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MEMORANDUM

TO: RHCf Members

FROM: Dan Heim, Senior Vice President for Policy and Program Development

DATE: May 3, 2010

SUBJECT: Appeals and Legal Challenges to Medicaid Rebasing Rates

ROUTE TO: Administrator, CFO

ABSTRACT: Information and reminders on appeals to 2009-10 nursing home Medicaid rates.

Introduction

Nursing home members are reminded that the timeframe within which to submit rate appeals or initiate legal challenges to the April 1/May 1, 2009 and January 1, 2010 Medicaid rebasing rates, issued on January 13, 2010, will be expiring May 13, 2010. Last year, NYAHSA filed a legal challenge that encompasses statutory provisions enacted in 2009 that affect these rates.

Rate Appeals

As indicated in previous NYAHSA communications, the deadline for submitting appeals to these rates is May 13, 2010. Based on advice from the Department of Health (DOH), NYAHSA continues to advise its members that identify errors in their new rates to file a rate appeal **AND** contact their rate setter at DOH.

Bear in mind that based on recently enacted legislation, DOH will only accept operating component appeals for the correction of computational errors or omissions of data based on information previously submitted. No updates or corrections to the operating component of the rate that would require the re-filing of a cost report are permitted.

A DOH *Dear Administrator* Letter (DAL) providing detailed instructions for filing appeals via the Electronic Appeals Submission System may be accessed [here](#). Only hospital-based homes that file an RHCf-2 Medicaid cost report are still required to file appeals on paper, as described in the DAL issued with the rate sheets.

Facility Legal Challenges

With the new limitations on the types of appeals that can be filed and some degree of vagueness about what constitutes “computational errors or omissions of data by the Department” versus rate “methodology,” some facilities may wish to preserve their legal rights by also filing a lawsuit on issues for which it is unclear whether a rate appeal remedy exists. The Article 78 statute of limitations for filing a legal challenge to these Medicaid rates corresponds to the appeal deadline; it is May 13, 2010.

NYAHSAs should consult with their legal counsel on whether a legal challenge should be filed if there is uncertainty on whether there is an appeal remedy to the issue. However, to potentially avoid the added time and expense associated with filing a protective legal action in such an instance, your counsel may want to contact DOH’s Bureau of Litigation at 518-473-4631 to see whether the Department would be willing to negotiate a “tolling agreement.” Such an agreement would “toll” the statute of limitations and effectively extend the facility’s time to initiate litigation if still needed to some future date. The intent would be to give DOH time to make a determination as to whether the issue is one that will be processed as a rate appeal. In that time frame, DOH might also revise and reissue the 2009/2010 rates, correcting some of the issues, which would make a lawsuit a moot point. That could in turn save members the cost of duplicative and potentially unnecessary litigation on the same issues included in their rate appeals. On the other hand, if DOH declines to enter into a tolling agreement, your facility and its attorney may need to file suit on or before May 13, 2010.

NYAHSAs’s Legal Challenge

NYAHSAs filed suit on behalf of its member nursing homes challenging the three-month delay in the 2009 Medicaid rate methodology. *NYAHSAs v. Daines et. al.* was filed in state Supreme Court, Albany County on June 3, 2009. NYAHSAs subsequently amended this suit to incorporate challenges to the following cuts enacted as part of the 2009-10 state budget: (1) elimination of the 2008 trend factor; (2) elimination of the 2009 trend factor; and (3) capping the benefit of rebasing at \$210 million. The challenged budgetary cuts are effective April 1, 2009 and were incorporated into the rates that were issued on January 13, 2010.

Further information on the NYAHSAs lawsuit, including copies of the amended petition and exhibits, are available in [NYAHSAs Doc. ID# n00003747](#). NYAHSAs is the named plaintiff in the action, on behalf of all of its member nursing homes (other than those represented in another lawsuit) that participate in the Medicaid program.

Since DOH’s issuance of the 2009/2010 Medicaid rebasing rates in January, one or more law firms have contacted nursing homes soliciting interest in litigating these rates and their promulgation, on a global or group basis. NYAHSAs does not have an official position on member participation in such challenges.

Please contact me at (518) 449-2707, ext. 128 or via e-mail at dheim@nyahsa.org with any questions.