RULES AND REGULATIONS

Title 55—PUBLIC WELFARE

DEPARTMENT OF PUBLIC WELFARE

[55 PA. CODE CH. 41]

Medical Assistance Provider Appeal Procedures

The Department of Public Welfare (Department) adopts Chapter 41 (relating to Medical Assistance provider appeal procedures) to read as set forth in Annex A. This final-form rulemaking is adopted under the authority of 67 Pa.C.S. § 1106 (relating to regulations). 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). The proposed rulemaking was published at 34 Pa.B. 4447 (August 14, 2004).

Purpose of the Final-Form Rulemaking

The purpose of this final-form rulemaking is to ensure the just and speedy determination of Medical Assistance (MA) provider appeals.

Affected Organizations and Individuals

The final-form rulemaking affects the Department, the Bureau of Hearings and Appeals (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 final-form rulemaking will not impose additional costs on State and local governments.

Private Sector

The final-form rulemaking will not impose additional costs on the public sector.

General Public

The final-form rulemaking will not impose additional costs on the general public.

Paperwork Requirements

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

Cross References

Part II of 1 Pa. Code (relating to the General Rules of Administrative Practice and Procedure) (GRAPP) and other applicable Departmental regulations apply to the practice and procedures in MA provider appeals, except as specifically superceded in relevant sections of the final-form rulemaking.

Effective Date

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

Discussion of Comments and Major Changes

Following is a summary of the major comments received following publication of the proposed rulemaking and the Bureau's response to those comments. A summary of major changes from the proposed rulemaking is also included.

General—Regulations

A commentator suggested that the regulations do not achieve the intended statutory purpose, and that the regulations unreasonably and unnecessarily favors the Department's interest over those of providers.

Response

Consistent with 67 Pa.C.S. § 1106, Chapter 41 expressly guarantees the independence and impartiality of the Bureau hearing officers in deciding appeals. In considering the comments and drafting Chapter 41, the Bureau balanced the complexity of the adjudicative process against the time and expense associated with adjudicating appeals. Several changes, which are addressed as follows, were made in furtherance of balancing the interests and equities of the parties. For instance, proposed § 41.153(a) (relating to burden of proof and production) would have assigned the burden of proof to providers in all instances. However, after considering the comments, the Bureau has concluded that it is appropriate in some instances that the Department should bear the burden of proof, and § 41.153(a) has been amended to reflect that determination.

General—Regulations

A commentator suggested that Chapter 41 should require the Bureau to resolve provider payment and reimbursement decisions within a specific time period.

Response

Act 142 requires the Bureau to promptly adjudicate timely filed requests for hearing and to establish deadlines for interim and final actions by the Bureau and parties to any proceeding before the Bureau. Although Chapter 41 places no specific time limit for hearings, it does establish deadlines for pleadings, discovery and briefs, and for the Bureau to rule on dispositive motions and issue its determinations. Specific or numeric time limits for hearings do not take into account the unique or the complex nature of each appeal. In certain classes of appeals, § 41.92 (relating to expedited disposition procedure for certain appeals) provides for expedited appeal procedures. As written, the regulation contemplates that, unless the time frame is expanded due to joint case management motions, adjudications resolving the ordinary appeals generally will be adjudicated by the Bureau within 2 to 3 years of the time that the appeals are filed.

General—Regulations

One commentator requested clarification of the jurisdiction of the Bureau to resolve disputes.

Response

A Department action or decision is appealable only if the provider is "aggrieved" under 67 Pa.C.S. § 1102(a). For a provider to be aggrieved, the underlying adverse action must be adjudicative in character under 67 Pa.C.S. § 1101 (relating to definitions). "Adjudicative agency actions are those that affect one individual or a few individuals, and apply existing laws or regulations to facts that occurred prior to the adjudication." *Small v. Horn*, 585 Pa. 600, 722 A.2d 664 (1998). Act 142 specifies that hearings under the act only involve "adjudications of the Department relating to the administration of the

[MA] Program" and that encompass "action[s] relating to a provider's enrollment in, participation in, claims for payment or damages under or penalties imposed under the program."

When the Department undertakes an adjudicative action, Act 142 and this regulation apply and the aggrieved provider must file a timely and proper request for hearing to contest the action. Because an adjudicative agency action may be undertaken by a subordinate official, Act 142 and this regulation supersede 1 Pa. Code § 35.20 (relating to appeals from actions of the staff), which would otherwise permit a provider to appeal the action of a subordinate officer directly to the Secretary of the Department (Secretary). Under Act 142 and this regulation, an appeal must be filed with the Bureau.

Adjudicative actions do not include agency actions that are legislative in character—that is, actions that result in rules of prospective effect and bind all, or at least a broad class of, citizens. *Small v. Horn*. Under existing Pennsylvania law, the issuance of regulations is a legislative act, not an "adjudication." *Laurel Lake Ass'n v. Pennsylvania Fish and Boat Comm'n*, 710 A.2d 129, 132 (Pa. Cmwlth. 1998); *Insurance Co. of North America v. Insurance Dept.*, 15 Pa.Cmwlth. 462, 327 A.2d 411 (1974). Consequently, a petition requesting the issuance, amendment or repeal of regulations does not involve an appealable adjudicative action and, therefore, would not fall within the scope of Act 142. Thus, the Bureau has no jurisdiction to consider these petitions, which should be filed under 1 Pa. Code § 35.18 (relating to petitions for issuance, amendment, waiver or deletion of regulations) and the GRAPP would apply in these matters.

The Bureau recognizes that a provider may request a waiver of a regulation or request declaratory relief without an underlying appealable action having been taken by the Department. As discussed as follows, these requests fall outside the scope of the jurisdiction conferred by Act 142. Instead, these requests must be made by petition under 1 Pa. Code § 35.18 and the GRAPP, which would apply in these matters.

So long as there is no underlying appealable "agency action," the procedures governing petitions for relief are those in the GRAPP. When an appealable action is taken, however, Act 142 and the regulation will apply. Thus, the regulation requires that all issues and requests for relief relating to an appealable agency action, including requests for waiver of a regulation or a dispute over the applicability or meaning of a regulation or policy, must be set forth in a proper and timely request for hearing.

General—Regulations

Various commentators suggested that the Bureau possesses the power to waive the application of the Department's regulations. In addition, the Independent Regulatory Review Commission (IRRC) suggested that 67 Pa.C.S. § 1105(a) (relating to determinations, review, appeal and enforcement) could be construed to grants these powers to the Bureau and stated that "the Department should clarify its rationale" for limiting the power to waive program requirements to the Secretary. Similarly, in commenting on § 41.191(b) (relating to determinations and recommendations by the Bureau), IRRC stated that the Department should either "delete language which restricts the Bureau's authority to adjudicate waiver requests presented in a request for hearing, or explain its rationale for this restriction in the final-form regulation."

Response

The Secretary is specifically vested under 67 Pa.C.S. § 1105(b)(3) with the discretionary authority to "waive compliance with program requirements, [in order] to promote fairness and the proper administration of the program." While Act 142 grants various powers to the Bureau, it does not confer the power to waive regulations on Bureau. Since Act 142 expressly empowers the Secretary, but not the Bureau, with waiver authority, it demonstrates the General Assembly's determination that the Bureau should not possess this authority. Moreover, that Act 142 mentions the Secretary's waiver power as part of the appeal process that occurs only after the Bureau has concluded its work underscores the legislative intent that the waiver power should not be exercised by the Bureau in prior stages of the appeal proceedings.

The Department disagrees with IRRC's view that the Bureau's general authority to "adjudicate[e] . . . contested issues of fact and law," and to issue "any appropriate order, decree or decision" implicitly and necessarily includes the power to waive compliance with the Department's regulations. Regulations are rules of general applicability, adopted by an agency under its policymaking discretion and have the force and effect of law. They are binding on all providers and "substantial" but less-than-complete compliance with them is generally inadequate. *Ashton Hall, Inc. v. Department of Public Welfare*, 743 A.2d 529 (Pa. Cmwlth 1999). Thus, a waiver effectively excuses a provider from complying with a regulations with which all other providers are bound to comply.

The legislature's decision to repose the exclusive authority to grant extraordinary relief in the Secretary is entirely reasonable and consistent with the preeminent role the legislature has assigned to the Secretary in administering the Commonwealth's public health and welfare programs. Specifically, under section 403(a) of the Public Welfare Code (62 P. S. § 403(a)), the General Assembly has designated the Secretary as "the only person authorized to . . . interpret, or make specific the law administered by the department," and has charged the Department which the Secretary manages with the duty to "maintain[ ] uniformity in the administration of public welfare . . . throughout the Commonwealth." See also *Pelton v. Department of Public Welfare*, 514 Pa. 323, 330, 523 A.2d 1104, 1107 (1987) ("[I]t is the secretary alone who is authorized to establish and interpret rules, regulations and standards for eligibility [under the Public Welfare Code]").

Further, the decision to grant or deny a waiver arises only after a determination is made that a provider is subject to the requirements of a regulation. Thus, it does not involve the determination of contested issues or fact or law. Rather, it is an issue involving the discretion and judgment of the policymaker. Conceptually, it is a post-hoc version of "prosecutorial discretion," a power not possessed by adjudicative tribunals. See, for example, *Commonwealth v. Kratsas*, 564 Pa. 36, 764 A.2d 20 (1999). Unlike the Bureau, whose role is limited to serving as a quasi-judicial adjudicative tribunal, the Secretary has a multiplicity of roles and powers. Acting under quasi-judicial powers, the Secretary possesses the power to "affirm, reverse or modify the determination of the bureau" under 67 Pa.C.S. § 1105(b)(3). However, the Secretary's power to "waive compliance with program requirements" is a discretionary power granted to the Secretary in the position as policymaker and, although Act 142 grants the Bureau the power to adjudicate

disputed issues of fact and law, it does not grant the Bureau the power to overrule the discretionary policy judgments of the Secretary.

Similarly, the Department disagrees with IRRC's interpretation the Bureau's authority to enter "any appropriate order, decree or decision" includes the power to waiver regulations. Preliminarily, the word "appropriate" is a term of limitation, not authorization. Moreover, this provision must be read in the context of the rest of the sentence, including the reference to "contested issues of fact and law." Because the question whether to grant a waiver is not a "disputed issue[ ] of fact [or] law," and because the Bureau has no jurisdiction to grant or deny a waiver request, an order that purported to do so would not be "appropriate."

General—Disparity of Sanctions

A commentator expressed concern that the sanctions that could be applied to providers were more severe than those that may be applied to the Department.

Response

The regulation is consistent with the allocation of the burden of proof in provider appeals, with *Snyder Memorial Health Center v. Department of Public Welfare*, 898 A.2d 1227 (Pa. Cmwlth 2006) and the rules of the Federal Provider Reimbursement Review Board. If the party that bears that burden is sanctioned and cannot present evidence, it follows that that party cannot carry its burden, in which case judgment must be entered for the other side. On the other hand, if the party that does not bear the burden of proof is sanctioned, the party with the burden of proof still bears that burden. Therefore, judgment can only be entered on behalf of the latter party if that party satisfies its burden. As discussed elsewhere, § 41.153(a) now establishes a limited exception to the general rule that the provider bears the burden of proof. In that limited exception, the sanction of dismissal applies to the Department, rather than to the provider, but only as to those issues on which the Department bears the burden of proof.

General—1 Pa. Code § 35.19. Petitions for declaratory orders.

A commentator has suggested that the preclusion of requests for declaratory relief, which would correct and prevent misinterpretation or misapplication of law, regulations, policies or other guidance or instructions by a program office, prevents the Bureau from making "any appropriate order, decree or decision" or to determine contested issues of facts and law and make a decision. The same commentator suggests that declaratory relief is often appropriate for the resolution of provider appeals, as contemplated by Act 142.

Response

Declaratory relief involves a determination of a justifiable controversy when the plaintiff is in doubt as to its legal rights and duties and is not (yet) aggrieved. If a provider is aggrieved by an adverse agency action, substantive relief on the merits is available, the order to resolve the issue is not declaratory, and declaratory relief is unnecessary and unavailable. If a nonaggrieved provider seeks declaratory relief, the provider must seek it through a petition for relief.

Declaratory relief is unavailable when an action is filed in anticipation of another proceedings. *Department of General Services v. Frank Briscoe Co., Inc.*, 502 Pa. 449, 466 A.2d 1336 (1983). Therefore, if the provider has already been cited for a violation of the regulation, § 41.42(b) (relating to request for declaratory relief) requires that the issue raised in the petition must be set forth in the context of a request for hearing, and the petition for relief cannot be used to avoid or disrupt the Department's enforcement of the regulation.

Section 403(b) of the Public Welfare Code designates the Secretary as the sole person authorized to adopt orders that interpret or make specific the laws administered by the Department. *Department of Public Welfare v. Presbyterian Medical Center of Oakmont*, 877 A.2d 419 (Pa. 2005). The Department interprets this provision to mean that the power to grant declaratory relief is vested with the Secretary and not with the Bureau.

§ 41.1. Scope.

Several commentators and IRRC raised several concerns including that the effective date of the final-form rulemaking is contrary to law and inconsistent with the Secretary's expressed effective date and must be changed. They asserted that the regulation cannot be effective unless, and until, the Department amends the rulemaking to invoke its authority under 2 Pa.C.S. §§ 501—508 and 701—704 (relating to Administrative Agency Law) to adopt rules of procedure inconsistent with the GRAPP. They also asserted that the regulation does not result in an independent forum designed to hear other kinds of provider matters de novo.

Response

Chapter 41 is not exclusive and does not override current Departmental practice or regulations when Chapter 41 is silent. The Bureau is the statutorily mandated forum for hearing provider appeals under Act 142 and is charged by the same statute with the de novo hearing and adjudication of appeals in a fair and impartial manner. Chapter 41 has specifically been designed to advance the speedy and efficient adjudication of disputes. For due process reasons, Chapter 41 has been revised to be effective from the date of publication. Appeals filed prior to that date will be governed by the Bureau's standing practice order (SPO), published at 33 Pa.B 3053 (June 28, 2003) or by earlier rules of procedure in the GRAPP.

Act 142 grants to the Bureau the power to adopt these procedural regulations. The regulations are designed to address all types of provider appeals, including, but not limited to, the numerous appeals that are typically filed by nursing facility providers. The regulations strike an appropriate balance. Sections 501—508 and 701—704 of 2 Pa.C.S. do not limit or affect the authority granted by Act 142 and, to the extent that the regulations enacted under that authority expressly or implicitly supersede provisions in the GRAPP, these regulations necessarily prevail.

§ 41.1(b). Scope.

One commentator raised the concern that this provision is too vague and unfairly incorporates by reference unspecified Departmental regulations and this reference should be stricken.

Response

The individual sections of the regulation identify the provisions of the GRAPP and the Department's other regulations that are superseded. In the event that another regulation appears to conflict with provisions of Chapter 41, the Bureau will resolve these issues on a case by case basis.

§ 41.1(c). Scope.

One commentator raised the concern that this section may confuse providers or be used to preclude appeals

brought by recipients of MA. The commentator further suggested the section be changed to show that appeals under Chapter 275 (relating to appeal and fair hearing and administrative disqualification hearings) remain unaffected by § 41.1(c). Another commentator suggested that § 41.1(c) conflicts with Act 142.

Response

Section 41.1(c) differentiates between the two classes of appeals: recipient appeals and provider appeals. Recipient appeals are filed under Chapter 275. Act 142 only pertains to provider appeals.

§ 41.2. Construction and application.

Two commentators stated that § 41.2 does not provide for conflicts between Act 142, the regulations and "other applicable Department regulations." Another commentator found this section incomplete in that it fails to provide the Bureau with authority to waive strict compliance with procedures.

Response

Chapter 41 does not conflict with Act 142 but, if it were to conflict, the statutory provision in Act 142 would necessarily prevail. Chapter 41 governs practice and procedure in MA provider appeals. To the extent that other regulations of the Department also affect practice and procedure in those appeals, the Bureau will seek to harmonize those regulations with Chapter 41. In the event that a particular provision cannot be harmonized with Chapter 41 and does conflict, the provision of Chapter 41 will control, but only to the extent that it affects practice and procedure in provider appeals before the Bureau.

§ 41.3. Definitions.

One commentator suggested § 41.3 redefines "hearing" as something different than Act 142. Another commentator and IRRC suggested that "senior Department official" is defined too broadly. A third commentator felt that the definitions excluded audit appeals from audits by the Attorney General.

Response

Act 142 uses "hearing" in a variety of ways. The definition of that term in § 41.3 reflects those uses.

Act 142 defines "hearing" to be a "proceeding" started by a provider under 67 Pa.C.S. § 1102(a). When used in this manner, the term is synonymous with terms such as "action," "appeal" and "matter" used in 2 Pa.C.S. § 101 (relating to definitions). Subparagraph (i) of the definition of "hearing" in § 41.3 is consistent with that usage.

In some instances, Act 142 uses "hearing" to refer to parts of an action at which evidence is presented and interlocutory disputes are considered and resolved. For example, see 67 Pa.C.S. § 1102(e)(1) and (2) and 67 Pa.C.S. § 1104 (relating to subpoenas). Subparagraphs (ii) and (iii) of the definition of "hearing" reflect these uses. In addition, to improve the clarity of the regulation, the Bureau has retained the term "provider appeal" as a synonym for "hearing" as defined by 67 Pa.C.S. § 1101. As retained, the term does not encompass actions started by "petitions for relief."

The term "senior Department official" has been amended to exclude clerical staff who work for the Secretary. To the extent that the Department uses an audit issued by the Auditor General to set rates or to take some other agency action from which a provider is aggrieved, the provider would be required to file a request for hearing with the Bureau contesting the findings in the audit. See *Temple University v. Auditor General*, 403 A.2d 1048 (Pa. Cmwlth 1979). Act 142 and Chapter 41 apply to these appeals.

§ 41.5. Jurisdiction of the Bureau.

Various commentators and IRRC expressed concerns about the apparent limitation of the Bureau's jurisdiction in § 41.5(b) and (c). One commentator viewed § 41.5(e) as unnecessary and suggested the subsection should be deleted to avoid confusion and potential litigation with Medicaid providers over actions taken by Federal agencies.

Response

As previously discussed, the Bureau only has jurisdiction to hear a provider appeal if the provider aggrieved by an adjudicative act of the Department. Also as previously discussed, if an aggrieved provider files a request for hearing and, therein, asks that the application of a regulation or other program requirement be waived, 67 Pa.C.S. § 1105(b)(3) specifies that the relief may only be granted by the Secretary. Therefore, in a provider appeal, the role of the Bureau is limited in the manner in § 41.5(b). The process on waiver requests fulfills the requirements placed upon the Bureau by Act 142 to review independently, to make a record and to present a recommendation to the Secretary for final administrative action. Section 41.5(d) necessarily limits the jurisdiction of the Bureau to exclude proceedings which, although a Departmental action, require appeal to the Department of Health and Human Services under the *Code of Federal Regulations*.

§ 41.12(e). Form.

IRRC questioned why a legal document could not be electronically submitted.

Response

The Bureau currently does not have the capacity to accept or to log large scale electronic filings. The Bureau will continually review technology and funding to see if and when electronic filings may be feasible.

§ 41.14. Verification.

One commentator suggested the verification requirement is unduly burdensome and overly broad and consequentially should be eliminated.

Response

Courts routinely require litigants to verify facts in the documents that they file. See, for example, Pennsylvania Rule of Civil Procedure (Pa.R.C.P.) 1024 (relating to verification). The Bureau has determined that verification should likewise be required in MA provider appeals. A fact contained in a pleading or legal document that has not been previously verified or stipulated by the parties must be verified in the specified form or in a form that substantially complies with this section. Therefore, § 41.15 imposes no more burden than would be required if 1 Pa. Code § 33.12 (relating to verifications) were applicable.

§ 41.15(c). Copies of documents.

One commentator suggested § 41.15(c) should be amended to provide a process by which protected information will be identified and redacted.

Response

Section 41.134 (relating to discovery motions) addresses the commentator's concern. Section 41.134 allows for

Motions in Limine to be entertained at any time, before, with or after filing if needed to protect information protected by law.

§ 41.21. Notice of agency actions.

Various commentators raised concerns of sufficiency of notice in § 41.21(a)(3), which permits notice in the *Pennsylvania Bulletin* of an agency action affecting a general class of providers.

Response

Generally, the Department notifies providers of agency action by first class mail. In some limited instances, however, the Department's regulations specify that the Department will notify providers of an appealable agency action by publication in the *Pennsylvania Bulletin*. For example, the Department annually publishes a public notice announcing the "peer group prices" for the nursing facilities enrolled in the MA Program and § 1187.141(a)(1) (relating to nursing facility's right to appeal and to a hearing) expressly permits the individual nursing facility providers to contest the peer group prices by filing appeals with the Bureau.. In addition, this section permits the Department to provide notice by publication when other forms of notice are unavailable or impracticable.

§ 41.22. Service of pleadings and legal documents.

IRRC suggested changing the term "General Counsel" in § 41.22(1)(ii) and (2)(ii) to "Chief Counsel" to maintain consistency with § 41.112(b) (relating to filing of position paper).

Response

The subparagraphs were changed to correspond with IRRC's suggestion.

§ 41.25. Amendment or withdrawal of legal documents.

One commentator noted concern that § 41.25 may be interpreted as interfering with the right of a provider to withdraw its appeal and will generate unnecessary motion practice before the Bureau. Another commentator is concerned that § 41.25 incorrectly supersedes 1 Pa. Code §§ 33.41, 33.42 and 33.51 (relating to amendments; withdrawal or termination; and docket). The same commentator noted the Bureau has not followed the practice of other Commonwealth agencies in either adopting 1 Pa. Code § 33.51 or another, separate regulation with the same language which permits public access to docketing information.

Response

Section 41.25 does not concern the withdrawal of provider appeals. A separate section, § 41.83 (relating to withdrawal of provider appeals), provides a specific appeal procedure and does not generate motion practice. The Bureau is currently reviewing various methods of installing computers and software in the Bureau's main regional offices for the public to review docket information. Under 67 Pa.C.S. § 1102(E)(2)(viii), the Bureau has created a researchable electronic index of Act 142 decisions, which is accessible at www.dpw.state.pa.us/oa/bha/searchdecisions.asp.

§ 41.31(a). Request for hearing.

Two commentators raised a concern that, as presently worded, the section is too subjective as to what constitutes an appeal and that the section excludes the acts of Departmental subordinates as being appealable.

Response

Under 67 Pa.C.S. §§ 1101 and 1102(a) and (b)(2), the Department must have undertaken some affirmative action of an adjudicative nature for a right to a hearing to arise.. Moreover, 67 Pa.C.S. § 1102(b)(2) requires that, for a provider's right to appeal to arise, the provider must have received a written notice "notice of departmental action" from the Department. An MA provider's right to appeal an agency action is not dependent on the management level at which the action was taken, but on whether the action was an "adjudication" and whether it has caused the provider to be "aggrieved."

§ 41.31(b). Request for hearing.

Several commentators asserted that the detail in pleading an appeal creates an onerous burden on a provider and suggested this subsection be amended to require that the Department answer hearing requests. One commentator indicated this subsection improperly restricts a provider's ability to seek declaratory relief before the Bureau.

Response

The Department's written notices of agency actions are required to and generally contain sufficient information for providers to determine if and why they disagree with an agency action. For example, when the Department issues a notice of termination under § 1101.77 (relating to enforcement actions by the Department), the notice states the basis for the action, the effective date of the action and whether and when the Department will consider re-enrolling the provider. See § 1101.77(d). Thus, providers are routinely provided with sufficient information to determine whether they are aggrieved and what issues they wish to pursue. The requirement for detailed pleadings and identification of specific issues arises from the technical nature of the subject matter and the need to narrow factual and legal issues for a quicker decision during the appeal process.

The requirement of detailed pleading by providers is not new. Department regulations have long required that all MA providers "explain in detail the reasons for [their] appeal" in their notices of appeal (§ 1101.84(a)(4) (relating to provider right of appeal)), and, since January 1996, have required that appeals by MA nursing facility providers "state in detail the reasons why the facility believes the [Department's] decision is factually or legally erroneous and the specific issues that the facility will raise in its appeal" (§ 1187.141(d)(2)).

Most providers know why they disagree with a Department determination when they file an appeal. In the relatively few instances when the reasons for the Department's actions may be unclear, the statute and the regulation allow providers an additional 90 days to evaluate the Department's determination. This additional period permits providers a sufficient amount of time to identify the bases for their appeals in the majority of cases.

The Department is not required to plead an answer to the appeal. This requirement would extend the adjudicatory timeline and is unnecessary, as the Department's answer would be duplicative of the notice of department determination, which announces the agency action being appealed. The unavailability of declaratory relief before the Bureau is previously explained.

§ 41.31(d)(4)(iii). Request for hearing.

IRRC suggested the subparagraph should include a reference to 1 Pa. Code § 35.19 (relating to petitions for declaratory orders).

Response

The Bureau changed § 41.31(d)(4)(iii) as suggested.

§ 41.31(e). Request for hearing.

Two commentators suggested it is unduly burdensome to require a provider to attach a copy of the entire written notice when there is no transmittal letter, the elimination of this requirement would reduce the amount of paperwork required of providers and that the Bureau should only require the attachment of those pages which indicate the rejection of the invoices.

Response

For the Bureau to determine whether it has jurisdiction to hear an appeal, the Bureau must examine the notice of departmental determination and, to facilitate the review, access to the entire notice is necessary. There is very little burden on providers to attach the adverse action notice. Since the SPO was promulgated in 2003, this requirement has not proven burdensome to providers. In most cases, the adverse action letter is one to three pages. In the limited cases of appeals that fall under § 41.92, the provider may provide the Remittance Advice Notice, the invoices and adverse action letter that indicates the rejection of the invoices.

§ 41.32. Timeliness and perfection of requests for hearing.

One commentator suggested the language should be revised to clarify that issues presented with sufficient specificity will not be dismissed.

Response

The provision is already sufficiently clear. Section 41.32(d) and (e) requires providers to identify the facts, issues and requested relief with specificity. By doing so, the Bureau and the opposing parties will understand why the appeal has been filed. If the provider meets the requirements of § 41.32(d) and (e), then the appeal will not be dismissed.

§ 41.32(a)(2). Timeliness and perfection of requests for hearing.

IRRC suggested the Department explain when and in what other manner would the Department give notice to the provider and when the Department would not contact a provider by mailing notice.

Response

The explanation of the Department's use of the *Pennsylvania Bulletin* to provide notice is set forth in the response to questions on § 41.21 (relating to notice of agency actions).

§ 41.32(c)(2)(ii). Timeliness and perfection of requests for hearing.

Two commentators suggested § 41.32(c)(2)(ii) should be deleted because there is no justification for precluding an amendment when the Department failed to provide a full and accurate disclosure and later discovered information contradicts the previously disclosed information.

Response

The statutory requirement that appeals be timely filed, and the limitation on amendments to those appeals as of right, is a jurisdictional requirement. *J. C. v. Department of Public Welfare*, 720 A.2d 193 (Pa. Cmwlth 1998); *Divine Providence Hospital v. Department of Public Welfare*, 463 A.2d 118 (Pa. Cmwlth 1983). When the Bureau published the proposed SPO, the 90-day amendment period would have made no allowance for amendments nunc pro tunc. Requiring the same nunc pro tunc showing for an amendment is consistent with Act 142 and adequately addresses the concerns of the commentators. By providing this exception, § 41.32(c)(2)(ii) reduces the likelihood of a need to reopen the record as provided for in § 41.201 (relating to reopening of record prior to adjudication).

§ 41.32(d). Timeliness and perfection of requests for hearing.

One commentator suggested this section is overly broad, divests the Bureau of its inherent discretion and should be revised to replace "shall" with "may."

Response

According to Act 142, the Bureau's jurisdiction is limited to appeals that are "timely filed" or appeals that satisfy the standard for being heard nunc pro tunc. In addition, the Bureau will only adjudicate the "factual and legal issues raised by a provider in the request for hearing . . . ." See 67 Pa.C.S. § 1102(e)(2)(iii) and (vii). Under 67 Pa.C.S. § 1102(d), a provider can only amend its request for hearing as of right within 90 days of the date that it was originally filed. Section 41.33(d) (relating to appeals nunc pro tunc) reflects these limitations. The same limitations routinely appear in similar rules of court.

§ 41.32(e). Timeliness and perfection of requests for hearing.

One commentator and IRRC stated concerns that this section limits the inherent authority of the Bureau and compels the Bureau to dismiss an appeal without consideration of the relevant facts and circumstances.

Response

The Bureau's jurisdiction to hear providers' appeals exists under Act 142. Section 1102(e)(2)(iii) of 67 Pa.C.S. grants the Bureau the authority to "adjudicate timely filed requests for hearing." In addition, 67 Pa.C.S. § 1102(c) grants the Bureau the authority to hear appeals nunc pro tunc, but only if certain requirements are met. Read together, these provisions mean that, unless a provider makes a "written request . . . for a hearing nunc pro tunc," and satisfies the burden off "good cause shown," the Bureau has no jurisdiction to hear the untimely appeal. Therefore, it is the responsibility of the provider to present the Bureau with the "relevant facts and circumstances."

§ 41.32(f). Timeliness and perfection of requests for hearing.

One commentator suggested this section should be subject to the requirements of § 41.32(g), which requires the Bureau to issue a rule to show cause if the dismissal is based upon the Bureau's own motion. Another commentator and IRRC suggested this section limits the Bureau's inherent authority because it compels the Bureau to dismiss an appeal without consideration of the relevant facts and circumstances. One commentator suggested this section creates a potential for abuse by the Bureau because it does not require the Bureau to include a reason for the dismissal in its order.

Response

As previously discussed, the timeliness of an appeal is a jurisdictional requirement. Consequently, timeliness can be addressed by the Bureau sua sponte. Because a program office is required to serve its motions on the provider, after which the provider has the opportunity to file an appropriate response with the Bureau, § 41.32(f) and (g) only applies to a dismissal made by the Bureau on its own motion. If the Bureau believes the conditions of

§ 41.32(f) are met, the Bureau will issue a rule to show cause and allow the provider an opportunity to respond. Section 41.32(d) and (e) requires providers to identify the facts, issues and requested relief with specificity. By doing so, the Bureau and the opposing parties will understand why the appeal has been filed with the Bureau. If the provider meets the requirements of § 41.32(d) and (e), its appeal will not be dismissed. The Bureau's practice has always been to notify parties of the reasons for its orders.

§ 41.33. Appeals nunc pro tunc.

One commentator suggested § 41.33 should include granting a hearing or an amendment nunc pro tunc when an intervening natural disaster or action of third parties make timely compliance impossible or unsafe. The commentator also suggested the Secretary may grant leave to a party to file a request for review of the Bureau when an intervening natural disaster or action of third parties makes timely compliance impossible or unsafe. The commentator also suggest that the section supersede §§ 1187.1(d) and 6210.14(b) (relating to policy; and time extensions).

Response

When considering the issue of appeals nunc pro tunc, the Bureau will apply the standards in *Bass v. Commonwealth*, 485 Pa. 256, 401 A.2d 113 (1979), and its progeny. These common law standards establish specific criteria to determine whether or not a delay in the filing of the appeal was caused by extraordinary circumstances involving fraud or some breakdown in the administrative process or non-negligent circumstances related to the appellant, his counsel or a third party. *H.D. v. Pennsylvania Department of Public Welfare*, 751 A.2d 1216 (Pa. Cmwlth. 2000). The Bureau amended § 41.33 to supersede §§ 1187.1(d) and 6210.14, but only insofar as these sections affect the time for filing a provider appeal or for amending a provider appeal.

§ 41.41. Waiver request.

One commentator suggested this section precludes the beneficial effects of waiver requests. The commentator believes this section is inconsistent with the limitations on the Bureau's jurisdiction conceded in § 41.5(c) (relating to jurisdiction of the Bureau). Two other commentators suggested this section is beyond the scope of the rulemaking authority granted by Act 142 and this section improperly restricts the ability of a provider to obtain consideration of waivers. A fourth commentator suggested the Bureau should be required to provide notice to a provider of a nonconforming petition or request with the opportunity for revision rather than outright dismissal. IRRC suggested § 41.41(c) be clarified to specify the dismissal for failure to include the waiver petition will only occur in a given case.

Response

The Bureau's lack of jurisdiction to grant a waiver request and the process for addressing requests in the context of a request for hearing are previously discussed.

§ 41.42. Request for declaratory relief.

One commentator suggested this section fails to achieve a just, speedy and inexpensive resolution of issues and disputes, and it requires unnecessary procedures for the preservation of rights. The commentator proposed a change that sets up procedures when a request for declaratory order has been included in a request for hearing and the same request is also filed in a petition for relief. Another commentator suggested the section alters the nature of proceedings based on petitions for relief and declaratory relief that exceed the scope of Act 142.

Response

Declaratory relief involves a determination of a justifiable controversy when the plaintiff is in doubt as to its legal rights and duties and is not (yet) aggrieved. If a provider is aggrieved by an adverse agency action, substantive relief on the merits is available and declaratory relief is unnecessary and unavailable. If a nonaggrieved provider seeks declaratory relief, the provider must seek it through a petition for relief.

Declaratory relief is unavailable when an action is filed in anticipation of another proceeding. *Department of General Services v. Frank Briscoe Co., Inc.*, 502 Pa. 449, 466 A.2d 1336 (1983). Therefore, if the provider has already been cited for a violation of the regulation, § 41.42(b) requires that the issue raised in the petition must be set forth in the context of a request for hearing and the petition for relief cannot be used to avoid or disrupt the Department's enforcement of the regulation.

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

One commentator suggested this section conflicts with Act 142 by attempting to limit the Bureau's authority to conduct de novo review. IRRC suggested that clarity might be achieved if the section was amended to include citations to the GRAPP or other related regulations concerning procedures to filing for this type of relief.

Response

The decision to issue, amend or delete a regulation is a nonadjudicative policy decision and is not appealable. *Laurel Lake Association, Inc. v. Pennsylvania Fish and Boat Commission*, 710 A.2d 129 (Pa. Cmwlth 1998). This section merely declares a provider who seeks the issuance, amendment or deletion of a regulation needs to do so by filing a petition for relief. The section was changed to include reference citations to GRAPP.

§ 41.51. General.

IRRC commented that § 41.51(f) should include a list of examples from the Department as to what appropriate sanctions, other than costs, would be imposed on a party who files a petition for supercedeas in bad faith or on frivolous grounds.

Response

Other appropriate sanctions will be based on case law for similar sanctions within the judicial system and case law. One example is barring the attorney, who knowingly filed a bad faith or frivolous petition, from practicing before the Bureau. Several factors will be reviewed on a case-by-case basis such as the severity of the violation and the history of violations.

§ 41.53. Circumstances affecting grant or denial.

Three commentators suggested this section established an irrebuttable presumption that injury to the public health, safety or welfare "shall be deemed to exist" whenever State or Federal law or regulation requires that an action take effect prior to the final determination of an appeal. They also assert that this section unduly limits the authority of the Bureau to consider all relevant circumstances when determining whether a supersedeas should be issued. IRRC suggested the Department should clarify whether the elements in § 41.53(a) will always be considered or if a combination will be considered. IRRC also suggested the Department should include examples

of or specific citations to State and Federal law that would be used as a basis for denying supersedeas.

Response

Except to the extent that case law indicates that less than all of the elements must be satisfied, a provider will be required to satisfy all of the elements in § 41.53(a) to obtain an order of supersedeas.

The second sentence of subsection (b) does not set forth a presumption. Rather, it encapsulates the well-established rule of law that a violation of law constitutes per se irreparable harm and that no further proof of harm is needed. *Pennsylvania Public Utility Commission v. Israel*, 356 Pa. 400, 52 A.2d 317 (1947). Likewise, if State or Federal law mandates a particular act, Act 142 does not grant the Bureau the power to bar or delay that act.

§ 41.61. Filing of petitions to intervene.

One commentator suggested this section should be revised to be consistent with 1 Pa. Code § 35.30 (relating to filing of petitions to intervene).

Response

To promote judicial economy, time constraints are necessary to provide a fair and expeditious hearing. Without a time constraint, a case could become delayed due to a last-minute intervention. This section allows the Bureau to extend the time period for an intervening party if good cause is shown and is similar to the process used in 1 Pa. Code § 35.30. Section 41.61 allows for filing of petitions to intervene after the deadline upon a showing of extraordinary circumstances and for good cause.

§ 41.71. Answers generally.

One commentator suggested the Department should be required to file answers to hearing requests in the same way a defendant answers a complaint. Several legislators noted the section should be amended because providers are required to file a detailed complaint, but the Department does not have to file an answer until discovery is complete.

Response

The Department previously will have notified the provider with an adverse action notice detailing the reasons for the Department's action. Requiring an answer by the Department to the request for a hearing would be unnecessary and redundant and would unnecessarily extend the timeline of the appeal process.

§ 41.81. Consolidation of provider appeals.

One commentator suggested this section should be revised to limit the discovery to both parties upon consolidation. Another commentator suggested this section should be amended to permit providers to consolidate requests for a hearing from the outset to ensure efficiency.

Response

This section does not limit the discovery available to providers under the regulation. This section compels the providers to comply with § 41.120 (relating to limitations on scope of discovery), which limits discovery for all of the parties involved in a particular case. If a provider is aggrieved by an action of the Department, the provider will be willing to file a request for a hearing by his own volition. Otherwise, one provider, who is truly aggrieved, may solicit other providers to join in the request for a hearing when the other providers are not truly injured by the action of the Department. This section ensures that providers will file appeals only when they are truly aggrieved by the actions of the Department. This section will prohibit providers from frivolously joining in hearing requests of other providers.

§ 41.83. Withdrawal of provider appeals.

Two commentators suggested a voluntary withdrawal of an appeal should be without prejudice because this section is contrary to Federal Rule of Civil Procedure 41(a) (relating to voluntary dismissal; effect thereof). IRRC requested the Department explain why withdrawn appeals are with prejudice.

Response

A provider's power to withdraw an appeal is not the power to unilaterally suspend the matter until some later time of the provider's choosing. When a provider withdraws an appeal, the provider unilaterally terminates that appeal. Having abandoned the pursuit of its right to obtain quasi-judicial review of the Department's adverse action, the general rule is that the withdrawal is deemed to be with prejudice. Nonetheless, the Bureau has amended § 41.83(b) to allow for the possibility that, in certain instances, a withdrawn appeal might be reopened.

§ 41.92. Expedited disposition procedure for certain appeals.

One commentator suggested revising this section to allow parties to opt into rather than opt out of the expedited procedures upon stipulation by the parties or upon motion with good cause shown. According to the commentator, good cause exists in utilization review cases when the payments were improper for either lack of medical necessity or lack of documentation demonstrating medical necessity or the recovery is based on provider misconduct. IRRC believes parties should be allowed to opt in rather than opt out with respect to expedited disposition.

Response

The section provides for an expedited procedure for provider appeals in these instances: 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; and the denial of claims for payment under § 1101.68 (relating to invoicing for services). This section facilitates the prompt resolution of disputes and permits an impartial hearing official from the Bureau to assess whether a case warrants a protracted proceeding. Otherwise, the provider would have too much authority to control the appeal process while the Department would not. The regulations do not preclude the Department or the provider from filing an appropriate motion with the Bureau if the facts of the case warrant. Forcing small providers to opt into the expedited proceeding would compel them to expend additional funds for the advice of legal counsel to make this judgment.

§ 41.111. Disclosures.

One commentator asserted that the disclosure process is not designed to assure a just, speedy and inexpensive determination of provider appeals and could be "subject to abuse" by the program office staff. The commentator also asserted that the burden rests upon the provider to find relevant information while not requiring the agency to produce it. IRRC suggests that both the Department and the provider must comply with § 41.111(f). One legislator noted that the section should be amended because the Department is not required to make the same specific disclosures as is required for the providers.

Response

To facilitate the expeditious disposition of cases, the section should equally apply to both the provider and to the Department. Otherwise, one party could obstruct the discovery process for its tactical advantage. Also, it protects the integrity and the fairness of the process. A party may file a motion with the Bureau if it perceives that the opposing party is in noncompliance and the Bureau will review each motion on a case-by-case basis. A party may file a motion under §§ 41.131—136 (relating to motions).

§ 41.112. Filing of position paper.

One commentator notes standards should be equal for both parties when filing prehearing position papers. Also, another commentator advised that both the Department and the provider should receive equivalent sanctions for failing to file position papers within a certain period (§ 41.112(a) and § 41.113(b) (relating to content of provider position paper)). IRRC believes equal penalties should be imposed for both providers and the program office for failing to file position papers timely.

Response

As set forth in § 41.153(a), the general rule is that the provider bears the burden of proving that the contested agency action is in error. Because the provider bears the burden of proof, if it fails to file its position paper without good cause within the time limits in the section, the Bureau will enter an order against that party. If the program office does not carry the burden of proof, its failure to file its position paper timely and without good cause does not create a situation when the provider is entitled to judgment in its favor as a matter of law. Therefore, in an instance such as this, the Bureau will bar the program office from presenting evidence and witnesses at the hearing.

In those situations when the Department bears the burden of proof, the effect of this rule is reversed and it is the Department that bears the risk of dismissal (but only as to those issues on which it bears the burden of proof). The section is revised to reflect the greater burden on the party carrying the burden of proof. Nothing in § 41.112 should be construed to disallow properly submitted impeachment evidence.

§ 41.113. Content of provider position paper.

One commentator noted position papers cannot always quantify the amount in dispute because the Department has not published its database information. There was a suggestion the provider only be required to identify regulations that, if continued in effect, are applicable to determining amounts in the future.

Response

The position paper must state the relevant facts and present arguments setting forth the position of the party with the burden of proof. The section was amended to require the party carrying the burden of proof (as opposed to always being the provider) to state the relevant facts and present the appropriate arguments to set forth the party's position. That party must include the monetary amount in dispute. There are situations when the party carrying the burden of proof cannot specify the exact monetary amount in dispute but can identify regulations, which apply to ascertaining this amount at a future time. The section was amended to address situations when the failure to disclose is not the party's fault and must rely upon the opposing party or a third party to obtain this information.

§ 41.114. Content of program office position paper.

One commentator noted §§ 41.113 and 41.114 fail to supersede the inconsistent requirements of 1 Pa. Code §§ 35.164 and 35.165 (relating to documents on file with agency; and public documents).

Response

Section 41.114 is amended to require the party that does not carry the burden of proof to present to the opposing party (that is, the party carrying the burden of proof) a copy of every document it will offer into evidence to support its position on each issue identified in its position paper. This section conflicts with 1 Pa. Code §§ 35.164 and 35.165, which do not require the party to produce and to copy documents which it will use at the hearing. Sections 41.113 and 41.114 were amended to supersede 1 Pa. Code §§ 35.164 and 35.165. This section was also amended to show it applies to the party that does not carry the burden of proof, referred to as the opposing party.

§ 41.115. Statement regarding expert opinions.

IRRC noted subsection (c) lists the requirements for expert opinion statements. This subsection should also include the expert's qualifications.

Response

The section delineates the requirements for expert opinion statements which include: an identification of the substance; the facts and the opinions to which the expert is expected to testify; the subject matter on which the expert is expected to testify; an identification of the substance of the facts and opinions to which the expert is expected to testify; summary of the grounds of the expert's opinion; and the signature of the expert. However, the section does not include the expert's qualifications. The section was revised to require the position paper to include a brief synopsis of the expert's qualifications or a current curriculum vitae. The expert's qualifications are essential in assessing whether one should consider the witness to be an expert or not.

§ 41.116. Amendments to position papers.

One commentator noted parties should have the right to amend their witness lists for "good cause shown."

Response

As proposed, the section permitted the party to amend its position paper upon good cause shown, but the party would not have been allowed to amend less than 30 days before the hearing. The section was revised to permit amendments less than 30 days before the hearing if the party demonstrates good cause.

§ 41.117. Penalties for noncompliance.

One commentator suggested good cause to permit the testimony of a witness not identified in a party's position paper should include instances such as the death of an identified witness or when an identified witness is no longer employed by the party and another individual functions in that capacity. Another commentator suggested § 41.117(b) should not apply if the party only uses the document solely for impeachment purposes. IRRC recommended there should be a good cause exception to offer testimony as well as documents and § 41.117(a) and (b) should not apply to documents and testimony solely used for impeachment purposes.

Response

The section was revised so that the parties do not need to identify documents or testimony which they are using

for impeachment purposes or for rebuttal testimony. These documents are being used only to challenge or rebut the testimony of a witness and not as part of the party's substantive case.

§ 41.119. General scope of discovery.

IRRC suggested the Department should include specific citations to the relevant Pa.R.C.P. in the regulation.

Response

Section 41.119 was amended to include specific citations to the Pa.R.C.P.

§ 41.120. Limitations on scope of discovery.

One commentator noted there is no basis for a rule that automatically precludes the deposition of the Secretary if he is likely to have knowledge of discoverable information. Also, if a senior department official is likely to have discoverable information, then the senior department official should be obligated to appear for a deposition. Then, the Department would exercise complete control over this discovery process.

Response

The deliberations and policy decisions of the Secretary are protected by the deliberative process privilege. *Commonwealth ex rel. Unified Judicial System v. Vartan*, 557 Pa. 390, 733 A.2d 1258 (1999). Section 41.120(b) codifies that privilege and, under the rulemaking powers granted by Act 142, extends that privilege to encompass inquiries into purely factual matters. Therefore, unless the program office has named the Secretary to be one of its witnesses at the hearing, a provider cannot compel the Secretary to attend a deposition.

The protection afforded the Secretary is appropriate. First, it protects the Secretary's quasi-judicial role as is the ultimate adjudicator in the case on review of the Bureau determination. In addition, lower-ranking Departmental officials are agents of the Secretary and those officials possess knowledge of procedures. Also, the provider could seek to depose the Secretary as a tool to intimidate the Department and to hinder the Secretary from performing other official duties. The same rationale applies to senior Department officials. If senior Department officials were involved in the agency action, there are provisions that will allow those individuals to be deposed.

§ 41.122. Supplementing disclosures and responses.

One commentator and IRRC noted the word "or" should be inserted between "ordered by the Bureau" and "if the party learns."

Response

The section was revised to include the word "or" between "ordered by the Bureau" and "if the party learns."

§ 41.132. Actions on motions.

One commentator suggested this section should be revised to expressly supersede 1 Pa. Code § 35.180(a) (relating to action on motions).

Response

This section provides the Bureau will rule on dispositive motions within 60 days after receiving 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 the dispositive motion within 60 days after the date on which the nonmoving party's response was due. Also, the Bureau will rule on all other motions within 30 days after the response is due. The Bureau will decide all prehearing motions within 20 days of the response. Chapter 41 only applies to MA provider appeals under § 41.1 (relating to scope). However, if the Bureau were to fail to rule on a motion within this time period, that failure is not deemed to be either a grant or a denial of the motion.

§ 41.153(a). Burden of proof and production.

One commentator suggested amending the section to place the burden of proof on the Department in cases involving allegations of overpayment, violation of program regulations, imposition of sanctions or penalties and proposed termination of provider agreements. The same commentator suggested adding 2 Pa.C.S. §§ 501—508 and 701—704 to the statutory authority relied upon for these new rules. Two commentators suggested placing the burden of proof on providers in cases inconsistent with Act 142 and the Commonwealth's common law concerning the allocation of the burden of proof. One commentator requested the burden of proof be on the Department when the Department imposes a penalty. One commentator requested the program office should have the burden of proof. IRRC suggested the Department should describe if and when the shift in burden of proof occurs in any case. Three legislators requested amendments to the regulations because the regulations allegedly create a disparity between providers and the Department and the regulations are unfair if the providers always bear the burden of proof. One legislator suggested the party asserting the fact should carry the burden of proof instead of always placing the burden of proof on the MA providers. Several legislators noted that the section should be amended because they don't provide for de novo review for providers.

Response

Act 142 does not require that the burden of proof be borne by either the program office or the provider. Therefore, the Bureau possesses the discretion to allocate the burden of proof through the use of its rulemaking power. *Augelli v. Department of Public Welfare*, 468 A.2d 524, 525 (Pa. Cmwlth 1983). During the period that the SPO has been in effect, the burden of proof was invariably allocated to providers. This facilitated the expeditious resolution of appeals and it has worked well in practice.

Section 41.153(a) sets forth as a general rule that the provider bears the burden of proof on issues raised by it in its appeal. This comports with "the general rule . . . that the burden of proof is upon the party who, in substance, alleges that a thing is so, or, as it is more commonly put, the burden of proof rests upon the party having the affirmative of the issue as determined by the pleadings." *Lincoln Intermediate Unit No. 12 v. Bermudian Springs School District*, 65 Pa. Commw. 53, 441 A.2d 813 (1982). The acts of the Department are presumed to be valid and correct. *Forbes Metropolitan Health System v. Department of Public Welfare*, 558 A.2d 159 (Pa. Cmwlth 1988). In a provider appeal, the provider makes the affirmative assertion, that the contested agency action is invalid or incorrect.

However, after careful consideration of the comments, the section has been revised to reflect that the Department has the burden of proof if the notice of Departmental action asserts that the provider violated either of following provisions: section 1407(a)(1) of the Public Welfare Code (62 P. S. § 1407(a)(1)); or § 1101.75(a)(1) or (2) (relating to provider prohibited acts).

Generally, the laws and regulations administered by the Department do not include an element of scienter and, therefore, those laws and regulations can be enforced through administrative action without consideration of this element. *Girard Prescription Center v Department of Public Welfare*, 496 A.2d 83, 86 (Pa. Cmwlth 1985). Section 41.153(b) identifies the three provisions that are the exception to that general rule. To enforce these provisions through administrative action (as opposed to criminal prosecution or the beginning of a civil law suit), the Department must first make a determination that the provider acted with specific intent. In these instances, the Bureau finds that it is appropriate for the Department to bear the burden of proving that the provider violated the specified provisions. This shift of the burden of proof is consistent with the common law rule that fraud cannot be presumed, but must be proved. Section 41.153 was amended to account for this change in the burden of proof.

It is unnecessary to add specifically 2 Pa.C.S. §§ 501—508 and 701—704 to the statutory authority relied upon for these new rules because the regulation does not state that 2 Pa.C.S. §§ 501—508 and 701—704 is superseded by this regulation. The common law in this Commonwealth requires the application of 2 Pa.C.S. §§ 501—508 and 701—704 in cases involving Commonwealth agencies unless specifically superseded by regulation or statute. In addition, the powers enumerated in Act 142 provide sufficient authority.

§ 41.161(a). Written testimony.

One commentator asked whether this section expressly supersedes 1 Pa. Code § 35.137 (relating to oral examination).

Response

The section specifically supersedes 1 Pa. Code §§ 35.138 and 35.139 (relating to expert witnesses; and fees of witnesses). Section 41.161(a) concerns the admission of the written testimony of a witness, including expert witnesses instead of the witness testifying in person before the Bureau. The regulations do not supersede 1 Pa. Code § 35.137. The regulation at 1 Pa. Code § 35.137 refers to oral examination of a witness at a hearing and provides that "witnesses shall be examined orally unless the testimony is taken by deposition as provided in §§ 35.145—35.152 (relating to depositions) or the facts are stipulated in the manner provided in § 35.112 (relating to conferences to expedite hearings) or in § 35.155 (relating to presentation and effect of stipulations) or the testimony is submitted in prepared written form as provided in § 35.138 (relating to expert witnesses). Witnesses whose testimony is to be taken shall be sworn, or shall affirm, before their testimony shall be deemed evidence in the proceeding or any questions are put to them." This section is in conformance with 1 Pa. Code § 35.137. However, this section adds to the provisions by specifying that a witness should be present for cross-examination or the parties must agree the witness' presence at the hearing is not required.

§ 41.162(a). Subpoenas.

IRRC asked that this section address the power which Act 142 granted to the Bureau to enforce subpoenas in Commonwealth Court, as specified in 67 Pa.C.S. § 1104(a).

Response

This section was not amended.

§ 41.171. Independence.

One commentator requested the definition of "presiding officer" be amended to indicate whether the appointed individual must be an employee of the Bureau or can be an employee of a program office. IRRC requested the Department explain the consequences resulting from noncompliance if a presiding officer engages in ex parte communication despite prohibition.

Response

The definition of "presiding officer" was added to § 41.3 (relating to definitions). A party who believes the presiding officer engaged in an inappropriate ex parte communication or is not acting in an independent manner from the Department may file a motion with supporting affidavits with the Director requesting the disqualification of the presiding officer from the specific appeal. The Director will review the facts and make an appropriate decision whether disqualification is appropriate.

§ 41.191(b). Determinations and recommendations by the Bureau.

One commentator suggests this section, in conjunction with § 41.5(b), creates a process inconsistent with Act 142 and requests the Department eliminate the section because Act 142 did not authorize a special waiver requests process. IRRC asked that the Department delete language restricting the Bureau's authority to adjudicate waiver requests presented in a request for hearing, or that the Department provide a justification for this rule.

Response

As previously explained, only the Secretary possesses the power to waive the application of a regulation or other program requirement. Therefore, in the absence of a delegation of that power to the Bureau, the Bureau has no power to do this. When a provider includes a waiver request in its request for hearing, the Bureau's role is to receive evidence from the parties on the question whether compliance with the program requirement should be waived, and to prepare a recommendation on that issue for the Secretary's consideration.

§ 41.201. Reopening of record prior to adjudication.

One commentator requests the section be amended to specifically afford a complete remedy when justice requires reopening the record and considering previously unavailable material evidence. IRRC requested the Department explain if parties can file amended pleadings and position papers if the record is reopened.

Response

This section was amended to add an additional subsection. That subsection specifies that, if the Bureau elects to reopen the record, and upon written request or motion to the Bureau or sua sponte by the Bureau, a provider will be afforded the opportunity to file an amendment to its request for hearing and that both parties will be permitted to file amended position papers. If the submittal of amended position papers is allowed, they shall be submitted in the same order as provided for in § 41.112, although the Bureau may alter the timing of the submittals.

§ 41.212(f) and (i). Review of Bureau determinations.

One commentator requested clarification on subsections (f) and (i) as to when a request is deemed denied or approved by virtue of the Secretary's inaction.

Response

If a request for review of the Bureau's determination is not acted upon by the Secretary within 30 days of receipt, then the request to review the determination is denied. If, after requesting the review of a determination, the Secretary grants the request and begins a review process, that review will be completed within 180 days. If the Secretary fails to issue an order before the 180th day, then the review will be deemed denied as against the requestor.

§ 41.213. Review of the Bureau recommendations.

One commentator suggested Act 142 does not empower the Bureau to make recommendations under this section, which allows for differential treatment of waiver requests, as opposed to other types of requests for a hearing.

Response

As previously explained, the Bureau has no jurisdiction to grant or deny a provider's waiver request. Therefore, the most that the Bureau can do is create a record for the Secretary's consideration, and prepare a recommendation regarding the request.

§ 41.214. Appeals.

One commentator noted Act 142 makes the Bureau's determination "binding upon" both parties unless the Secretary reviews the determination. Another commentator requested this section be amended to clearly enumerate the procedural requirements for judicial review.

Response

This section clearly indicates an aggrieved party who wishes to appeal for judicial review of either a final adjudication of the Bureau or the final order of the Secretary should refer to 2 Pa.C.S. Chapter 7 (relating to judicial review). If this section were altered or amended to specify the exact judicial body to which an appeal should be filed, then this section would work to supersede the statute. The statute more clearly specifies the procedural requirements for judicial review and a specification in this section would be redundant and potentially confusing.

Sunset Date

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

Regulatory Review Act

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 the notice of proposed rulemaking, published at 34 Pa.B. 4447, to IRRC and the Chairpersons of the House Committee on Health and Human Services and the Senate Committee on Public Health and Welfare for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.1) and (j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.1) and (j.2)), on October 3, 2006, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on October 19, 2006, and approved the final-form rulemaking.

Findings

The Department finds that:

(1) Public notice of proposed rulemaking has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) Adoption of these regulations in the manner provided by THIS Order is necessary and appropriate for the administration and enforcement of 67 Pa.C.S. § 1106.

Order

The Department, acting under 67 Pa.C.S. § 1106, orders that:

(a) The regulations of the Department, 55 Pa. Code, are amended by adding §§ 41.1—41.7, 41.11—41.15, 41.21—41.25, 41.31—41.33, 41.41—41.44, 41.51—41.53, 41.61, 41.71, 41.72, 41.81—41.83, 41.91, 41.92, 41.101, 41.102, 41.111—41.123, 41.131—41.136, 41.141, 41.151—41.153, 41.161, 41.162, 41.171, 41.181, 41.191, 41.201 and 41.211—41.214 to read as set forth in Annex A.

(b) The Secretary shall submit this order and Annex A to the Office of General Counsel and Attorney General for approval as to legality and form as required by law.

(c) The Secretary shall certify and deposit this order and Annex A with the Legislative Reference Bureau as required by law.

(d) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

ESTELLE B. RICHMAN,
Secretary

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 36 Pa.B. 6742 (November 4, 2006).)

Fiscal Note: Fiscal Note 14-488 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 55. PUBLIC WELFARE

PART I. DEPARTMENT OF PUBLIC WELFARE

Subpart D. HEARINGS AND APPEALS

CHAPTER 41. MEDICAL ASSISTANCE PROVIDER APPEAL PROCEDURES

GENERAL PROVISIONS

DOCUMENTARY FILINGS

SERVICE AND AMENDMENT OF DOCUMENTS

GENERAL PROVISIONS

§ 41.1. Scope.

(a) This chapter governs the practice and procedures in MA provider appeals commencing on November 25, 2006, or after the effective date of this chapter.

(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).

§ 41.2. Construction and application.

(a) This chapter shall be liberally construed to secure the just, speedy and inexpensive determination of provider appeals. At every stage of a provider appeal, the Bureau may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

(b) To the extent that GRAPP applies in MA provider appeals:

(i) The term "agency" as used in 1 Pa. Code Part II means "Bureau."

(ii) The term "participant" as used in 1 Pa. Code Part II means "party."

(iii) The term "presiding officer" as used in 1 Pa. Code Part II means "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 order, 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 1 Pa. Code § 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.

Presiding officer—A member of the agency, or one or more trial examiners appointed according to law and designated, to preside at hearings or conferences, or other officers specially provided for and designated under statute to conduct specified classes of proceedings, but not including the agency head when sitting as such.

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, a nonclerical 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 definitions 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)—(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 shall 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 Chief 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 and 35.19 (relating to petitions for issuance, amendment, waiver or deletion of regulations; and petitions for declaratory orders).

(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, 35.2, 35.5—35.7, 35.9—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), 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 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 subsection (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, 35.2, 35.5—35.7, 35.9—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, 35.2, 35.5—35.7 and 35.9—35.11 and, to the extent that they would otherwise apply to the time for filing appeals with the Bureau, §§ 1187.1(d) and 6210.14(b) (relating to policy; and time extensions).

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 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 under 1 Pa. Code § 35.18 (relating to petitions for issuance, amendment, waiver or deletion of regulations).

§ 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 shall 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. Nos. 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 requires 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 shall 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 pleading 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, except that the appeal may be reopened if, on motion of the provider, the Bureau finds that the withdrawal of the appeal was reasonable and not done for dilatory or vexatious purposes, that the program office will not be prejudiced by the reopening, and that good cause exists for permitting the appeal to be re-opened.

(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).

PREHEARING 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 shall 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) Section 41.11 (relating to title of document).

(2) Section 41.12 (relating to form).

(3) Section 41.14 (relating to verification).

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

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

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

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

(8) Sections 41.111—41.123.

(9) Section 41.134 (relating to discovery motions).

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

(11) Section 41.141 (relating to voluntary mediation).

(12) Section 41.151 (relating to initiation of hearings).

(13) Section 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—41.121 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 shall 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 shall be filed within 30 days of the close of discovery.

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

(5) Dispositive motions shall 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 the 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 when 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.

§ 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, unless the provider shows good cause for its noncompliance.

(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 the 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 bar it from presenting evidence and witnesses at the hearing, unless the program office shows good cause for its noncompliance.

(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 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 only if the sum is certain in whole or in part as of the date the position paper is due. If the sum in dispute is not certain as of the date the position paper is due, the party is required to identify the regulation that is applicable to determining such sum and a supporting affidavit for the reason the sum could not be determined.

(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.

(8) This section supersedes 1 Pa. Code §§ 35.164 and 35.165 (relating to documents on file with agency; and public documents).

§ 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 it 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, it will provide a counterstatement of the items in dispute if the information has not already been published in the *Pennsylvania Bulletin*.

(c) The program office's position paper will identify those additional issues not addressed by the provider that it 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 it will present and a copy of every document that it will offer into evidence to support its position on each issue identified in its position paper.

(f) On those occasions when the Department bears the burden of proof under § 41.153(b) (relating to burden of proof and production), the program office will file an initial position paper. That position paper will conform to § 41.113 (relating to content of provider position paper), except § 41.113(b)(3)—(5). If the program office fails to timely file its initial position paper and required documentation with the Bureau, the Bureau will affirm the provider's appeal as to those issues on which the program office bears the burden of proof, unless the program office shows good cause for its noncompliance. Once that program office's initial position paper has been filed, the provider shall file its position paper, which shall address all issues raised in the provider's request for hearing, including those on which it bears the burden of proof. Thereafter, the program office will file another position paper, which will address any issues on which the provider bears the burden of proof. The deadlines for filing these position papers will be set by order of the Bureau.

(g) This section supersedes 1 Pa. Code §§ 35.164 and 35.165 (relating to documents on file with agency; and public documents).

§ 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.

(6) A brief statement of the expert's qualifications or a current curriculum vitae.

(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.

§ 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 unless there is good cause.

(c) This section does not preclude a party from introducing a document or testimony solely for use as an impeachment of a witnesses's credibility even if a party did not give advance notice to the opposing party.

§ 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 Pa.R.C.P 4001—4020 as 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 or 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 shall be filed within 30 days of service of the motion, and a response to other motions shall 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.

(d) Subsections (a)—(c) supersede 1 Pa. Code § 35.180(a) (relating to action on motions).

§ 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 shall 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 shall 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) Except as provided in subsection (b), 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.

(b) If the agency action at issue in the provider's appeal is based upon the Department's determination that the provider committed an act prohibited by section 1407(a)(1) of the Public Welfare Code (62 P. S. § 1407(a)(1)), or § 1101.75(a)(1) or (2) (relating to provider prohibited acts), the Department has the burden of proving that the provider violated those provisions. The provider has the burden of proving the other issues raised in the provider's request for hearing.

(c) The party with the burden of proof 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.

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

(e) 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.

(f) Subsections (a)—(e) 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 shall 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 and 234.6—234.9. 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.

(c) A presiding officer may withdraw from a proceeding when he deems himself disqualified, or he may be withdrawn by the agency head for good cause found after timely affidavits alleging personal bias or other disqualification have been filed and the matter has been heard by the agency head or by another presiding officer to whom the agency head has delegated the matter for investigation and report.

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—35.207, 35.211—35.214 and 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 shall be served upon the parties to the proceedings.

(f) Upon written request or motion to the Bureau or sua sponte by the Bureau, the parties will be afforded the opportunity to file amended pleadings and position papers, if the Bureau orders that the record be reopened. The additional pleadings and position papers will be due to the Bureau as ordered by the presiding officer.

(g) Subsections (a)—(f) 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 im-

mediate 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 shall 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 shall be filed within 30 days of the mailing date of the Bureau determination. An untimely request for review will 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. 06-2326. Filed for public inspection November 22, 2006, 9:00 a.m.]