

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF SOCIAL SERVICES
Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)

FINAL

Fair Hearings

**DSSM 5311 - Notifying Appellants and Others of Hearings;
DSSM 5312 - Responding to Fair Hearing Requests**

ORDER

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) regarding Fair Hearings, specifically, *Notifying Appellants and Others of Hearings and Responding to Fair Hearing Requests*. 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 January 2012 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by January 31, 2012 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 proposal described below amends policies in the Division of Social Services Manual (DSSM) regarding Fair Hearings, specifically, *Notifying Appellants and Others of Hearings and Responding to Fair Hearing Requests*.

Statutory Authority

45 CFR §205.10, *Hearings*

Summary of Proposed Changes

DSSM 5311, *Notifying Applicants and Others of Hearings*: Text was modified to clarify that the word "record" refers to the "case record". Case record is meant to include the totality of all files and records on the client. This clarification was made to ensure that clients can access their full case record and not just the materials that were submitted with the fair hearing summary.

DSSM 5312, *Responding to Fair Hearing Requests*: Text was modified to include reference to the Managed Care Organization (MCO) or other Contractor. This change clarifies that MCOs prepare fair hearing summaries where there are appeals of MCO actions.

Other proposed changes include minor formatting and punctuation changes.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE AND EXPLANATION OF CHANGE(S)

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. The Division of Social Services (DSS) has considered each comment and responds as follows.

First, in the "notice" context, the Councils' recommendation and DSS response were as follows:

Thirteenth, in §5311, Par. 3, it would be preferable to include a disclosure of right to access "case records" apart from the documents the agency or MCO has submitted as part of the Fair Hearing summary (the "record"). For example, an agency or MCO may not submit documents which undermine its position to the hearing officer but they may be in its case records. Access is a beneficiary's right and should be disclosed in the hearing notice. See §5403, Par. 2.

Agency Response: The 6 items in §5311 make up the hearing notice. Item 6 currently reads: "Explain that the appellant or representative may examine the record prior to or during the hearing." This statement encompasses your request.

15 DE Reg. 87, 89 (July 1, 2011) [emphasis supplied]

The new proposal mirrors the Councils' view:

Text was modified to clarify that the word "record" refers to the "case record". Case record is meant to include the totality of all files and records on the client. This clarification was made to ensure that clients can access their full case record and not just the materials that were submitted with the fair hearing summary.

15 DE Reg. 971, 972 (January 1, 2012) [emphasis supplied]

The change is an improvement. However, beneficiaries may still be confused by the term "case record" and believe that it only refers to documents submitted to the hearing officer. The federal regulation uses the term "case file" as distinct from "all documents and records to be used by the agency at the hearing". See attached 45 C.F.R. §205.10(a)(13). The term "record" is a term of art which generally refers to materials actually submitted to a tribunal. Indeed, Section 5000 contains the following definition of "hearing record":

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.

At a minimum, GACEC and SCPD recommend that DSS use the federal term "case file" which would include both "paper" and "computer" records. See attached broad Wikipedia definition of "file". DSS should then include a definition of "case file" in Section 5000. It could be as simple as the following:

Case File - Is comprised of the totality of all files and records on a client within the custody, control, or possession of an agency in electronic, paper, or other format.

Agency Response: DSS and DMMA have considered your comment. We choose to retain the term case record. We have however, amended the text to clarify that the case record refers to documents beyond those submitted to the hearing officer. The referenced text of §5311 is amended as follows:

F. Explain that the appellant or representative may examine the **[agency and/or MCO]** case record prior to or during the hearing

Second, in the context of fair hearing summaries, the Councils' recommendation and DSS response were as follows:

Fourteenth, in §5312, the introduction recites that the policy applies to decisions made by DSS or DMMA. There is no comparable provision covering MCOs which also issue appealable decisions. The regulation covers "Medicaid Managed Care Cases" [§5304, Par. 1B; §5401, Par. C.6]. We believe the superseded version of §5312 contained references such as "if completed by DSS" because it contemplated MCOs responding to hearing requests in addition to the State. The new version solely contemplates "State Agency" preparation of the hearing summary, etc. which has not been the historic practice for appeals from MCO decisions. MCOs have traditionally been required to prepare their own Fair Hearing Summaries.

Agency Response: We believe the revised language in §5312 more accurately captures the requirements for responding to Fair Hearing requests. In fact, the previous language, "If completed by DSS.." was specific to that Division. DMMA's procedures were never specified. Because the MCOs are a contractual arm of DMMA for purposes of service delivery, we believe the reference to DMMA inherently includes the requirements for MCO Fair Hearing responsibilities.

15 DE Reg. 87, 89 (July 1, 2011) [emphasis supplied]

The new proposal mirrors the Councils' view: "Within 5 working days of receipt of a fair hearing, the agency (or MCO or other Contractor) will prepare a hearing summary and submit the summary to the Hearing Office." This is an improvement over the current regulation. Councils' only recommendation would be to delete the word "State" from the heading to §5312, Par. 1. It would then read "(t)he State-Agency Prepares a Hearing Summary". The regulations contain many references to "agency" as juxtaposed to "State agency". See, e.g., Section 5000, definition of State Presenter, as an "agency employee"; and definition of Hearing Summary" as document prepared by "an agency"

Agency Response: The text of §5312 is amended as follows:

1. The [State] Agency Prepares a Hearing Summary

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the January 2012 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Division of Social Services Manual (DSSM) regarding Fair Hearings, specifically, *Notifying Appellants and Others of Hearings and Responding to Fair Hearing Requests* is adopted and shall be final effective March 10, 2012.

Rita M. Landgraf, Secretary, DHSS

**DSS FINAL ORDER REGULATION #12-07
REVISIONS:**

5311 NOTIFYING APPELLANTS AND OTHERS OF HEARINGS

45 CFR 205.10(a)(8), (a)(13)(i)

This policy applies to applicants and recipients of any public assistance program administered by the Division of Social Services (DSS) or the Division of Medicaid and Medical Assistance (DMMA).

1. **Hearings Are Made Accessible to the Appellant**
The Hearing Office will arrange the time, date, and place of the hearing so that it is accessible to the appellant.
2. **Hearing Office Provides Advance Notice**
The Hearing Office will mail written notice to all parties involved at least 12 days before the hearing.

Exception: An appellant may request less notice in order to speed up the scheduling of the hearing.

3. **Hearing Notice is Specific**
The hearing notice will:
 - ~~4.A.~~ Inform the appellant or representative of the name, address, and phone number of the person to notify if it is not possible for the appellant to attend the scheduled hearing.
 - ~~2.B.~~ Stipulate that the hearing request will be dismissed if the appellant or his or her representative fails to appear for the hearing without good cause (~~i.e.~~, e.g., death in family, personal illness, unexpected emergency).
 - ~~3.C.~~ 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. It will also include the fair hearing summary and documents filed for the hearing.
 - ~~4.D.~~ Explain that the appellant has the right to bring an attorney or other representative to his or her hearing.
 - ~~5.E.~~ Explain that the appellant may present any information that he or she desires at the hearing.
 - ~~6.F.~~ Explain that the appellant or representative may examine the **[agency and/or MCO] case** record prior to or during the hearing.

5312 RESPONDING TO FAIR HEARING REQUESTS

45 CFR 205.10

This policy applies anytime anyone requests a fair hearing due to a decision made by the Division of Social Services (DSS) or the Division of Medicaid and Medical Assistance (DMMA) for a program administered by DSS or DMMA.

1. **The [State] Agency Prepares a Hearing Summary**
Within 5 working days of receipt of a request for a fair hearing, the agency (or MCO or other Contractor) will prepare a hearing summary and submit the summary to the Hearing Office.
2. **Staff Ensure the Summary Contains Pertinent Information**
The hearing summary will contain enough information for the appellant to prepare his or her case. The summary must contain:
 - A. Identifying information - Give the client's name, the client's address, and the DCIS identification number.

- B. Action taken – Indicate the basis of the client's appeal (rejection, reduction, closure, amount of benefits, etc.).
- C. Reason for action - Describe the specific action taken by the agency, as well as the factual basis for its decision.
- D. Has assistance continued? - Indicate whether or not the appellant's assistance was restored because the appellant filed a request for a hearing within the timely notice period.
- E. Policy basis - Cite the specific State and federal rules supporting the action taken.
- F. Persons expected to testify - This section lists the names and addresses (if any) of persons that the agency expects to call to testify.

3. The Hearing Office Notifies the Appellant

Upon receipt of the hearing summary, the Hearing Office will:

- A. Set a prompt date for the hearing.
- B. Send a notice conforming to the requirements of §5311. The notice will include the hearing summary.
- C. Notify all parties, including witnesses, of the date, time, and place of the hearing.

15 DE Reg. 971 (01/01/12) (Prop.)

15 DE Reg. 1339 (03/01/12) (Final)