee on Public Health and Welfare. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Depart-

ment, the General Assembly and the Governor of comments, recommendations or objections raised.

ESTELLE B. RICHMAN,
Secretary

Fiscal Note: 14-486. (1) General Fund; (2) Implementing Year 2003-04 is \$106,000; (3) 1st Succeeding Year 2004-05 is \$237,000; 2nd Succeeding Year 2005-06 is \$245,000; 3rd Succeeding Year 2006-07 is \$252,000; 4th Succeeding Year 2007-08 is \$260,000; 5th Succeeding Year 2008-09 is \$268,000; (4) 2002-03 Program—\$777,084,000; 2001-02 Program—\$761,877,000; 2000-01 Program—\$722,565,000; (7) Medical Assistance—Long Term Care; (8) recommends adoption. Funding for this proposed rulemaking has been provided through the Department's Intergovernmental Transfer Agreement for fiscal years 2003-04 and 2004-05.

Annex A

TITLE 55. PUBLIC WELFARE

PART III. MEDICAL ASSISTANCE MANUAL

CHAPTER 1187. NURSING FACILITY SERVICES

Subchapter A. GENERAL PROVISIONS

§ 1187.2. Definitions.

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

* * * * *

LTCCAP—Long Term Care Capitated Assistance Program—The Department's community-based managed care program for the frail elderly based on the Federal Program of All-inclusive Care for the Elderly (PACE) (see section 1894 of the Social Security Act (42 U.S.C.A. § 1395eee)).

* * * * *

MA day of care—[A day of care for which the Department pays 100% of the MA rate for an MA resident or a day of care for which the Department and the resident pay 100% of the MA rate for the MA resident's care.] A day of care for which one of the following applies:

- (i) The Department pays 100% of the MA rate for an MA resident.
- (ii) The Department and the resident pay 100% of the MA rate for an MA resident.
- (iii) An MA MCO or an LTCCAP provider that provides managed care to MA residents, pays 100% of the negotiated rate or fee for an MA resident's care.
- (iv) The resident and either an MA MCO or LTC-CAP provider that provides managed care to an MA resident, pays 100% of the negotiated rate or fee for an MA resident's care.
- (v) The Department pays for care provided to an MA resident receiving hospice services in a nursing facility.

MA MCO—Medical Assistance Managed Care Organization—An entity under contract with the Department that manages the purchase and provision of health services, including nursing facility ser-

vices, for MA recipients who are enrolled as members in the entity's health service plan.

* * * * *

[Pa.B. Doc. No. 04-1491. Filed for public inspection August 13, 2004, 9:00 a.m.]

**[55 PA. CODE CH. 1187]
Metropolitan Statistical Area**

The Department of Public Welfare (Department), under the authority of sections 201(2), 206(2), 403(b) and 443.1 of the Public Welfare Code (62 P. S. §§ 201(2), 206(2), 403(b) and 443.1), proposes to amend § 1187.94 (relating to peer grouping for price setting) to read as set forth in Annex A.

Purpose of the Proposed Rulemaking

If adopted, the proposed rulemaking will amend the method by which the Department establishes the peer groups used to set net operating prices under the case-mix payment system. See § 1187.94.

Need for the Proposed Rulemaking

The Medical Assistance (MA) Program pays each enrolled MA nursing facility provider for nursing facility services provided to MA residents using the Department's case-mix payment system. See Chapter 1187 (relating to nursing facility services). Under this payment system, the Department sets a prospective per diem rate for each MA nursing facility provider. A nursing facility's case-mix per diem rate is comprised of three "net operating" rate components and one "capital rate" component. See § 1187.96(e) (relating to price and rate setting computations). The three net operating rate components are based upon peer group prices. See § 1187.96(a)—(e).

The Department computes net operating peer group prices annually using the nursing facility cost report data available in the Nursing Home Information System database. See § 1187.94 and § 1187.95 (relating to general principles for rate; and price setting). The Department's case-mix payment system regulations specify that, in setting net operating prices, the Department will classify each nursing facility participating in the MA Program, except nursing facilities that meet the definition of a hospital-based nursing facility or special rehabilitation facility (as defined in § 1187.2 (relating to definitions)), into 1 of 12 mutually exclusive peer groups based on Metropolitan Statistical Areas (MSA) group classification and the nursing facility's certified bed complement. See § 1187.94(1). The regulations further state that "the Department will use the most recent MSA group classification, as published by the Federal Office of Management and Budget (OMB) on or before April 1 of each year" to make the peer group classifications. See § 1187.94(1)(i).

Prior to 2003, the OMB categorized MSAs into three levels based on the total population of the counties in the MSA: Level A (areas with a total population of 1 million or more), Level B (areas with a total population of 250,000 to 999,999) and Level C (areas with a total population of 100,000 to 249,000). The Department's case-mix payment system regulations in § 1187.94(1)(iii), make explicit reference to MSA groups A, B and C in

identifying the 12 peer groups into which nursing facilities are classified under the case-mix payment system.¹

On June 6, 2003, the OMB published OMB Bulletin No. 03-04 (relating to revised definitions of "Metropolitan Statistical Areas," new definitions of "Micropolitan Statistical Areas" and "Combined Statistical Areas" and guidance on uses of the statistical definitions of these areas) that revised the definitions of MSAs. In publishing these revised MSA definitions, the OMB added definitions for "Micropolitan Statistical Areas" and "Combined Statistical Areas" based on Federal Census Bureau data derived from the 2000 census. However, the OMB eliminated the use of the MSA group levels A, B and C that are specifically referenced in § 1187.94(1)(iii).

The OMB's elimination of the three MSA group levels makes it impossible for the Department to apply the existing language of § 1187.94(1) in classifying nursing facilities into peer groups. More specifically, the Department cannot use the most recent MSA group classifications published by the OMB, as required by § 1187.94(1)(i), and also classify nursing facilities into the 12 peer groups identified in § 1187.94(1)(iii). To address this problem, the Department has determined that the language of § 1187.94 should be amended.

In evaluating the alternative ways in which § 1187.94 might be amended, the Department considered the potential effects that adopting the new Federal definitions for MSAs might have on peer group prices and nursing facility rates. The Department's preliminary analyses indicate that a majority of nursing facility providers would be adversely affected (that is, the case-mix payment system would compute lower rates for the majority) if the Department were to adopt the new Federal MSA definitions.

Instead of adopting the new Federal definitions, the Department is proposing to amend § 1187.94(1)(i) and the Commonwealth's Title XIX State Plan to specify that the Department will use the MSA group classification published by the OMB in OMB Bulletin No. 99-04 (relating to revised statistical definitions of "Metropolitan Areas" and guidance on uses of "Metropolitan Area" definitions) to peer group nursing facilities. By using the MSA classification in OMB Bulletin No. 99-04, the Department will maintain the historical MSA groups and will continue to classify each MA nursing facility as MSA A, B or C or as non-MSA. Although the language of § 1187.94 will change, the effect of this amendment will be to preserve the status quo.

Requirements

The Department is proposing to amend § 1187.94 to change the method used for peer grouping by specifying that the Department will use the MSA group classification published in OMB Bulletin No. 99-04 to classify nursing facilities into peer groups instead of the most recent MSA group classification published on or before April 1 of each year.

Affected Organizations

Nursing facilities enrolled in the MA Program except nursing facilities that meet the definition of "hospital-based nursing facility" or "special rehabilitation facility." See § 1187.2.

¹ Nursing facilities that are located in counties that are not included in one of the three MSA group levels are classified in a "non-MSA" peer group under the regulations. See § 1187.94(1)(iii).

Accomplishments and Benefits

Amending § 1187.94 to specify that the Department will use the MSA group classifications published in OMB Bulletin 99-04 enables the Department to ensure that the case-mix payment system takes into account variables that may impact the cost of providing nursing facility services while the Department continues and completes its discussions with the nursing facility industry, consumers and other stakeholders on a more comprehensive overhaul of the case-mix payment system.

*Fiscal Impact**Commonwealth, Political Subdivisions and Private Sector*

No fiscal impact will result from this proposed rulemaking since the effect is to preserve the status quo by maintaining the same MSA group classification method which the Department has used to assign nursing facilities to peer groups since the case-mix payment system was implemented in January 1996.

No fiscal impact will result from this proposed amendment since the effect is to preserve the status quo by maintaining the same MSA group classification method which the Department has used to assign nursing facilities to peer groups since the case-mix payment system was implemented in January 1996.

General Public

There will be no fiscal impact on the general public.

Paperwork Requirements

No new or additional paperwork requirements result from the proposed rulemaking.

Effective Date

The proposed rulemaking will take effect with July 1, 2004, rate setting.

Sunset Date

There is no sunset date. However, the Department will review the effectiveness of the regulation and the issue of peer group classifications as part of its continuing discussions with the nursing facility industry, consumers and other stakeholders on a more comprehensive overhaul of the case-mix payment system.

Public Comment

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed rulemaking to the Department of Public Welfare, Division of Long Term Care Client Services, Attn: Gail Weidman, P. O. Box 2675 Harrisburg, PA 17105-2675 within 30 calendar days after the date of publication in the *Pennsylvania Bulletin*. Persons with a disability may use the AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users).

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on August 3, 2004, the Department submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Health and Human Services and the Senate Committee on Public Health and Welfare. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the

close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Department, the General Assembly and the Governor of comments, recommendations or objections raised.

ESTELLE B. RICHMAN,
Secretary

Fiscal Note: 14-483. No fiscal impact; (8) recommends adoption.

Annex A**TITLE 55. PUBLIC WELFARE****PART III. MEDICAL ASSISTANCE MANUAL****CHAPTER 1187. NURSING FACILITY SERVICES****Subchapter G. RATE SETTING****§ 1187.94. Peer grouping for price setting.**

To set net operating prices under the case-mix payment system, the Department will classify the nursing facilities participating in the MA Program into 14 mutually exclusive groups as follows:

(1) Nursing facilities participating in the MA Program, except those nursing facilities that meet the definition of a special rehabilitation facility or hospital-based nursing facility, will be classified into 12 mutually exclusive groups based on MSA group classification and nursing facility certified bed complement:

(i) [**The**] **Effective for rate-setting periods commencing July 1, 2004, the** Department will use the [**most recent**] MSA group classification[, as] published by the Federal Office of Management and Budget [**on or before April 1 of each year**] in the OMB Bulletin No. 99-04 (relating to revised definitions of Metropolitan Areas and guidance on uses of Metropolitan Area definitions), to classify each nursing facility into one of three MSA groups or one non-MSA group.

* * * * *

[Pa.B. Doc. No. 04-1492. Filed for public inspection August 13, 2004, 9:00 a.m.]

FISH AND BOAT COMMISSION

[58 PA. CODE CHS. 103, 105, 107 AND 111]

Boating

The Fish and Boat Commission (Commission) proposes to amend Chapters 103, 105, 107 and 111. The Commission is publishing this proposed rulemaking under the authority of 30 Pa.C.S. (relating to the Fish and Boat Code) (code). The proposed amendments relate to the definition of "slow, no wake speed" and eliminating the term "slow, minimum height swell speed" as used throughout the Commission's regulations.

A. Effective Date

The proposed rulemaking, if approved on final-form, will go into effect on January 1, 2005.

B. Contact Person

For further information on the proposed rulemaking, contact Laurie E. Shepler, Esq., P. O. Box 67000, Harrisburg, PA 17106-7000, (717) 705-7815. This proposal is available on the Commission's website: ww.fish.state.pa.us.

C. Statutory Authority

The proposed amendments to §§ 103.2, 103.3, 103.16, 105.3 and 107.5 are published under section 5123 of the code (relating to general boating regulations). The proposed amendments to §§ 111.2—111.4, 111.6, 111.9, 111.13, 111.14, 111.17, 111.20—111.25, 111.27, 111.30, 111.31, 111.36, 111.40—111.43, 111.46, 111.49, 111.52, 111.56, 111.58, 111.59, 111.62, 111.64 and 111.66 are published under the statutory authority of section 5124 of the code (relating to particular areas of water).

D. Purpose and Background

The proposed rulemaking is designed to update, modify and improve the Commission's boating regulations. The specific purpose of the proposed amendments is described in more detail under the summary of proposal. The Commission's Boating Advisory Board considered the proposed changes and recommended that the Commission publish a notice of proposed rulemaking containing the proposed amendments.

E. Summary of Proposal

Historically, the Commission's regulations have used the term "slow, minimum height swell speed," as opposed to the more common term "slow, no wake speed." Section 103.2 (relating to definitions) defines "slow, minimum height swell speed" as the "lowest engagement speed for the engine and that the wake or wash creates a minimum disturbance." The section also provides that "Buoys and signs marked 'slow, no wake' shall mean operation at slow, minimum height swell speed."

The current definition does not adequately describe what the Commission means by "slow, no wake speed." There have been misunderstandings by the boating public and problems when citations by Commission officers for wake violations have been challenged in court. Staff have reviewed the definitions for "slow, no wake speed" in other states and by the National Park Service. Other states and the Federal government do not use the term "slow, minimum height swell speed."

The Commission therefore proposes that the term "slow, minimum height swell speed" be replaced with "slow, no wake speed" so the public better understands the term. In addition, the Commission proposes to amend the definition to reflect the accepted standards in other states. The Commission proposes that § 103.2 be amended to read as set forth in Annex A.

In addition, there are several references to "slow, minimum height swell speed" throughout the Commission's regulations. The Commission proposes that these references in §§ 103.3, 103.16, 105.3, 107.5, 111.2—111.4, 111.6, 111.9, 111.13, 111.14, 111.17, 111.20—111.25, 111.27, 111.30, 111.31, 111.36, 111.40—111.43, 111.46, 111.49, 111.52, 111.56, 111.58, 111.59, 111.62, 111.64 and 111.66 be amended to reflect the new term to read as set forth in Annex A.

F. Paperwork

The proposed rulemaking will not increase paperwork and will create no new paperwork requirements.

G. Fiscal Impact

The proposed rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The proposed rulemaking will impose no new costs on the private sector or the general public.

H. Public Comments

Interested persons are invited to submit written comments, objections or suggestions about the proposed rulemaking to the Executive Director, Fish and Boat Commission, P. O. Box 67000, Harrisburg, PA 17106-7000 within 30 days after publication of this notice in the *Pennsylvania Bulletin*. Comments submitted by facsimile will not be accepted.

Comments also may be submitted electronically to ra-pfbcregs@state.pa.us. A subject heading of the proposal and a return name and address must be included in each transmission. In addition, all electronic comments must be contained in the text of the transmission, not in an attachment. If an acknowledgment of electronic comments is not received by the sender within 2 working days, the comments should be retransmitted to ensure receipt.

DOUGLAS J. AUSTEN, Ph.D.,
Executive Director

Fiscal Note: 48A-157. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 58. RECREATION

PART II. FISH AND BOAT COMMISSION

Subpart C. BOATING

CHAPTER 103. RULES OF THE ROAD

§ 103.2. Definitions.

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

* * * * *

[*Slow, minimum height swell speed*—The lowest engagement speed for the engine and that the wake or wash creates a minimum disturbance.]

Slow, no wake speed—The slowest possible speed of a motorboat required to maintain maneuverability so that the wake or wash created by the motorboat on the surface of the water is minimal.

[(b) *Buoys and signs marked "slow, no wake"* shall mean operation at slow, minimum height swell speed.]

§ 103.3. Restriction for special areas.

* * * * *

(b) Boats are limited to [**slow, minimum height swell**] **slow, no wake** speed when within 100 feet of the shore line; docks; launching ramps; swimmers or downed skiers; persons wading in the water; anchored, moored or drifting boats; floats, except for ski jumps and ski landing floats; or other areas so marked. This subsection does not apply in a zoned ski area or authorized ski return areas when those areas are found within the areas described in this subsection.

* * * * *

§ 103.16. Speed restrictions.

* * * * *

(b) *Specific speed restrictions.* In addition to the general restriction on speed of watercraft set forth in subsection (a), the Commission may by general or special boating regulations set forth specific restrictions such as “[**slow, minimum height swell**] **slow, no wake** speed” restrictions. The observation of an officer authorized to enforce this part shall be evidence of violation of nonnumerical specific speed restrictions.

* * * * *

CHAPTER 105. OPERATIONAL CONDITIONS

§ 105.3. Unacceptable boating practices.

It is unlawful to:

(1) Operate a motorboat not equipped with railings or other safeguards at greater than a [**slow, minimum height swell**] **slow, no wake** speed while a person is riding on bow decking, gunwales, transom or motor cover. It is not a violation of this paragraph to ride on the motor cover of an inboard motorboat while underway at that speed if the motor cover is designed by the manufacturer for the operator or a passenger to ride on it.

(2) Operate a motorboat—less than 20 feet in length—at greater than [**slow, minimum height swell**] **slow, no wake** speed while a person is standing on or in the boat. It is not a violation of this paragraph if the boat is designed for the operator or a passenger, or both, to stand while underway at that speed.

* * * * *

(7) Follow too close to another boat, including personal watercraft. For the purposes of this paragraph, following too close shall be construed as operating in excess of [**slow, minimum height swell**] **slow, no wake** speed within 100 feet to the rear or 50 feet to the side of another boat that is underway, unless the boats are operating in a narrow channel, in which case the boats may operate at the speed and flow of other boat traffic.

* * * * *

CHAPTER 107. BOATING RESTRICTIONS

§ 107.5. Streams less than 200 feet across.

(a) A boat may not exceed [**slow, minimum height swell**] **slow, no wake** speed on an area of a stream that measures less than 200 feet across except where special regulations have been promulgated by the Commission that provide for zoned areas where higher speeds are permitted under controlled conditions.

* * * * *

CHAPTER 111. SPECIAL REGULATIONS COUNTIES

§ 111.2. Allegheny County.

(a) *Allegheny River.* The following special regulations apply to the Allegheny River:

(1) Boats are limited to [**slow, minimum height swell**] **slow, no wake** speed from Miles 12.8 to Lock and Dam Number 2 at Mile 14.5 in the back channel of Twelve and Fourteen Mile Islands.

(2) The area behind Nine Mile Island, Mile 10.0 to Mile 10.4 is a designated ski zone. Boats not actively engaged in towing water skiers are limited to [**slow, minimum height swell**] **slow, no wake** speed.

* * * * *

(c) *Allegheny, Monongahela and Ohio Rivers (City of Pittsburgh).* Boats are limited to [**slow, minimum height swell**] **slow, no wake** speed from the Fort Pitt Bridge over the Monongahela River and the Fort Wayne (Norfolk Southern) Bridge over the Allegheny River to the West End Bridge over the Ohio River. This zone shall be in effect on weekends from May 1 to October 1 from 3 p.m. Friday until midnight Sunday and from 3 p.m. on the day preceding Memorial Day, July 4 and Labor Day until midnight of the holiday.

(d) *Youghiogheny River.* Boats are limited to [**slow, minimum height swell**] **slow, no wake** speed from the mouth of the Youghiogheny River to the McKeesport Access Area, a distance of about 200 yards.

§ 111.3. Armstrong County.

(a) *Crooked Creek Lake.*

* * * * *

(4) Boats are limited to [**slow, minimum height swell**] **slow, no wake** speed in the following areas:

* * * * *

§ 111.4. Beaver County.

(a) *Beaver River.* Boats are limited to [**slow, minimum height swell**] **slow, no wake** speed from the mouth of the Beaver River (Mile 0.0) to a point 2 miles upstream (Mile 2.3).

(b) *Connoquenessing Creek Dam.*

* * * * *

(2) The speed of boats is restricted to [**slow, minimum height swell**] **slow, no wake** speed upstream from a marked point 8/10 of a mile above the Route 65 bridge.

* * * * *

§ 111.6. Berks County.

(a) *Blue Marsh Lake.* The following special regulations apply to Blue Marsh Lake:

* * * * *

(2) Boats are limited to a [**slow, minimum height swell**] **slow, no wake** speed in the two arms of the lake formed by Spring Creek and Tulpehocken Creek.

* * * * *

§ 111.9. Bucks County.

* * * * *

(b) *Neshaminy Creek.* Boats are limited to [**slow, minimum height swell**] **slow, no wake** speed from the mouth of Neshaminy Creek to a point approximately 200 yards upstream from the Route 13 Bridge, a distance of approximately 1.5 miles.

* * * * *

(d) *Delaware River.*

(1) Boats are limited to [**slow minimum height swell**] **slow, no wake** speed in the following areas:

* * * * *

(2) Boats are limited to [**slow minimum height swell**] **slow, no wake** speed while passing through the following bridge spans:

* * * * *

§ 111.13. Carbon County.

(a) *Beltzville Lake—Beltzville State Park.* The following regulations apply to Beltzville Lake:

(1) Boats are limited to [slow, minimum height swell] slow, no wake speed at Pine Run, Wild Creek and Pohopoco Creek Bays.

* * * * *

§ 111.14. Centre County.

* * * * *

(d) *Foster Joseph Sayers Lake—Bald Eagle State Park.*

(1) Boats are limited to [slow, minimum height swell] slow, no wake speed in the following areas:

* * * * *

§ 111.17. Clearfield County.

* * * * *

(b) *Treasure Lake.*

(1) Boats are limited to [slow, minimum height swell] slow, no wake speed from the established buoy line at the following areas:

* * * * *

§ 111.20. Crawford County.

* * * * *

(f) *Woodcock Creek Lake.*

* * * * *

(3) Boats are limited to [slow, minimum height swell] slow, no wake speed in a zone defined by the area east of the L. R. 20063 Causeway.

* * * * *

§ 111.21. Cumberland County.

* * * * *

(c) *Power Company Dam (Cove Hill) Conodoguinet Creek.*

* * * * *

(5) Boats are limited to [slow, minimum height swell] slow, no wake speed in the channel behind the island from the breast of the dam to the inlet.

§ 111.22. Dauphin County.

Susquehanna River, Lake Frederick. Boats are limited to [slow, minimum height swell] slow, no wake speed between Bashore Island and the York County shoreline.

§ 111.23. Delaware County.

(a) *Delaware River.* Boats are limited to [slow, minimum height swell] slow, no wake speed between Tincum Island and the Pennsylvania shoreline.

(b) *Tincum Lagoons.* Boats are limited to [slow, minimum height swell] slow, no wake speed.

§ 111.24. Elk County.

East Branch Clarion River Lake—Elk State Park.

* * * * *

(2) Boats are limited to [slow, minimum height swell] slow, no wake speed in the following areas:

* * * * *

§ 111.25. Erie County.

(a) *Lake Erie and Presque Isle Bay.*

(1) Boats are limited to [slow, minimum height swell] slow, no wake speed in the following areas:

* * * * *

(b) *Lake Leboeuf.* It is unlawful to operate a boat in excess of [slow, minimum height swell] slow, no wake speed.

* * * * *

§ 111.27. Forest County.

Tionesta Lake.

* * * * *

(2) Boats are limited to [slow minimum height swell] slow, no wake speed upstream from the confluence of Little Piney Run.

§ 111.30. Greene County.

* * * * *

(b) *Ten Mile Creek.* It is unlawful to operate a boat in excess of [slow, minimum height swell] slow, no wake speed.

§ 111.31. Huntingdon County.

(a) *Lake Raystown.*

(1) Boats are limited to [slow, minimum height swell] slow, no wake speed in the following areas:

* * * * *

§ 111.36. Lancaster County.

(a) *Lake Aldred—Susquehanna River.* Boats are limited to [slow, minimum height swell] slow, no wake speed from the York County shoreline to the northern point of Urey Islands to the southern tip of Blair Island, and back to the York County shoreline. The area is about 1 mile in length.

* * * * *

(c) *Susquehanna River.* Boats are limited to [slow, minimum height swell] slow, no wake speed for both of the following:

* * * * *

§ 111.40. Luzerne County.

* * * * *

(c) *Lily Lake.*

* * * * *

(2) Boats are limited to [slow, minimum height swell] slow, no wake speed except those operating within the buoyed high speed operating zone, between noon and sunset between the Saturday preceding Memorial Day and September 30.

* * * * *

(f) *Harveys Lake.* The speed of boats is limited to [slow, minimum height swell] slow, no wake speed between sunset and sunrise.

§ 111.41. Lycoming County.

* * * * *

(c) *Susquehanna River*. Boats are limited to [**slow, minimum height swell**] **slow, no wake** speed between Swimmers Island and the south shore of the Susquehanna River.

* * * * *

§ 111.42. McKean County.

Allegheny River Reservoir (Kinzua Dam).

* * * * *

(2) Boats are limited to [**slow, minimum height swell**] **slow, no wake** speed in the following areas:

* * * * *

§ 111.43. Mercer County.

Shenango River Lake.

* * * * *

(4) Boats are limited to [**slow, minimum height swell**] **slow, no wake** speed in the following areas:

* * * * *

§ 111.46. Montgomery County.

Schuylkill River. Boats are limited to [**slow, minimum height swell**] **slow, no wake** speed between Barbadoes Island and the Norristown shore from the Barbadoes Island Bridge downriver to the Norristown Dam.

§ 111.49. Northumberland County.

Susquehanna River. Boats are limited to [**slow, minimum height swell**] **slow, no wake** speed from the vicinity of the Shikellamy State Park boat launch on the south side of Packard's Island upriver a distance of 1/3 mile.

§ 111.52. Pike County.

* * * * *

(c) *Lake Wallenpaupack*.

* * * * *

(4) Boats are limited to [**slow, minimum height swell**] **slow, no wake** speed in the following areas:

* * * * *

(i) *Fairview Lake*. Boats are limited to [**slow, minimum height swell**] **slow, no wake** speed from the Commission boat launch to the head of the cove.

* * * * *

§ 111.56. Somerset County.

* * * * *

(b) *Youghiogeny River Lake*. Persons shall wear a Coast Guard approved personal flotation device at all times when on board boats less than 16 feet in length or any canoe or kayak. Boats are limited to [**slow, minimum height swell**] **slow, no wake** speed within the following areas:

* * * * *

§ 111.58. Susquehanna County.

* * * * *

(d) *Laurel Lake*.

* * * * *

(3) *Restrictions on operation of boats powered by internal combustion motors*. Operation of boats powered by internal combustion motors is subject to the following restrictions:

* * * * *

(ii) *Upper Lake*. Boat speed is limited to [**slow, minimum height swell**] **slow, no wake** speed except that, during the period from noon until 6 p.m., no more than two boats powered by internal combustion motors may, at any one time, operate at speeds greater than [**slow, minimum height swell**] **slow, no wake** speed in the marked boat operating zone. Boats operating in the marked zone shall circle in a counter-clockwise direction and shall be subject to the restrictions in this subsection and the code and this subpart. It is unlawful to waterski or to operate a boat at greater than [**slow, minimum height swell**] **slow, no wake** speed at any location on the upper lake from 6 p.m. until noon of the following day.

(iii) *Lower Lake*. It is unlawful to water ski or to operate a boat at greater than [**slow, minimum height swell**] **slow, no wake** speed at any time at any location on the lower lake.

* * * * *

(4) *Restrictions on competing uses of marked boat operating zone*. Boats powered by internal combustion motors operating at authorized speeds greater than [**slow, minimum height swell**] **slow, no wake** speed in the marked boat operating zone shall have priority during the time periods when the operation is authorized under paragraph (3)(ii). It is unlawful to operate or stop a boat in the marked boat operating zone in a manner that interferes with authorized operation of internal combustion powered motorboats in the zone.

* * * * *

§ 111.59. Tioga County.

* * * * *

(b) *Cowanisque Lake*. Boats are limited to [**slow, minimum height swell**] **slow, no wake** speed in the following areas:

* * * * *

(c) *Hammond Lake*. Boats are limited to [**slow, minimum height swell**] **slow, no wake** speed from a buoy line across the lake in the vicinity of Ives Run to the extreme backwaters of the lake.

* * * * *

(f) *Tioga Lake*. Boats are limited to [**slow minimum height swell**] **slow, no wake** speed in the following areas:

* * * * *

§ 111.62. Warren County.

(a) *Allegheny River Reservoir (Kinzua Dam)*.

* * * * *

(2) Boats are limited to [**slow, minimum height swell**] **slow, no wake** speed in the following areas:

* * * * *

§ 111.64. Wayne County.

* * * * *

(b) *Duck Harbor Pond.*

* * * * *

(2) The speed of boats is limited to [**slow, minimum height swell**] **slow, no wake** speed between the hours of 6 p.m. and 10 a.m.

(c) *Long Pond.*

* * * * *

(3) The speed of boats is limited to [**slow, minimum height swell**] **slow, no wake** speed from sunset until sunrise.

* * * * *

§ 111.66. Wyoming County.

* * * * *

(b) *Lake Winola.*

* * * * *

(2) The speed of boats is limited to [**slow, minimum height swell**] **slow, no wake** speed from sunset to sunrise, 7 days a week, year-round, and from sunrise to 11 a.m. on Sundays from the day before Memorial Day until Labor Day.

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[Pa.B. Doc. No. 04-1493. Filed for public inspection August 13, 2004, 9:00 a.m.]
