

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF MEDICAID AND MEDICAL ASSISTANCE
Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)
16 **DE Admin. Code** 5000

FINAL

ORDER

Fair Hearings

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance initiated proceedings to amend Title XIX Medicaid State Plan regarding Fair Hearings, specifically, to clarify policy and procedures. The Department's proceedings to amend its regulations were initiated pursuant to 29 **Del.C.** §10114 and its authority as prescribed by 31 **Del.C.** §512.

The Department published its notice of proposed regulation changes pursuant to 29 **Del. C.** §10115 in the March 2024 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by April 1, 2024, 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 notice is to advise the public that Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) is proposing to amend Division of Social Services Manual (DSSM) Fair Hearings.

Background

The Patient Protection and Affordable Care Act modernized the means by which an application can be filed. We are proposing a policy change that facilitates individual's ability to exercise their fair hearing rights through the same modalities that can be used to submit an application.

In accordance with section 1413(b)(1)(A) of the Patient Protection and Affordable Care Act and CFR § 431.221 Request for Hearing, the agency must accept an application from the applicant, an adult who is in the applicant's household or family, an authorized representative, or if the applicant is a minor or incapacitated, someone acting responsibly for the applicant, and any documentation required to establish eligibility--

(1) Via the internet website;

(2) By telephone;

(3) Via mail;

(4) In person; and

(5) Through other commonly available electronic means.

Currently the Division of Social Services Manual defines a Medical Assistance fair hearing request as any clear, written expression by the appellant or his authorized agent that the individual wants to appeal a decision to a higher authority. We are proposing a change to enable applicants and beneficiaries to request a Medical Assistance fair hearing via all the same modalities as are available for individuals to submit an application. For that reason, we are proposing to redefine Medical Assistance fair hearing requests as any clear expression (oral or written).

We believe that facilitating individuals' ability to exercise their fair hearing rights through modernizing how a Medical Assistance fair hearing request can be made is as important as, and no more inherently burdensome than, modernizing how an application can be filed. The proposed change will add two new types of Medical Assistance fair hearing requests: telephonic and online fair hearing requests.

Statutory Authority

- 1413(b)(1)(A) of the Patient Protection and Affordable Care Act

- 42 CFR § 431.221 Request for hearing

Purpose

The purpose of this notice is to advise the public that Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) is proposing to amend the Division of Social Services Manual (DSSM) 5000 and 5304 regarding Fair Hearings.

Summary of Proposed Changes

Effective for services provided on and after June 11, 2024, Delaware Health and Social Services/Division of Medicaid and Medical Assistance (DHSS/DMMA) proposes to amend the Delaware Social Services Manual (DSSM) to clarify internal policy and procedures regarding Fair Hearings.

Public Notice

In accordance with the *federal* public notice requirements established at Section 1902(a)(13)(A) of the Social Security Act and 42 CFR 440.386 and the *state* public notice requirements of Title 29, Chapter 101 of the **Delaware Code**, DHSS/DMMA gave public notice and provided an open comment period for 30 days to allow all stakeholders an opportunity to provide input on the proposed regulation. Comments were to have been received by 4:30 p.m. on April 1, 2024.

Centers for Medicare and Medicaid Services Review and Approval

The provisions of this state plan amendment (SPA) are subject to approval by the Centers for Medicare and Medicaid Services (CMS). The draft SPA page(s) may undergo further revisions before and after submittal to CMS based upon public comment and/or CMS feedback. The final version may be subject to significant change.

Provider Manuals and Communications Update

Also, there may be additional provider manuals that may require updates as a result of these changes. The applicable Delaware Medical Assistance Program (DMAP) Provider Policy Specific Manuals and/or Delaware Medical Assistance Portal will be updated. Manual updates, revised pages or additions to the provider manual are issued, as required, for new policy, policy clarification, and/or revisions to the DMAP program. Provider billing guidelines or instructions to incorporate any new requirement may also be issued. A newsletter system is utilized to distribute new or revised manual material and to provide any other pertinent information regarding DMAP updates. DMAP updates are available on the Delaware Medical Assistance Portal website: <https://medicaid.dhss.delaware.gov/provider>

Fiscal Impact Statement

There is no anticipated fiscal impact.

Summary of Comments Received with Agency Response and Explanation of Changes

Comment: Comments were received suggesting the language "by the appellant or his authorized agent" be changed to a gender-neutral pronoun, or to add the female pronoun making it consistent with other language in the regulation.

Agency response: DMMA appreciates the suggestion and agrees with amending the language to "by the appellant or his/her authorized agent" making it consistent with the language throughout the regulation.

Comment: Suggested that the wording of 5304.2 which states "Hearing Office Determines if Hearing Request is Valid" be changed to "Hearing Officer Determines if Hearing Request is Valid". "Office" is an error as Section 5304.2 describes the duties and responsibilities of the Hearing Officer.

Agency response: DMMA acknowledges the error and agrees with correcting the word to "Officer".

Comment: There were comments supporting the proposed changes as they enable Delaware Medicaid to comply with federal law and expands the means by which individuals may request Fair Hearings.

Agency response: DMMA appreciates the support.

DMMA is pleased to provide the opportunity to receive public comments and greatly appreciates the thoughtful input given by:

- Governor's Advisory Council for Exceptional Citizens (GACEC)
- State Council for Persons with Disabilities (SCPD)

IMPACT ON THE STATE'S GREENHOUSE GAS EMISSIONS REDUCTION TARGETS AND RESILIENCY TO CLIMATE CHANGE:

The DMMA Division Director has reviewed the proposed regulation as required by 29 Del. C. §10118(b)(3) and has determined that if promulgated, the regulation would have a de minimis impact on the State's resiliency to climate change

because neither implementation nor compliance with the regulation would reasonably involve the increase in greenhouse gas emissions.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the March 2024 Register of Regulations should be adopted with additions. The Department finds that the proposed does not require further public notice or comment under the APA because the amendments are non-substantive pursuant to 29 Del.C. §10118(c).

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Division of Social Services Manual (DSSM) and Title XIX Medicaid State Plan regarding Fair Hearings, specifically, to clarify policy and procedures, and shall be final effective June 11, 2024.

5/28/2024 | 12:57 PM EDT

Date of Signature

Josette D. Manning Esq.
Cabinet Secretary, DHSS

5000 Fair Hearing Practice and Procedures

5000 Definitions

42 CFR 438.400

Abandonment	When the claimant fails without good cause, to appear (by [himself themselves] or by authorized representative) at [his or her their] scheduled hearing.
Adequate Notice	A written notice that includes: <ol style="list-style-type: none">1. A statement of what action the agency intends to take2. The reasons for the intended agency action3. The specific regulations supporting such action4. An explanation of the individual's right to request a State agency hearing5. The circumstances under which assistance is continued if a hearing is requested6. If the agency action is upheld, that such assistance must be repaid under title IV-A, and must also be repaid under titles I, X, XIV or XVI (AABD) if the State plan provides for recovery of such payments.
Advance Notice Period	The 10 day period between the date a notice is mailed to the date a proposed action is to take effect. (Also called Timely Notice Period.)
Adverse Benefit Determination	For recipients enrolled in a MCO, the denial or limited authorization of a requested service, including determinations based on the type or level of service, requirements for medical necessity, appropriateness, setting, or effectiveness of a covered benefit; the reduction, suspension, or termination of a previously authorized service; the denial, in whole or in part, of payment for a service; the failure to provide services in a timely manner, as defined by the State; the failure of the MCO to act within timeframes regarding the standard resolution of grievances and appeals; and the denial of a recipient's request to dispute a financial liability, including cost sharing, copayments, and other recipient financial liabilities.
Appellant Benefits	Anyone who requests a hearing. (Also called Claimant.) Any kind of assistance, payments or benefits made by TANF, GA, Medicaid, Delaware Healthy Children Program (DHCP), Chronic Renal Disease Program (CRDP), Child Care, Refugee, Emergency Assistance or Food Supplement programs.
Claimant	Anyone who requests a hearing. (Also called Appellant.)

DHSS	<p>The Department of Health and Social Services, including:</p> <ol style="list-style-type: none"> 1. The Division of Social Services (DSS), in connection with economic, medical, vocational or child care subsidy assistance 2. The Division of Medicaid and Medical Assistance (DMMA) or a managed care 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	The Division of Social Services (or "the Division.")
Expedited Fair Hearing	An administrative hearing for Medicaid and DHCP which provides for a decision to be issued within 3 working days from the receipt of the request for an appeal of a decision to terminate, reduce, or suspend previously authorized services or a decision to deny or limit a new service request where the standard decision time frame of 45 days could seriously jeopardize the claimant's life or health or ability to attain, maintain, or regain maximum function.
Fair Hearing	<p>An administrative hearing held in accordance with the principles of due process which include:</p> <ol style="list-style-type: none"> 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, represent him or herself, or use any other person of his or her choice.
Fair Hearing Summary	A document prepared by the agency stating the factual and legal reason(s) for the action under appeal. The purpose of the hearing summary is to state the position of the agency/entity that initiated the action in order to provide the appellant with the necessary information to prepare [his or her their] case.
Good Cause	<p>May include, but is not limited to the following:</p> <ol style="list-style-type: none"> 1. Death in the family 2. Personal injury or illness 3. Sudden and unexpected emergencies 4. Failure to receive the hearing notice
Group Hearing	A series of individual requests for a hearing consolidated into a single group hearing. A group hearing is appropriate when the sole issue involved is one of State or federal law, regulation, or policy. The policies governing hearings will be followed in all group hearings. The individual appellant in a group hearing is permitted to present [his or her their] case or be represented by an authorized representative.
Hearing Decision	<p>The decision in a case appealed to the State hearing officer. The decision includes:</p> <ol style="list-style-type: none"> 1. The substance of what transpired at the hearing 2. A summary of the case facts 3. Supporting evidence 4. Pertinent State or federal regulations 5. The reason for the decision <p>In Food Supplement Program disqualification cases, the hearing decision must also respond to reasoned arguments by the appellant.</p> <p>EXAMPLE: At a Food Supplement 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.</p>
Hearing Officer	The individual responsible for conducting the hearing and issuing a final decision on issues of fact and questions of law.

Hearing Record	A verbatim transcript of all evidence and other material introduced at the hearing, the hearing decision, and all other correspondence and documents which are admitted as evidence or otherwise included for the hearing record by the hearing officer.
Hearing Summary	A document prepared by the agency stating the factual and legal reason(s) for the action under appeal. The purpose of the hearing summary is to state the position of the agency/entity that initiated the action in order to provide the appellant with the necessary information to prepare [his or her their] case.
Hearsay Evidence	Testimony about a statement made by a third party that is offered as fact without personal knowledge
Individual Hearing	A hearing in which an individual client disagrees with the action taken by the Department on the facts of [his or her their] case.
MCO	A Managed Care Organization under contract with DHSS to administer the delivery of medical services to recipients of Medicaid and CHIP through a network of participating providers.
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.
Privilege	Appellants may decline to present testimony or evidence at a fair hearing under claim of privilege. Privilege may include the privilege against self- incrimination or communication to an attorney, a religious advisor, a physician, etc.
Request for a Fair Hearing	Any clear expression (oral or written) by the appellant or [his their] authorized agent that the individual wants to appeal a decision to a higher authority. Such request may be oral in the case of actions taken under the <u>Medical Assistance or Food Supplement Program. Programs. The agency must establish procedures that permit an individual, or an authorized representative, to submit a hearing request for Medical [Assistance Assistance:]</u> <ol style="list-style-type: none"> <u>1. Via the internet website;</u> <u>2. By telephone;</u> <u>3. Via mail;</u> <u>4. In person; and</u> <u>5. Through other commonly available electronic means.</u>
Relevance	Refers to evidence. Evidence is relevant if an average person believes that the evidence makes a significant fact more probable.
Remand	To send back for further action.
Rule of Residuum	Findings of fact must be supported by at least some evidence which is admissible in a court of law.
Timely Notice Period	The 10 day period between the date a notice is mailed to the date a proposed action is to take effect. (Also called Advance Notice Period.)

- 11 DE Reg. 1482 (05/01/08)
- 15 DE Reg. 1343 (03/01/12)
- 16 DE Reg. 419 (10/01/12)
- 21 DE Reg. 568 (01/01/18)

5304 Presiding Over Fair Hearings

7 CFR 273.15, 42 CFR 431.241, 45 CFR 205.10

This policy applies to applicants and recipients for any public assistance program administered by the Division of Social Services or the Division of Medicaid and Medical Assistance. It also applies to programs administered by other agencies over which DSS has authority. Staff may not limit or interfere in any way with an appellant's freedom to make a request for a hearing.

1. DSS Hearing Officers Preside Over Fair Hearings

The Division of Social Services is authorized to preside over and render decisions in the following types of hearings:

- A. PASRR Hearings
- B. Medicaid Managed Care Cases

C. Emergency Assistance Services Hearings

D. Jurisdiction for Hearings over Medicaid Program Services

2. Hearing [**Office Officer**] Determines if Hearing Request is Valid

A request for a hearing must be a clear, written expression to the effect that the appellant wants the opportunity to present his or her case to a higher authority. The request must be signed by the appellant or his or her representative.

Exception: The agency must establish procedures that permit an individual, or an authorized representative, to submit a hearing request for Medical [**Assistance**

Assistance:]

1. Via the internet website;

2. By telephone;

3. Via mail;

4. In person; and

5. Through other commonly available electronic means.

Appellants of actions taken in the Food Supplement Program may request a fair hearing orally. If an oral request is made, inform the appellant that it is advisable to finalize the request by putting it in writing. The staff member receiving an oral request will take steps to begin the hearing process. This includes an offer, at the time of the request, to assist the appellant by putting the request in writing.

3. Hearing Officer Limits Issues Presented at the Hearing

The Hearing Officer has the authority to restrict the issues raised at the hearing. The following issues may be raised at the hearing.

A. Issues described in the notice of action sent to the appellant

B. Issues fairly presented in the appellant's request for a hearing

C. Issues fairly presented in the Division's response in its hearing summary.

15 DE Reg. 86 (07/01/11)

27 DE Reg. 975 (06/01/24) (Final)