

# DEPARTMENT OF HEALTH AND SOCIAL SERVICES

## DIVISION OF SOCIAL SERVICES

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

### PROPOSED

### PUBLIC NOTICE

#### Fair Hearing Procedures

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the **Delaware Code**) and under the authority of Title 31 of the **Delaware Code**, Chapter 5, Section 512, Delaware Health and Social Services (DHSS) / Division of Social Services (DSS) is proposing to amend the Division of Social Services Manual (DSSM) regarding Fair Hearing procedures.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Sharon L. Summers, Policy & Program Development Unit, Division of Social Services, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 or by fax to (302) 255-4425 by March 31, 2008.

The action concerning the determination of whether to adopt the proposed regulation will be based upon the results of Department and Division staff analysis and the consideration of the comments and written materials filed by other interested persons.

#### 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.

#### DSS PROPOSED REGULATIONS #08-07 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 or child care subsidy assistance;

2) the Division of Medicaid and Medical Assistance (“DMMA”) or a managed care company (“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.

**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 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 ineligibility determinations, the 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 nonmoving 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~~ party has presented ~~any~~ evidence, the ~~first~~ 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~~ 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.

**11 DE Reg. 1193 (03/01/08) (Prop.)**