

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF SOCIAL SERVICES

Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)

FINAL

ORDER

Fair Hearing Procedures

Nature of the Proceedings:

Delaware Health and Social Services ("Department") / Division of Social Services initiated proceedings to provide information of public interest with respect to Fair Hearing procedures. The Department's proceedings were initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 31 **Delaware Code** Section 512.

The Department published its notice of public comment pursuant to 29 **Delaware Code** Section 10115 in the March 2008 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by March 31, 2008 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

Summary of Proposal

The purpose of this regulatory action is to amend the Division of Social Services Manual (DSSM) regarding Fair Hearing procedures.

Statutory Authority

- 31 Delaware Code, *Department of Health and Social Services*
- 45 CFR §205.10, *Hearings*
- 7 CFR §273.15, *Fair Hearings*
- 42 CFR §431.205, *Provision of Hearing System*

Summary of Proposed Changes

1) DSSM 5000, *Definitions*: This rule modification: a) updates the Fair Hearing policy to include the Child Care Subsidy Program; and, b) expands the definition of the Department to clarify the divisions affected by this policy.

2) DSSM 5405, *Fair Hearing Procedures*: This revision clarifies the responsibilities of each party in a fair hearing, including the extent of the hearing officer's authority.

Summary of Comments Received with Agency Response and Explanation of Changes

The Governor's Advisory Council for Exceptional Citizens (GACEC) and the State Council for Persons with Disabilities (SCPD) offered the following observations and recommendations summarized below. DSS has considered each comment, found the comments to be helpful and instructive and have, for the most part, adopted the suggestions made.

First, in §5000, the definition of "DHSS" merits revision.

A. Paragraph 2 refers to "a managed care company ("MCO") under contract with DHSS to manage an operation of the Medicaid Program." The Division of Child Mental Health Services is a Medicaid MCO. It is not a "company". Moreover, we lack information on whether its status as an MCO is established by "contract", memorandum of understanding, or other document. DHSS should consider amending this section to accurately include the DCMHS.

Agency Response: DSS agrees and changed the reference in the final order regulation to read "managed care organization." Also, in response to amending §5000 to include DCMHS, DSS decline the recommendation

because §5000 describes the Divisions within the Department of Health and Social Services (DHSS) and DCMHS is a Division within the Department of Services to Children, Youth & Their Families. The rules adequately cover hearing requests over Medicaid Program services offered by DCMHS as a Medicaid Program managed care provider.

B. Paragraph 1 refers to “financial assistance”. This may be too narrow. The **Delaware Code** contemplates many forms of “public assistance”. See Title 31 **Del.C.** §§501-502. DSS administers a variety of public assistance benefits, including job training and education. Compare 16 **DE Admin Code** §5304: “An opportunity for a hearing will be granted to any... recipient who is aggrieved by any action of the Division of Social Services such as actions to... assign Food Stamp Program recipients to a specific employment and training component.” DSS is also involved in medical assistance. Apart from the Chronic Renal Disease Program, DSS is responsible for PASARR hearings. See 16 **DE Admin Code** §5304.1. Therefore, Par. 1 could be amended to refer to “economic, medical, vocational or child care subsidy assistance”. Parenthetically, 16 **DE Admin Code** §5304 refers to “economic assistance” rather than “financial assistance”. “Economic” is ostensibly a more encompassing term.

Agency Response: DSS adopted the Councils’ recommendation.

C. DDDS and DSAAPD are not mentioned in the definition of covered DHSS divisions. Both agencies administer some Medicaid waivers. The waivers authorize aggrieved applicants and participants to pursue a fair hearing. See, e.g. attached Appendix F-1:1 from ABI waiver.

Agency Response: DSS adopted this change in the final order regulation and also added the Division of Public Health to the list since that Division is involved with AIDS waiver services funded under the Medicaid Program.

D. The DLTCRP is not mentioned in the definition of covered DHSS divisions. Consistent with Title 16 **Del.C.** §1121(18), residents of licensed long-term care facilities can request a DHSS hearing to contest an involuntary discharge. Pursuant to 16 **DE Admin Code** §5304.2, DSS processes such fair hearing requests involving nursing homes. However, the DLTCRP has been processing hearings for non-nursing homes with no regulations. See attached October, 2004 correspondence between DLP and DLTCRP. It would be preferable to clarify that such hearings are subject to the Title 16 **Admin Code** 5000 procedures and clarify if they are processed by DSS or the DLTCRP.

Agency Response: The proposed rulemaking does not change the existing rule at §5304.2 and DSS has jurisdiction for residential nursing facility discharge hearings as provided under 42 CFR 483.202 and 483.204 (a) (1). (The reference in the current rule to §438.202 and §438.204 (a)(1) erroneously transposes the rule numbers and may have been superseded by changes in the federal numbering system. Please note that this jurisdictional issue is under review by DHSS’ legal council.)

Second, §5405(4) categorically disallows the hearing officer “to assist either party in the presentation of the case”. Since DHSS representatives are professionals routinely involved in hearings, this disallowance disproportionately affects pro se applicants. This provision also violates federal Food Stamp regulations which recite as follows:

(p) Household rights during hearing. The household may not be familiar with the rules of order and it may be necessary to make particular efforts to arrive at the facts of the case in a way that makes the household feel most at ease.

7 C.F.R. §273.15(p). The courts have often imposed an expectation of some assistance to pro se applicants in presenting their case in administrative hearings. See, e.g. Reefer v. Barnhart, 326 F.3d 376, 380 (3d Cir. 2003); Livingston v. Califano, 614 F.2d 342, (3d Cir. 1980); and Dobrowolsky v. Califano, 606 F. 2d 403 (3d Cir. 1979).

Agency Response: The only change in the rule text is to remove indefinite pronouns as references and replace with gender neutral language. DSS considered the comment and will retain the rule as proposed.

Third, §5405(3)(b) changes the order of presentation. The current standard establishes a norm of DHSS presenting first unless the hearing officer exercises discretion to have the individual present first. The amendment requires the party with the burden of proof to proceed first and disallows any hearing officer discretion. This is

highly objectionable. The hearing officer should be granted some discretion in establishing the order of presentation. Moreover, it would be preferable to retain the current approach in which the State normally presents first. This is the approach adopted in other administrative hearings. See, e.g. attached Department of Education hearing procedures under Title 14 **Del.C.** §3135. As a practical level, it may streamline the hearing to have the State present first. For example, if a pro se applicant has been denied eligibility for a program, it is logical to have DHSS present first on the program eligibility standards and specific reasons why the applicant does not meet the standards. If the applicant proceeds first, the applicant may not be clear on the standards and eligibility deficits. As a result, the presentation will be unfocused and protracted. Moreover, if the unsophisticated pro se applicant simply recites that he believes he is eligible, his appeal will be summarily denied for failure to prove all essential elements of the case with no presentation by the State based on §5405(3)c).

Agency Response: This change was prompted by a 2007 Delaware Supreme Court decision, *Urban v. Meconi*, No. 439, 2006. In the matter before the Court a party claimed that the Department had improperly allocated the burden of proof at a fair hearing. The Court considered "it noteworthy that DHSS, itself, took the position that the relevant sections of the Delaware Social Services Manual are inconsistent and 'improper.' . . . In light of that admission, we assume DHSS is reviewing the Manual and making appropriate changes."

DSS has reviewed the Social Services Manual. The change in the order of presentation at fair hearings as proposed is a result of that review. In light of the Delaware Supreme Court's remark, the proposed change, as written, is appropriate.

If the proposed changes to §5405(3)b) are retained, DHSS should amend the fourth sentence to read as follows:

The appellant or claimant is the moving party for actions related to initial ineligibility determinations, initial denials of claims or the failure to act upon a claim with reasonable promptness.

Councils' rationale is that any termination or discontinuation of assistance decision amounts to an "ineligibility determination" or "denial".

Agency Response: To facilitate clarity and enable recognition of the party who carries the burden of proof, DSS adopted the Councils' recommendation.

Fourth, the amendment to §5405(3)d) is problematic. It recites:

If the ~~second~~ party has presented evidence, the ~~first~~ party may, in the discretion of the hearing office, present rebuttal evidence.

The words "second" and "first" should be retained for clarity. Otherwise, it is unclear which "party" is being referenced.

Agency Response: DSS changed the terms in the final order regulation to the "moving" and "non-moving" parties.

Further analysis by Division staff resulted in changes to the rule as proposed to correct administrative and publication errors and omissions as indicated by **[bracketed bold type]**.

Findings of Fact:

The Department finds that the proposed changes as set forth in the March 2008 Register of Regulations should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Division of Social Services Manual regarding Fair Hearing procedures is adopted and shall be final effective May 10, 2008.

Vincent P. Meconi, Secretary, DHSS, April 14, 2008

**DSS FINAL ORDER REGULATIONS #08-16
REVISIONS:**

5000 Definitions

Advance Notice Period or Timely Notice Period - Is the ten (10) day period between the date a notice is mailed to the date a proposed action is to take effect.

Appellant - Is a recipient who has requested a hearing.

Benefits - Are any kind of assistance, payments or benefits made by TANF, GA, Medicaid, Child Care, or Food Stamps.

Claimant - Is an applicant who has requested a hearing.

Department - (or DHSS) is the Department of Health and Social Services.

DHSS - Is the Department of Health and Social Services, including

- 1) the Division of Social Services ("DSS"), in connection with ~~[financial assistance~~ economic, medical, vocational] or child care subsidy assistance;
- 2) the Division of Medicaid and Medical Assistance ("DMMA") or a managed care ~~[company organization]~~ ("MCO") under contract with DHSS to manage an operation of the Medicaid Program, in connection with medical assistance;
- 3) the Division of State Service Centers ("DSSC") in connection with the Emergency Assistance Program [;];
- 4) **the Division of Developmental Disabilities Services (DDDS) in connection with Medicaid Program services;**
- 5) **the Division of Public Health in connection with Medicaid Program services;**
- 6) **the Division of Services for the Aging and Adults with Physical Disabilities (DSAAPD) in connection with Medicaid Program services.]**

DSS - Is the Division of Social Services (or "the Division.")

Fair Hearing - Is an administrative hearing held in accordance with the principles of due process which include:

- 1) Timely and adequate notice;
- 2) The right to confront and cross-examine adverse witnesses;
- 3) The opportunity to be heard orally;
- 4) The right to an impartial decision maker;
- 5) The opportunity to obtain counsel.

Hearing Decision - Is the decision in a case appealed to the State hearing officer. The decision includes the substance of what transpired at the hearing and a summary of the case facts, supporting evidence, and pertinent State or federal regulations and gives the reason for the decision. In Food Stamp disqualification cases, the hearing decision must also respond to reasoned arguments by the appellant.

EXAMPLE: At a Food Stamp Program Intentional Program Violation Hearing involving a failure to report a change promptly, an appellant may argue that a failure to report does not constitute "clear and convincing evidence" of intent to defraud. The hearing officer's decision must respond to this argument.

Hearing Officer - Is the individual responsible for conducting the hearing and issuing a final decision on issues of fact and questions of law.

Hearing Record - Is a verbatim transcript of all evidence and other material introduced at the hearing, the hearing decision, and all other correspondence and other documents which are admitted as evidence or otherwise included for the hearing record by the hearing officer.

Hearing Summary - Is a document prepared by an agency stating the reason(s) the action under appeal was taken and the information upon which the reasons are based. The summary may include documents to be used to decide the issue in question. Its purpose is to provide an appellant with information to prepare his/her case for the hearing.

MCO - Means a Managed Care Organization offering or providing medical services to recipients of medical assistance from ~~the Division of Social Services~~ DHSS and individual medical service providers of an MCO panel.

Party - A party to a hearing is a person or an administrative agency or other entity who has taken part in or is concerned with an action under appeal. A party may be composed of one or more individuals.

Request for a Fair Hearing - Any clear expression (oral or written) by the appellant or his/her authorized agent that ~~(s)he~~ the individual wants to appeal a decision to a higher authority. Such request may be oral in the case of actions taken under the Food Stamp Program.

State Presenter - Is the agency employee advocating the State's case in a hearing.

(Break In Continuity of Sections)

5405 Fair Hearing Procedures

1) Hearing Officer's Introduction

The hearing officer will ~~appropriately introduce~~ open the ~~purpose of the meeting~~ hearing, will identify the individuals and roles of those in attendance, and generally "set the stage" to assure the appellant or claimant of his/her right to be heard. In addition, ~~(s)he~~ the hearing officer will administer an oath to all witnesses and parties ~~presenting~~ expected to present testimony at the hearing. The hearing officer may, in his/her discretion, deal with any preliminary matters prior to beginning the case.

2) Manner of Proceeding

The hearing officer shall conduct the hearing in an informed fashion, consistent however with the procedural rights of the Department and the **[appellant or]** claimant to a courteous, fair, and fairly conducted hearing consistent with due process and the requirements of the federal regulation. Parties will be courteous to each other and the hearing officer at all times and will obey the orders and rulings of the hearing officer.

3) Order of Presentation

a) Opening Remarks.

At the discretion of the hearing officer, the Department and the appellant or claimant will each be given an opportunity to make brief opening statements. An opening statement shall advise the hearing officer of the issues a party contends are a part of the case and shall ~~succinctly~~ briefly summarize how the party's case will be proven. The hearing officer may, ~~however~~, terminate or limit any opening statement which is unduly lengthy, repetitive or irrelevant.

b) ~~The State will present its case first, unless, in the discretion of the hearing officer, The moving party will present its case first. ‡The burden of persuasion proof rests on the other party (the claimant) is on the moving party. The moving party is the party to the hearing seeking a change in the status quo ante. The Department is the moving party for actions to discontinue, terminate, suspend, or reduce assistance. The appellant or claimant is the moving party for actions relating to [initial] ineligibility determinations, the [initial] denials of claims or the failure to act upon a claim with reasonable promptness. This shall~~ Each party's case shall include the presentation of all witnesses to give testimony and all documents and other evidence which is admissible offered to prove its case. The other party may cross-examine each witness and may raise any legal basis for exclusion of any evidence at appropriate times during the hearing. Witnesses may be sequestered by or with the approval of the hearing officer.

c) ~~The other~~ Each party may present any witnesses to give testimony ~~(and may testify his/herself)~~ and other evidence which is admissible to ~~prove~~ support his/her/its case. However, ~~such~~ the non-moving party need not present any evidence, but may rely upon the ~~other~~ moving party's failure to prove an essential element of his/her/its case. If evidence or testimony is presented, the other party shall have the opportunity to raise any legal

basis for its exclusion and the opportunity to cross examine witnesses at the appropriate time during the proceeding.

d) If the ~~second~~ **[non-moving]** party has presented ~~any~~ evidence, the ~~first~~ **[moving]** party may, in the discretion of the hearing officer, present rebuttal evidence.

e) Closing Remarks.

The parties will be given an opportunity to briefly summarize their cases in closing remarks. Such closing remarks may summarize evidence and present legal argument for the adoption of one position against the adoption of the other. However, the hearing officer may limit or terminate unduly lengthy, repetitive, or irrelevant closing remarks.

4) Role of Hearing Officer

The hearing officer is in charge of running the hearing. ~~He/she~~ The hearing officer shall make all rulings on the admissibility of evidence as to how the proceedings are conducted. The hearing officer may question witnesses or direct the parties to produce evidence which ~~he/she~~ the hearing officer determines ~~to be~~ is necessary for ~~him/her~~ to render a decision in the case. However, other than ensuring that the hearing is conducted fairly, the hearing officer is not permitted to assist either party in the presentation of ~~his/her/its~~ the case.

5) Decisions of the Hearing Officer

Decisions of the State hearing officer will be based exclusively on evidence introduced at the hearing. The decision of the hearing officer will be issued not more than 90 days from the date the request for a fair hearing is filed or more than 30 days from the date the hearing is conducted. The decision of the hearing officer is the final decision of the agency. Judicial review, pursuant to 31 **Del.C.** 520, may be taken directly from the hearing officer's decision, within thirty (30) days of the decision.