Title of Rule: Revision to the Medical Assistance Rule Concerning Recipient Appeals, Section 8.057
Rule Number: MSB 16-08-09-A
Division / Contact / Phone: Legal / Paul Ritzma / 3026

STATEMENT OF BASIS AND PURPOSE

1. Summary of the basis and purpose for the rule or rule change. (State what the rule says or does and explain why the rule or rule change is necessary).

   The Colorado General Assembly passed HB 16-1277, requiring an applicant's or recipients receive 60 days to file an appeal and the right to a county dispute resolution conference.

2. An emergency rule-making is imperatively necessary

   ☐ to comply with state or federal law or federal regulation and/or
   ☐ for the preservation of public health, safety and welfare.

   Explain:

   The Colorado General Assembly passed HB 16-1277, requiring an applicant's or recipients receive 60 days to file an appeal and the right to a county dispute resolution conference.

3. Federal authority for the Rule, if any:

   42 CFR 431.244(f)(2)

4. State Authority for the Rule:

   25.5-1-301 through 25.5-1-303, C.R.S. (2015);
   HB 16-1277

Initial Review	**08/12/16**	Final Adoption	**10/14/16**
Proposed Effective Date	**11/30/16**	Emergency Adoption	

DOCUMENT #03

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REGULATORY ANALYSIS

1. Describe the classes of persons who will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

   Medicaid applicant's and recipients, there is no cost to the Department

2. To the extent practicable, describe the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons.

   This rule will have a positive impact to applicant's and recipients. All persons will have 60 days to file an appeal and a right to county dispute resolution conference.

3. Discuss the probable costs to the Department and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

   There is no cost to the Department or any other agency

4. Compare the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction.

   The benefit of the proposed rule change is that the Department will be in compliance with HB 16-1277

5. Determine whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

   There are no less costly or less intrusive methods for achieving the purpose of the proposed rule change.

6. Describe any alternative methods for achieving the purpose for the proposed rule that were seriously considered by the Department and the reasons why they were rejected in favor of the proposed rule.

   There are no alternative methods for achieving the purpose of the proposed rule change, as the Department must comply with HB 16-1277.

8.057 RECIPIENT APPEALS

8.057.1 DEFINITIONS

Action means a termination, suspension or reduction of Medicaid, Home Care Allowance and Adult Foster Care eligibility or covered services. It also means determinations by skilled nursing facilities and nursing facilities to transfer or discharge residents and adverse determinations with regard to a Level II Screen finding for the preadmission screening and annual resident review requirements.

Adverse determination means a determination with regard to a Level II Screen finding for the preadmission screening and annual review requirements that the individual does not require the level of services provided by a nursing facility or that the individual does or does not require specialized services.

Authorized representative means a person designated by the applicant or recipient to act on his/her behalf. Such authorization shall be in writing in compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) privacy regulations located at 45 C.F.R. parts 160 and 164. A written designated power of attorney may substitute for the HIPAA compliant release.

Date of action means the intended date on which a termination, suspension, reduction, transfer or discharge becomes effective. It also means the date of the preadmission screening and annual resident review determination.

Notice, other than that required to be provided by a nursing facility seeking to transfer or discharge a resident, means a written statement which contains:

1. A statement of what action the Department or its designee intends to take;

2. The reasons for the intended action;

3. The specific regulations that support, or the change in federal or state law that requires the action;

4. An explanation of

    a. The individual's right to request an evidentiary hearing if one is available; or

    b. In cases of an action based on a change in law, the circumstances under which a hearing will be granted.

5. The method by which the individual may obtain a hearing;

6. That the individual may represent himself/herself or use legal counsel, a relative, a friend, or other spokesman at the hearing; and

7. An explanation of the circumstances under which Medicaid is continued if a hearing is requested.

8. An explanation of the applicant's or recipient's right to a county or service agency dispute resolution conference.

Notice required to be provided by a nursing facility seeking to transfer or discharge a resident means a written statement which contains, in addition to the requirements above:

1. The reason for transfer or discharge;

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2. The effective date of the transfer or discharge;

3. The location to which the resident is transferred or discharged;

4. The name, address and telephone number of the State long term care ombudsman;

5. For nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act; and

6. For nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.

Request for a hearing means a clear expression by the applicant or recipient, or his/her authorized representative that he/she wants an opportunity to present his/her case to a reviewing authority.

8.057.2 ADVANCE NOTICE

8.057.2.A. Notice shall be mailed at least 10 calendar days before the date of the intended action except as permitted in 8.057.2.B and 8.057.2.C. Requirements for the timing of notice before the facility can transfer or discharge a resident shall be governed by 8.057.2.D and 8.057.2.E.

8.057.2.B. Notice for any action other than when a nursing facility seeks to transfer or discharge a resident, may be mailed less than 10 calendar days before the date of the intended action if:

1. The Department or its designee has factual information confirming the death of a recipient;

2. The Department or its designee receives a clear written statement signed by a recipient that

a. The recipient no longer wishes services; or

b. The recipient gives information that requires termination or reduction of services and indicates that he/she understands that this must be the result of supplying that information;

c. The recipient has been admitted to an institution where he/she is ineligible for further services;

d. The recipient's whereabouts are unknown and the post office return agency mail directed to him/her indicating no forwarding address;

e. The recipient has been accepted for Medicaid services by another State, territory or commonwealth;

f. A change in the level of medical care is prescribed by the recipient's physician; or

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g. The notice involves an adverse determination made with regard to the preadmission screening and annual resident review requirements.

8.057.2.C. Notice for any action other than when a nursing facility seeks to transfer or discharge a resident, shall be sent 5 calendar days before the date of the action if:

1. The Department or its designee has facts indicating that action should be taken because of probably fraud by the recipient; and

2. The facts have been verified, if possible, through secondary sources.

8.057.2.D. Except as specified in 8.057.2.E, the required notice when a nursing facility seeks to transfer or discharge a resident shall be at least 30 calendar days before the resident is transferred or discharged.

8.057.2.E. The required notice by a nursing facility before transfer or discharge shall be as soon as practicable when:

1. The safety of individuals in the facility would be endangered;

2. The health of individuals in the facility would be endangered;

3. The resident's health improves sufficiently to allow a more immediate transfer or discharge because the resident no longer needs the services provided by the facility;

4. An immediate transfer or discharge is required by the resident's urgent medical needs; or

5. A resident has not resided in the facility for 30 calendar days.

8.057.3 OPPORTUNITY FOR HEARING

8.057.3.A. An individual shall have an opportunity for a hearing where:

1. An application for services is denied or is not acted upon with reasonable promptness;

2. The recipient requesting the hearing believes the action is erroneous;

3. The resident of a nursing facility believes the facility has erroneously determined that he/she must be discharged; and

4. An individual who believes the determination with regard to the preadmission and annual resident review requirements is erroneous.

8.057.3.B. An individual does not have the right to an opportunity for hearing if the sole issue is a federal or state law requiring an automatic change adversely affecting some or all recipients.

8.057.3.C. An individual does not have the right to an opportunity for hearing for a preadmission screening and annual resident review Level I Screen finding.

8.057.3.D. A provider of medical assistance or any other provider of goods and services to an applicant or recipient, shall not have the right to a hearing concerning an action or an adverse determination to an applicant or recipient.

8.057.4 REQUEST FOR HEARING

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8.057.4.A. The request for a hearing shall be in writing and contain:

1. The recipient or applicant's name, address and State Identification Number, if applicable;

2. The action, denial or failure to act promptly on which the requested appeal is based; and

3. The reason for appealing the action, denial or failure to act promptly.

8.057.4.B. The request for a hearing shall be filed with the Office of Administrative Courts:

1. Within ~~30~~ 60 calendar days of the date of the notice of action.

8.057.4.C. The recipient or applicant or his/her authorized representative shall be entitled to examine the complete case file and any other documents to be used at hearing at a reasonable time before the hearing or during the hearing. Documents and information that are confidential as a matter of law shall be exempt from this requirement unless they are to be offered as evidence during the hearing.

8.057.4.D. If the recipient or applicant makes an oral request for a hearing to the Department or its designee, the Department or its designee shall prepare a written request for the individual's signature or have the individual prepare such a request.

8.057.5 MAINTAINING SERVICES

8.057.5.A. Where the recipient requests a hearing before the date of action, the recipient's services may not be terminated or reduced until a final agency decision is rendered after the hearing unless:

1. It is determined at the hearing that the sole issue is one of federal or state law or policy; and

2. The recipient is promptly informed that services are to be terminated or reduced pending the hearing decision.

8.057.5.B. Where the action of the Department or its designee is sustained by the final agency decision, the Department or its designee may institute recovery procedures against the applicant or recipient to recoup the cost of any services furnished the recipient, to the extent they were furnished solely by reason of this section regarding maintaining services.

8.057.5.C. Continued Benefits During an SSA Appeal. If an individual receiving Medicaid based upon disability is determined by SSA not to be disabled, and he or she is not eligible for Medicaid on some other basis, Medicaid is continued during the 60-day period within which an SSA appeal may be filed. If the individual does not appeal the SSA decision within the 60-day period, Medicaid shall be terminated.

If an SSA hearing is requested within the 60-day period, Medicaid may not be terminated until a final decision is made after the SSA hearing. A final administrative decision occurs when the Medicaid recipient has no right to further administrative appeal with the SSA. The Department shall provide 10-days notice to the individual that Medicaid shall be terminated after the 60-day period if the individual fails to appeal the SSA decision.

8.057.6 DENIAL OR DISMISSAL OF REQUEST FOR HEARING

8.057.6.A. The request for hearing shall be denied or dismissed if:

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1. The applicant or recipient withdraws the request in writing; or

2. The applicant or recipient fails to appear at a scheduled hearing without good cause. Good cause shall mean a sudden severe illness, an accident, or other particular occurrence which, by its emergent nature and drastic effect, prevented appearance at the hearing.

8.057.6.B. The applicant or recipient shall have 10 calendar days from the date of the notice of dismissal scheduled hearing to explain, in a letter to the Administrative Law Judge, the reason for his/her failure to appear. If the Administrative Law Judge finds that there was good cause for the nonappearance, the Administrative Law Judge shall schedule another hearing date.

8.057.7 FAIR HEARINGS

8.057.7.A. A hearing shall cover:

1. Action, denial or failure to act with reasonable promptness regarding eligibility or services;

2. Decisions regarding changes in the type or amount of services;

3. Decision by a nursing facility to transfer or discharge a resident; and

4. Determination with regard to the preadmission screening and annual resident review requirements.

8.057.7.B. Conference telephone hearings may be conducted as an alternative to face-to-face hearings. All applicable provisions of the face-to-face hearing shall apply to telephone hearings.

8.057.7.C. Upon receipt of notice of a Department hearing of an appeal, the county department shall arrange for a suitable hearing room appropriate to accommodate the number of persons, including witnesses, who are expected to be in attendance.

8.057.7.D. Except as otherwise specifically provided in these rules, the provisions of Section 24-4-105, C.R.S., as amended, shall apply to the conduct of fair hearings.

8.057.7.E. Hearings related to an applicant or recipient's disability determination, level of care determination or target group eligibility shall be held within 20 calendar days after the Office of Administrative Courts receives the request for a fair hearing unless the client demonstrates good cause for postponement of the hearing. Under no circumstances shall the hearing be conducted more than 45 calendar days after receipt of the request for a fair hearing.

8.057.7.F. In hearings related to an applicant or recipient's disability determination, where the hearing involves medical issues such as those concerning a diagnosis, an examining physician's report or a medical review team's decision, the Administrative Law Judge may order a medical assessment other than that in the record of the Department or its designee making the disability determination if the Administrative Law Judge considers such medical assessment necessary. The assessment shall be at the expense of the Department or its designee and shall be made part of the record.

8.057.7.G. The hearing shall be private unless the applicant or recipient requests, on the record, that the hearing be open to the public.

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8.057.7.H. If the appellant is not fluent in English or has a language difficulty, the Department will arrange with county assistance to have present at the hearing a qualified interpreter who will be sworn to translate correctly.

8.057.8 INITIAL DECISIONS

8.057.8.A. The Administrative Law Judge shall promptly prepare and issue a written Initial Decision and file it with the Office of Appeals of the Department. Initial decisions shall be based exclusively on evidence introduced at the hearing.

8.057.8.B. The Administrative Law Judge shall issue the Initial Decision following a disability determination hearing, a level of care denial hearing or a target group eligibility hearing within 20 calendar days of the hearing date.

8.057.8.C. The Initial Decision shall be in writing and shall:

1. Summarize the facts;

2. Identify the regulations and evidence supporting the decision;

3. Advise the applicant or recipient that failure to file exceptions to the provisions of the Initial Decision shall waive the right to seek judicial review of a final agency decision affirming those provisions.

8.057.8.D. The Administrative Law Judge shall be bound by the Department's interpretation of statutes where the Department has regulations implementing such statutes.

8.057.8.E. The Administrative Law Judge shall have no jurisdiction or authority to determine issues of constitutionality or legality of the Department's regulations.

8.057.8.F. In hearings concerning disability determinations, the only factual issue to be determined by the Administrative Law Judge is whether the applicant or recipient meets the Medicaid definition of disability or blindness set forth in sections 8.110.32 and 8.110.33. The Administrative Law Judge's determination shall be limited to whether or not the applicant or recipient met the definition of disability or blindness on the date that the disability determination was completed.

8.057.8.G. In hearings concerning level of care determinations, the only factual issue to be determined by the Administrative Law Judge is whether the applicant or recipient meets the level of care screen applicable to the program at issue. The Administrative Law Judge's determination shall be limited to whether or not the applicant or recipient met the level of care on the date that the level of care determination was completed.

8.057.9 REVIEW BY THE OFFICE OF APPEALS

8.057.9.A. The Department's Office of Appeals shall promptly serve the Initial Decision upon each party to the fair hearing by first class mail. Party shall include the Department even if the Department has not previously appeared as a party to the appeal.

8.057.9.B. Any party seeking to reverse, modify or remand the Initial Decision shall file exceptions with the Office of Appeals within 15 calendar days, plus 3 calendar days for mailing, of the date the Initial Decision is mailed to the parties.

8.057.9.C. Exceptions to Initial Decisions shall be in writing and shall state the specific grounds for reversal, modification or remand of the Initial Decision.

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8.057.9.D. A written transcript of the hearing is required where the party filing the exceptions asserts that the findings of evidentiary fact in the Initial Decision are not supported by the weight of the evidence.

1. The party requiring a written transcript of the hearing shall request the written transcript from the Office of Administrative Courts prior to the filing of exceptions. If the written transcript is not filed with the exceptions, the exceptions shall state that a written transcript has been requested. The party shall comply with all applicable due dates. Prior to the due date for filing exceptions, the party may request, in writing, an extension of time to file either exceptions or the written transcript.

2. In cases where the applicant or recipient (Appellant) requests a written transcript in order to file exceptions based on findings of evidentiary fact, the Department shall pay the transcribing agency for the cost of one original transcript for the Office of Appeals, and one copy for the requesting applicant or recipient.

3. While review of the initial decision is pending, the submitted written transcript of the hearing shall be available for examination by any party to the appeal, during regular business hours of the Office of Appeal.

8.057.9.E. The Office of Appeals shall promptly serve a copy of the exceptions on each party by first class mail. Each party may file a written response to an exception filed by another party within 10 calendar days from the date the exceptions were mailed to the parties.

8.057.9.F. The parties shall not have the right to oral argument to the Office of Appeals.

8.057.10 FINAL AGENCY DECISIONS

8.057.10.A. The Final Agency Decision shall be based on the record except that the Office of Appeals may remand for rehearing if a party establishes in its exceptions that material evidence has been discovered which the party could not, with reasonable diligence, have produced at the hearing.

8.057.10.B. The record shall consist only of:

1. The written transcript of testimony and exhibits,

2. All papers and requests filed in the proceeding;

3. The initial decision of the administrative law judge; and

4. Any exceptions and requests filed in response to the initial decision of the administrative law judge.

8.057.10.C. The applicant or recipient shall have access to the record at a convenient place and time.

8.057.10.D. The Office of Appeals shall issue a Final Agency Decision within 90 calendar days, except as stipulated in 8.057.10.E, from the date the request for a hearing is received unless an extension has been granted to the applicant or recipient in which case the 90 calendar day period shall be increased accordingly.~~The Office of Appeals shall issue a Final Agency Decision within 90 calendar days from the date the request for a hearing is received unless an extension has been granted to the applicant or recipient in which case the 90 calendar day period shall be increased accordingly~~.

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8.057.10.E. The Office of Appeals shall issue a Final Agency Decision within 3 calendar days from the date the request for an expedited hearing is received.

8.057.11 NOTIFICATION OF DECISION

8.057.11.A. The applicant or recipient shall be provided, in writing, with:

1. A copy of the Final Agency Decision; and

2. Notification of his/her right to seek judicial review and the effective date of the Final Agency Decision for purposes of requesting judicial review.

8.057.11.B. For purposes of requesting judicial review, the effective date of the Final Agency Decision shall be the third day after the date the decision is mailed to the parties, even if the third day falls on Saturday, Sunday or a legal holiday.

8.057.12 CORRECTIVE ACTION

8.057.12.A. If the Final Agency Decision is favorable to the applicant or recipient, corrective action shall be taken, within three working days after the effective date of the Final Agency Decision, retroactive to the date the incorrect action was taken.

8.057.13 RECONSIDERATION OF FINAL AGENCY DECISION

8.057.13.A. A party may file a motion for reconsideration of a Final Agency Decision with the Office of Appeals:

1. Upon a showing of good cause for failure to file exceptions to the Initial Decision within the allowed 15 calendar day period; or

2. Upon a showing that the Final Agency Decision is based upon a clear or plain error of fact or law.

8.057.13.B. The motion for reconsideration shall be filed, in writing, with the Office of Appeals within 15 calendar days of the date that the Final Agency Decision is mailed to the parties. The motion shall state the specific grounds for reconsideration.

8.057.13.C. The Office of Appeals shall promptly serve a copy of the motion for reconsideration on each party by first class mail. Each party may file a written response to a motion for reconsideration filed by another party within 10 calendar days from the date the motion was mailed to the parties.

8.057.13.D. The Office of Appeals shall promptly serve a copy of its decision on the motion for reconsideration on all parties by first class mail.

8.057.14 INFORMAL CLIENT CONFERENCE IN DISABILITY DETERMINATIONS

8.057.14.A. Prior to the issuance of an action regarding an applicant or recipient's disability determination, the Department or the entity designated to conduct the disability determination shall provide the applicant or recipient with the opportunity for an informal conference, in person or by telephone, at which time the applicant or recipient may provide new or additional information relevant to the applicant or recipient's claim of disability or blindness.

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8.057.14.B. If an action issues from the Department or the designated entity, the appeal procedures set forth in 8.057, Recipient Appeals, shall apply to disability determinations.

8.057.15 ALTERNATIVES TO INSTITUTIONAL CARE

8.057.15.A Recipients who are determined to be likely to require a level of care available in an institution shall have the right to request a hearing where:

1. The recipient is not given the choice of home and community-based services as an alternative to the institutional care or

2. The recipient is denied the service of their choice or available provider of their choice.

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