

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF SOCIAL SERVICES
Statutory Authority: 31 Delaware Code, Section 107 (31 Del.C. §107)

ORDER

DSSM 5311 Notification of Time and Place of Hearing

FINAL

NATURE OF THE PROCEEDINGS

Delaware Health and Social Services (“Department”) / Division of Social Services initiated proceedings to amend the Division of Social Services Manual (DSSM) as it relates to Fair Hearing Practice and Procedure. The Department’s proceedings to amend its regulations 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 proposed regulation changes pursuant to 29 Delaware Code Section 10115 in the June 2004 Delaware Register of Regulations, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by June 30, 2004 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSED CHANGE

DSSM 5311, Notification of Time and Place of Hearing - The change adds language to clarify that the ten day advance notice period in this rule refers to the date the fair hearing scheduling letter is mailed and not to the date the letter is received by certified mail.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE

The Delaware Developmental Disabilities Council (DDDC), the Governor’s Advisory Council for Exceptional Citizens (GACEC), and the State Council for Persons with Disabilities (SCPD) provided the following summarized statement as a preamble to their observations, concerns and suggestions:

The regulation contemplates that the notice will be sent to the beneficiary by certified mail. This will often result in additional delay in receipt since the mail carrier will only leave a notice of the availability of the mail if the beneficiary is not at home. The beneficiary may need to alert witnesses of a hearing date with only a few days advance notice. This provides little advance notice to witnesses (who may be medical providers with “tight” calendars). Such “short” notices will predictably result in more requests for continuances since attorney, beneficiary, and witness calendars will already be filled.

Agency Response: The proposal, which would amend the current regulation covering notification of a fair hearing, is to clarify that the 10-day advance notice provision only requires that the notice be mailed, not actually received, 10 calendar days prior to the hearing. Regulations already provide and the practice has been to use certified mail for mailing hearing notices.

The rule was proposed because of some recent confusion over its application. The Delaware rule is based primarily on the federal Food Stamp Program rule at 7 CFR 273.15(k)(3)(1). This rule says, in part, that “At least 10 days prior to the hearing, advance written notice shall be provided to all parties involved to permit adequate preparation of the case.” The federal Medicaid Program rule at 42 CFR 431.240 does not include any time standard for mailing but says, in part, that “all hearings must be conducted...(2) only after adequate written notice of the hearing.”

The Councils suggested that (1) a “mailing date” approach utilize a “10 business days” standard, (2) the regulation be amended so that the notice is sent by both certified mail and regular mail to facilitate prompt receipt and (3) “amend the regulation or adopt a business practice of contemporaneously mailing the notice to both the appellant and appellant’s representative, if any.”

DSS has carefully considered each of the suggestions.

DSS has not adopted the Councils' suggestions for the following reasons: commonly accepted rule of regulatory construction is that time periods of 7 days or less mean "working days" and rules that have time periods of more than 7 days mean calendar days; and, our experience over many years is that certified mail is typically delivered very promptly after it is posted. The obligation is to communicate with the client and, the majority of our scheduling notices are mailed 30 days in advance of the date of the hearing; adding mailings to our process is an additional expense as well as a manpower strain. However, the time period is changed to read "12 calendar days" to more clearly define the time period and to allow two (2) days for mailing.

FINDINGS OF FACT

The Department finds that the proposed changes as set forth in the June 2004 Register of Regulations should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Division of Social Services Manual as it relates to the notification of time and place of fair hearing is adopted and shall be final effective August 10, 2004.

7.15.2004

Karryl McManus for Vincent P. Meconi

Vincent P. Meconi, Secretary, DHSS

5311 Notification of Time and Place of Hearing

The time, date, and place of the hearing will be arranged so that the hearing is accessible to the appellant. At least ten (10) days before the hearing, advance written notice will be provided by mailing the notice to all parties involved to permit adequate preparation of the case. An appellant may request less notice in order to expedite the scheduling of the hearing. Notices to appellants are sent by certified mail. The notice will:

- 1) Advise the appellant or representative of the name, address, and phone number of the person to notify in the event it is not possible for the appellant to attend the scheduled hearing;
- 2) Stipulate that the hearing request will be dismissed if the appellant or his/her representative fails to appear for the hearing without good cause (i.e., death in family, personal illness, unexpected emergency);
- 3) Include the hearing procedures and any other information that would provide the appellant with an understanding of the proceedings that would contribute to the effective presentation of the household's case and will include fair hearing summary and documents filed for the hearing;
- 4) Explain that the appellant has the right to bring an attorney or other representative to his/her hearing;
- 5) Explain that the appellant may present any information that (s)he desires at the hearing;
- 6) Explain that the appellant or representative may examine the record prior to the hearing.

8 DE Reg. 351 (8/1/04)