

July 12, 2023

Ms. Cheryl Roberts
Director
Virginia Department of Medical Assistance Services
600 E. Broad Street, Suite 1300
Richmond, VA 23219

Re: Emergency Department Downcoding Provision

Dear Director Roberts,

On April 27, 2023, the U.S. District Court for the Eastern District of Virginia issued a final judgment in *Va. Hosp. & Healthcare Assoc. et al. v. Roberts et al.*, No. 3:20-cv-587. The order enjoined the Department of Medical Assistance Services (“DMAS”) from enforcing the Item 313.AAAAA of Chapter 1289 of the 2020 Virginia Acts of Assembly (the “Downcoding Provision”) and vacated the Centers for Medicare & Medicaid Services (“CMS”) approval of the Downcoding Provisions under the applicable Medicaid regulations.

Neither DMAS nor CMS has appealed the decision, and the deadline for noticing an appeal passed on June 26, 2023. We are now working to ensure that the order is fully complied with by all parties.

We are in receipt of the June 29, 2023, Medicaid Bulletin notifying providers that effective for dates of service on and after April 27, 2023, date of the order DMAS and Medicaid Managed Care Organizations (“MCOs”) will no longer enforce the Downcoding Provision. The Medicaid Bulletin explains that:

- The Downcoding Provision has been removed from all MCO contracts effective April 27, 2023, and will be removed from applicable regulations and manuals.
- DMAS and the MCOs are implementing the necessary system changes required to remove the Downcoding Provision and reprocess previously submitted claims impacted by this change for dates of service from April 27, 2023, forward in the fee-for service and managed care programs.
- Once system changes are complete, new timely claims submitted for dates of service from April 27, 2023, forward will be processed without the Downcoding Provision.

While we appreciate this directive, we do not believe these actions ensure full compliance with the court’s order. Our members have expressed concern with the roughly two-month delay in communicating this information and the fact that DMAS and MCOs have not begun reprocessing of claims in compliance with the order.

Furthermore, we understand DMAS’s initial focus on complying with the court’s injunction forbidding it from enforcing the Downcoding Provision on a going forward basis, but we have noticed that the Medicaid Bulletin does not mention the reprocessing of claims to which the

Downcoding Provision was applied prior to April 27, 2023. It does not identify what steps will be undertaken to repay to providers the amounts that they are owed for improper application of the Downcoding Provision from the date of its initial implementation on July 1, 2020.

On behalf of our members, Virginia College of Emergency Physicians (“VACEP”), Virginia Hospital & Healthcare Association (“VHHA”), and The Medical Society of Virginia (“MSV”) are requesting that DMAS and each MCO provide to each affected provider an accounting of all claims to which the Downcoding Provision was applied and the amount of payment reduction for all dates of service July 1, 2020, through the date that necessary system changes required to remove the Downcoding Provision are complete. Correspondingly, we are requesting that DMAS immediately develop a process and timeline to provide repayment of these payment reduction amounts by affected providers.

As we have maintained from the time the Downcoding Provision was first proposed, and the federal court confirmed, the policy behind the Downcoding Provision violated federal law and regulation. The Downcoding Provision has caused direct financial hardship and irreparable harm to hospitals and physicians. This is particularly troubling considering the Downcoding Provision was applied in the midst of the COVID-19 pandemic. Emergency departments were on the front lines treating patients at a time when the public was encouraged to seek care if they suspected themselves of having COVID-19 and due to shutdowns and stay-at-home orders, emergency departments were most often the only option for seeking needed care.

We did not undertake filing this suit lightly. VACEP, VHHA, and MSV:

- Consistently and vehemently advocated for the removal of the Downcoding Provision in multiple General Assembly sessions;
- In response to a May 20, 2020, DMAS notice of intent to amend the state plan to implement the Budget Items, VHHA, VACEP, and MSV, and many of their members submitted public comment in opposition to the Budget Items. DMAS received 194 comments in total, all expressing opposition; and
- During this time period we also submitted comprehensive letters to CMS and held conference calls with agency representatives expressing our legitimate concerns and asking CMS to intervene.

Despite these extensive efforts to prevent harm, the Downcoding Provision was implemented and enforced beginning July 1, 2020, and we had to resort to filing this suit on behalf of our members. Now that the legal questions have been resolved, we would like to rectify all outstanding administrative and financial matters as quickly as possible.

We appreciate your support in this challenging time for Virginia’s emergency departments and health care providers and look forward to bringing this matter to a close.

Ms. Cheryl Roberts

July 12, 2023

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Sincerely,

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Todd Parker, MD, FACEP
President, Virginia College of Emergency Physicians

A handwritten signature in black ink, appearing to read "Sean T. Connaughton". The signature is cursive and includes a long horizontal stroke at the end.

Sean T. Connaughton
President & CEO, Virginia Hospital & Healthcare Association

A handwritten signature in black ink, appearing to read "Harry Gewanter". The signature is cursive and includes a long horizontal stroke at the end.

Harry Gewanter, MD, FAAP, MACR
President, Medical Society of Virginia