Strategic Approaches to Support State Fair Hearings as States Resume Normal Eligibility and Enrollment Operations After the COVID-19 PHE

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Background: COVID-19 PHE

- The COVID-19 outbreak and implementation of federal policies to address the resulting public health emergency (PHE) have disrupted routine Medicaid and Children's Health Insurance Program (CHIP) eligibility and enrollment operations.
- Medicaid and CHIP program enrollment has grown by 20 percent since February 2020 and, as of September 2021, nearly 85 million individuals were enrolled.
- This growth in enrollment is mostly due to the continuous enrollment condition that states implemented as a condition of receiving a temporary 6.2 percentage point federal medical assistance percentage (FMAP) increase under section 6008 of the Families First Coronavirus Response Act (FFCRA).
- When the continuous enrollment condition ends, states will have a 12-month unwinding period to *initiate* all renewals and other outstanding eligibility actions, and an additional two months to *complete* all pending actions initiated during the 12-month unwinding period.

Increased Fair Hearing Request Volume: The Context

- As states resume processing renewals and other eligibility actions, they may experience an increase in fair hearing volume which challenges their ability to process fair hearings timely.
- Generally, states are required to take final administrative action on a fair hearing request within 90 days of receipt of the request (42 C.F.R. § 431.244(f)(1)), while states must take final administrative action on expedited fair hearings "as expeditiously as possible" (42 C.F.R. § 431.244(f)(3)).
- During the PHE, a number of states were granted a regulatory concurrence that allowed a state to take more than 90 days to take final administrative action on Medicaid fair hearing requests due to an emergency beyond the state's control.
- When the continuous enrollment condition ends, states are expected to resume timely processing of fair hearing requests.
- This deck provides steps states can take to assess their fair hearing process and capacity in preparation for the increased volume of requests, and outlines strategies states can use to address the anticipated fair hearing volume.

How to Use This Resource

- States may want to use this resource by utilizing following steps:
  - **Step 1**: Assess the fair hearing process and capacity (slide 6)
  - **Step 2**: Review strategies to address anticipated fair hearing volume:
    - Strategic redeployment of state resources (slide 7-8)
    - Expanding informal resolution processes (slide 9)
    - Streamlining fair hearing processes and operations (slides 10-11)
    - Engaging internal and external stakeholders (slide 12)
  - **Step 3**: If a state anticipates needing longer timeframes to process fair hearing requests, consider requesting the authority to implement a mitigation strategy using section 1902(e)(14)(A) authority (slide 13)
- Each strategy contains several options for states to consider. States can decide which strategies and options to tailor to their unique structures and circumstances to best enable their capacity to respond to the anticipated increased fair hearing volume.
- States can also leverage additional resources for fair hearing requirements and tools (slide 14).

Step 1: Assess Fair Hearing Process and Capacity

- **Assess** the state's ability to process fair hearing requests timely.
  - States can use the "Eligibility and Enrollment Pending Actions Resolution Planning Tool" to assist in assessing anticipated fair hearing volume, capacity, and current process (see link on side 14).
- **Create a process map** to assess and look for ways to streamline current processes and operations (e.g., intake of fair hearing requests, scheduling):
  - Outline current steps and entities/staff involved in the hearing process: draw out an appellant's appeal process, from denial or other adverse action to final administrative action, and all steps along the way. A software mapping tool may be helpful.
  - For each stage of the process, identify the timeframe to completion and contingencies, barriers, or bottlenecks that could affect whether the next step can be reached timely.
  - Sketch out a possible future process, incorporating any new strategies, staff responsibilities, or innovations to address anticipated barriers and mitigate challenges with timely processing of fair hearing requests.

Step 2: Review Strategies – Strategic Redeployment of State Resources

Determine if a **strategic redeployment of state resources** could help address capacity issues identified in the state's self-assessment

- **Adjust staffing** by redistributing current staff duties, detailing state staff to Medicaid or administrative hearing agency, or repurposing fair hearing resources used for different programs at sister agencies to increase capacity.
- **Use hearing officers** to conduct and issue hearing decisions, if currently using administrative law judges (ALJs).
- **Leverage contractors** to the fullest extent possible, or consider temporary contract modifications to shift or increase capacity. (See chart on slide 8 for more information about permissible use of contractors.)

Step 2: Review Strategies – Strategic Redeployment of State Resources (Continued)

Consider **leveraging contractor resources** to assist with increased fair hearing volume

States can use contractors to support the administrative functions of the fair hearing process that do not require discretion but must use employees of a government agency which maintain personnel standards on a merit basis for fair hearing functions that require discretion. See examples below.

Contractor Support Functions	Government Agency Staff Functions
Intake of fair hearing requests	Conduct Fair Hearings
Follow-up on requests (e.g., calling to collect missing information)	Evaluate Evidence
Schedule fair hearings	Develop, write, and issue fair hearing decisions
Evidence collection and management	Any other function involving discretion (e.g., evaluating expedited hearing requests)
Send fair hearing-related notices	(Left blank intentionally)
Technology (e.g., teleconference support)	(Left blank intentionally)
Other administrative tasks	(Left blank intentionally)

Step 2: Review Strategies – Expanding Informal Resolution Processes

Consider establishing, modifying or expanding an **informal resolution process** to help resolve fair hearing requests prior to conducting a fair hearing

- **Troubleshoot appeals** - Train and deploy policy, call center, and/or eligibility staff to screen fair hearing requests to identify procedural or inappropriate denials.
  - Have staff review cases to determine whether the denial was appropriate or could be cured by additional information provided by appellant (for example, returning the renewal form).
  - For inappropriate/procedural denials, have staff communicate with the beneficiary to resolve issue.
  - Depending on how a state conducts eligibility determinations, these staff may redetermine eligibility or transfer to other staff to effectuate the decision.
- **Require internal review before hearing officer formal review** - Use paralegals or senior eligibility staff to review appeals to spot incorrect decisions, address eligibility errors, or to develop more detailed information to facilitate hearing officer review, if needed.
- **Implement pre-hearing alternative dispute resolution** - Use mediation, pre-hearing conferences, or other alternative dispute resolution to identify consensus resolution, eliminating the need to conduct a fair hearing.

Step 2: Review Strategies – Streamlining Fair Hearing Processes and Operations

Identify additional strategies that can help the state **streamline its fair hearing process** to decrease processing times and increase efficiencies

- **Prioritize categories of fair hearing requests -** e.g., individuals having urgent health needs, individuals who have lost coverage or services, or vulnerable populations such as foster youth, individuals experiencing domestic violence, or those experiencing homelessness.
- **Utilize scheduling strategies** to improve the timing and workflow of fair hearings:
  - **Schedule "round robin" hearing panels** in which a set of fair hearings are assigned to a day and time for a group of hearing officers, rather than assigning cases to a specific hearing officer. This can reduce scheduling gaps by allowing hearing officers to proceed with the next hearing as soon as the prior hearing ends or when an appellant fails to appear.
  - **Schedule hearings in blocks by type** so a hearing officer hears the same type of cases (e.g., Medicaid eligibility fair hearings or other categories of Medicaid fair hearings) on a given day.
- **Utilize additional hearing modalities** (in-person, video, telephonic) to improve access and efficiency while providing access to individuals with disabilities and those who have limited English proficiency. May increase efficiencies when conducting a fair hearing, saving time for state agency staff and appellants.

Step 2: Review Strategies – Streamlining Fair Hearing Processes and Operations (Continued)

- **Develop or enhance electronic appeals management processes** to reduce reliance on paper files and achieve efficiencies (e.g., online fair hearing requests, upload of evidence).
- **Develop templates** to standardize and streamline the fair hearing process, by ensuring necessary and consistent information is gathered during the hearing and reflected in the hearing decision including:
  - Appeal summary templates for reviewers to categorize the case and issues being raised.
  - Fair hearing question templates to ensure reviewers or hearing officers/ALJs ask all necessary questions consistently during the hearing on certain types of high volume subject areas.
  - Hearing decision templates to help standardize and simplify decision-writing and create greater consistency in decision justifications for appellants.
- **Streamline the decision process** by accepting the hearing officer's/ALJ's decision as final without further Medicaid agency review or approval (if state currently requires state Medicaid agency review of hearing officer's/ALJ's recommended decision).

Step 2: Review Strategies – Engaging Internal and External Stakeholders

Consider increasing regular **engagement with internal and external stakeholders** to support the state's fair hearing process

- **Identify internal and external stakeholders** who work closely with beneficiaries and are involved with or affected by the fair hearing process.
  - Stakeholders could include sister state agencies, ombuds offices, legal services providers, health care providers, and social and community service organizations.
- **Utilize regular feedback loop** between agency and stakeholders to increase beneficiary understanding, resolve cases before an appeal and reduce inappropriate denials. Communication could flow between state:
  - *To Stakeholders:* Communicate upcoming process changes, dates, and deadlines (e.g., when renewal cycles will begin, informal resolution processes) to stakeholders regularly and proactively.
  - *From Stakeholders:* Have stakeholders alert the state about emerging systemic or process concerns that could increase appeals, and cases involving vulnerable individuals that warrant prioritization.

Step 3: Consider Mitigation Strategy if State Experiences a Fair Hearing Backlog

If the strategies in step 2 are insufficient to assist the state in managing increased fair hearing volume, **consider requesting mitigation authority** from CMS

- When a state experiences an increase in fair hearing volume that exceeds its capacity to process fair hearing requests timely, CMS may grant states authority under section 1902(e)(14)(A) of the Social Security Act to temporarily extend the timeframe to take final administrative action on fair hearing requests.
- Section 1902(e)(14)(A) authority can only be granted to protect beneficiaries. In order to use this option states must:
  - Provide benefits pending the outcome of a fair hearing decision (including reinstating benefits pursuant to 42 C.F.R. § 431.231), regardless of whether or not a beneficiary has requested a fair hearing prior to the date of the adverse action; and
  - Forgo recoupment from beneficiaries if the fair hearing ultimately upheld the agency's determination.
- CMS is available to provide technical assistance. Interested states should contact their state lead.

Resources

- **Medicaid.gov: Unwinding and Returning to Regular Operations after COVID-19** https://www.medicaid.gov/resources-for-states/coronavirus-disease-2019-covid-19/unwinding-and-returning-regular-operations-after-covid-19/index.html

- **March 2022 SHO #22-001**: Promoting Continuity of Coverage and Distributing Eligibility and Enrollment Workload in Medicaid, the Children's Health Insurance Program (CHIP), and Basic Health Program (BHP) Upon Conclusion of the COVID-19 Public Health Emergency https://www.medicaid.gov/federal-policy-guidance/downloads/sho22001.pdf

- **Eligibility and Enrollment Pending Actions Resolution Planning Tool – Version 2.0** (March 2022) https://www.medicaid.gov/resources-for-states/downloads/medicaid-chip-covid19-health-emergency-eligibility-enrollment-pending-actions-resolution-planning-tool.docx

- **December 2020 SHO #20-004**: Planning for the Resumption of Normal State Medicaid, Children's Health Insurance Program (CHIP), and Basic Health Program (BHP) Operations Upon Conclusion of the COVID-19 Public Health Emergency https://www.medicaid.gov/sites/default/files/2020-12/sho20004.pdf

- **State Report on Plans for Prioritizing and Distributing Renewals Following the End of the Medicaid Continuous Enrollment Provisions (Renewal Distribution Report)** https://www.medicaid.gov/resources-for-states/downloads/state-renewable-fillable-report.pdf

- **Medicaid Fair Hearing Authorities**: Section 1902(a)(3) of the Social Security Act, 42 C.F.R. part 431, subpart E

- **Medicaid Single State Agency Authorities**: Sections 1902(a)(4) and (a)(5) of the Social Security Act, 42 C.F.R. § 431.10