

**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 Provisions: DSSM; 5000, 5501, 5502, 5600, 5600.1, 5601, 5602, 5603, 5604, 5605, 5606 and 5607**

**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 various Fair Hearing provisions. 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 various Fair Hearing provisions including *Definitions, Public Access to Hearing Records, Admissible Evidence, Official Notice, Protocol, and Request for Continuance*.

**Statutory Authority**

- Federal Rule of Evidence 803
- Delaware Uniform Rules of Evidence
- 31 Del Code §1101,
- Confidential character of public assistance records; penalties for violations
- 7 CFR 272.1(c), *General Terms and Conditions, Disclosure*
- 7 CFR 273.15(c)(4), *Fair hearings, Timely action on hearings; household requests for postponement*
- 7 CFR 273.15(m), *Hearing official*
- 7 CFR 273.15(q)(5), *Hearing decisions*
- 7 CFR 273.15(s), *Implementation of final State agency decisions*
- 42 CFR 431.240(a)(3), *Conducting the hearing*
- 42 CFR 431.244(g), *Hearing decisions*
- 42 CFR 431.246, *Corrective action*
- 45 CFR 205.10(a)(9), 45 CFR 205.10(a)(14), 45 CFR 205.10(a)(16), 45 CFR 205.10(19), *Hearings, State plan requirements*
- 45 CFR 205.50, *Safeguarding information for the financial assistance programs*

**Summary of Proposed Changes**

The proposed changes reformat and clarify text for ease of readability. Additional changes include updating DSSM 5000; moving DSSM 5601 to *Definitions*; and, incorporating DSSM 5602, 5603, and 5607 into DSSM 5600.1. Also, section titles were renamed to more accurately reflect the section contents.

The proposed changes affect the following policy sections in the Division of Social Services Manual (DSSM):

- DSSM 5000, *Definitions*
- DSSM 5501, *Corrective Payments*
- DSSM 5502, *Public Access to Hearing Decisions*
- DSSM 5600, *Admission of Hearsay Evidence*
- DSSM 5600.1, *Admissible Evidence*
- DSSM 5601, *Rule of Legal Residuuum*
- DSSM 5602, *Exclusionary Rules of Evidence*
- DSSM 5603, *Official Notice*

DSSM 5604, *Protocol*  
DSSM 5605, *Requests for Continuance*  
DSSM 5606, *Recusation*  
DSSM 5607, *Demeanor Evidence*.

## 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.

As background, DSS proposed a set of comprehensive revisions to its fair hearing regulation in January, 2011. The Councils submitted extensive comments resulting in a final regulation in July, 2011 which incorporated several amendments prompted by the commentary [14 DE Reg. 618 (January 1, 2011) (proposed); 15 DE Reg. 86 (July 1, 2011) (final)]. The GACEC and the SCPD have the following observations and recommendations on the latest proposed revisions.

1. In §5000, definition of "abandonment", delete the comma after "cause".

**Agency Response:** Correction made.

2. In §5000, definitions of "advance notice period" and "timely notice period" are inaccurate since they categorically state that the period is ten days. A notice can be provided which gives more than a 10-day notice. The 10 days is a "minimum" which an agency or MCO may exceed. See, e.g., 42 C.F.R. 431.211 and 5300, Par. 2.B. ("timely notice is one mailed at least 10 days before the time of action"). If an MCO mailed out a notice with an effective date 15 days from notice date, the "timely" notice period would be 15 days, not 10 days. Reduction or termination of benefits would be barred within that 15 day period, not a 10 day period.

**Agency Response:** DSS and DMMA agree that a notice can be provided which gives more than a 10-day notice. However, with few exceptions, notices are not considered timely if mailed with less than 10 days between the date a notice is mailed and the date a proposed action is to take effect. No change is made to the definitions.

3. In §5000, definition of "fair hearing", Par.5 refers to "(t)he opportunity to obtain counsel". This is somewhat misleading. Compare 42 C.F.R. 431.206(b)(3), which requires DSS to publish hearing procedures which include notice that the appellant "may represent himself or use legal counsel, a relative, a friend, or other spokesman." See also 7 C.F.R. 273.15(f). Finally, other sections (§5000, definition of "group hearing"; §5606, Par. 3) refer to "authorized representative" or "authorized agent".

**Agency Response:** Appropriate text changed as follows.

5. The opportunity to obtain counsel[, **represent him or herself, or use any other person of his or her choice**]

4. In §5000, it is redundant to have a separate definition of "fair hearing summary" and "hearing summary". It would be preferable to combine the definitions and ensure that it encompasses the text from both of the current definitions and §5312 components, including a reference to the omitted persons expected to testify on behalf of the agency.

**Agency Response:** Two definitions are used because some users use the term "fair hearing summary" and others use the term "hearing summary". Putting the definition in both places saves the user time in that she or he can easily find the definition for the term that she or he is familiar with. A closer review of the definitions shows that they are slightly different from each other. The text of "hearing summary" has been changed to mirror the text of "fair hearing summary".

Section 5312 addresses the steps the State takes when responding to hearing requests. It is not appropriate to include "§5312 components, including a reference to the omitted persons expected to testify on behalf of the agency" in the definition of a hearing summary.

5. Section 5000 now defines an MCO as including "individual medical service providers of an MCO panel." This may be "overbroad". The Councils are dubious that the federal regulations contemplate hearings involving a beneficiary and a doctor's office or child's dentist. The federal regulations contemplate "agencies" as parties, not individual providers.

**Agency Response:** DMMA reviewed your comment and amends the definition of an MCO to read as follows:

**MCO - [4.] 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] [offering or providing medical services to recipients of medical assistance from the DHSS 2. Individual medical service providers of an MCO panel.]**

6. Section 5000 includes a definition of "State Presenter". DSS may wish to consider substituting "agency presenter" since MCOs involved as parties are not "State" presenters.

**Agency Response:** A review of the Policy Manual reveals the term State Agency is not used anywhere except in the Definitions. Consequently, that definition is being removed from the manual.

7. In §5501, the "note" is "overbroad". It recites as follows: "Staff must always prepare a claim against the household

for any over-issuance when the hearing decision upholds the agency's action." GACEC and SCPD shared a similar concern in connection with the January, 2011 proposed regulation resulting in the following commentary and response:

Third, §5300, Par. 2.A.6 is not literally accurate. It categorically recites "(i)f the agency action is upheld, that such assistance must be repaid." Repayment is discretionary and the State or MCO can decide to not pursue recovery. The analogous federal regulation [42 C.F.R. 431.230(b)] states that the agency "may institute recovery". Moreover, a beneficiary can elect to not continue benefits during the pendency of appeal. See §5308, Par. 2.A and §5300, Par. 2.C. Finally, this section would literally impose a mandatory repayment duty for benefits received prior to issuance of the notice and during the minimum 10-day notice period.

**Agency Response:** DSS and DMMA thank you for your comment. The regulation is amended and indicated by [Bracketed Bold Text]. See §5300, Par. 2.A.6.

The proposed categorical requirement that "(s)taff must always prepare a claim" should be amended or deleted.

**Agency Response:** The note is amended as follows:

NOTE: **[For food benefits and cash assistance, Ss]**staff must always prepare a claim against the household for any over-issuance when the hearing decision upholds the agency's action.

8. Section 5600.1, Par. 1.D contains a highly objectionable provision: "The hearing officer may make a negative assumption when a party declines to give testimony under a claim of privilege." The corresponding Delaware Rule of Evidence explicitly bars such a "negative assumption":

Rule 512. Comment upon or inference from claim of privilege; instruction.

(a) Comment or inference not permitted. The claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

It is highly inappropriate to penalize a party for invoking the attorney-client or other privilege.

**Agency Response:** The referenced text is deleted from the policy.

9. Section 5600.1, Par. D.1 recites as follows: "Privileges are waived by a claimant if the information is relevant to the defense of the action or inaction under appeal." This is also "overbroad". Simply because what a party told his attorney could be "relevant" to a defense does not automatically waive the attorney-client privilege.

**Agency Response:** The referenced text is deleted from the policy.

10. Section 5604, Par. 1. B, recites as follows: "However, after the hearing decision is made final, the parties may discuss the results of the hearing with the hearing officer." There is no definition of "made final". Moreover, the regulation ostensibly allows ex parte contact. This authorization is problematic for several reasons. A party can ask for reconsideration of a fair hearing decision. Cf. Henry v. Dept. of Labor, 293 A.2d 578, 581 (Del. Super. 1972)(Delaware quasi-judicial administrative hearing bodies have inherent jurisdiction to entertain applications for reconsideration). If one party has already had ex parte contact with the hearing officer, the hearing officer could not impartially entertain the application for reconsideration. A party could also request "reopening" based on criteria contained in the attached Superior Court (Civ) Rule 60. Accord, Henry at 581. If parties have had ex parte contact with the hearing officer, such applications could not be impartially entertained by the hearing officer.

**Agency Response:** Section 5604, Par.1.B is amended as follows to remove the referenced text.

B. After the Hearing

Agency employees may not discuss the merits of the case with the hearing officer after the hearing is adjourned.

**[However, after the hearing decision is made final, the parties may discuss the results of the hearing with the hearing officer.]**

**~~Exception: The parties may not discuss the results of the hearing with the hearing officer if the hearing officer sends the case back with instructions for further action and the agency worker expects to receive another request for a fair hearing.]~~**

11. Section 5605, Par. 2, which addresses continuances, is problematic.

a. This section omits consideration of the status of a party's attorney or representative (e.g. illness). This should be included in Par. 2.B .1.

b. There are no exceptions for a continuance within 24 hours of hearing. A medical emergency, hospitalization, or

sudden illness can occur within 24 hours of hearing. Adoption of a "no-exceptions" regulation violates due process.

**Agency Response:** Section 5605, Par. 2 is amended as follows:

**2. Requests For A Continuance Meet Specific Requirements**

A request for a continuance[ ~~must~~]:

- A. ~~[Should Be be]~~ made at least 24 hours in advance of the hearing so that the other party may be notified
- B. ~~[Must Specify specify]~~ the reason that a continuance is needed

Examples of requests for which a continuance should be granted[~~,~~] include, but are not limited to:

1. Illness of a party or witness
2. Extreme inclement weather
3. Request for additional time to prepare for the hearing

**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 various Fair Hearing provisions referenced above is adopted and shall be final effective March 10, 2012.

Rita M. Landgraf, Secretary, DHSS

**DSS FINAL ORDER REGULATION #12-08  
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.~~

~~DHSS – Is the Department of Health and Social Services, including~~

~~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 – 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 case for the hearing.

MCO—Means a Managed Care Organization offering or providing medical services to recipients of medical assistance from 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 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 Food Stamp Program.

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

**“Abandonment”**; When the claimant fails without good cause to appear (by himself or by authorized representative) at his or her scheduled hearing.

**“Adequate Notice”**; A written notice that includes:

1. A statement of what action the agency intends to take
2. The reasons for the intended agency action
3. The specific regulations supporting such action
4. An explanation of the individual's right to request a State agency hearing
5. The circumstances under which assistance is continued if a hearing is requested
6. 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.)

**“Appellant”**; Anyone who requests a hearing. (Also called Claimant.)

**“Benefits”**; Any kind of assistance, payments or benefits made by TANF, GA, Medicaid, Child Care, Refugee, Emergency Assistance or Food Supplement programs.

**“Claimant”**; Anyone who requests a hearing. (Also called Appellant.)

**“DSS”**; The Division of Social Services (or “the Division.”)

**“DHSS”**; The Department of Health and Social Services, including:

1. The Division of Social Services (DSS), in connection with economic, medical, vocational or child care subsidy assistance
2. The Division of Medicaid & 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

**“Fair Hearing”**; 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[, 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 case.

**“Good Cause”**; May include, but is not limited to the following:

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 case or be represented by an authorized representative.

**“Hearing Decision”**: The decision in a case appealed to the State hearing officer. The decision includes:

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

In Food Supplement Program disqualification cases, the hearing decision must also respond to reasoned arguments by the appellant.

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.

**“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 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 or her case for the hearing.]~~ 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 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 case.

**“MCO”**: ~~[1.] 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 offering or providing medical services to recipients of medical assistance from the DHSS.~~

~~2. 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.

**“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 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 Food Supplement Program.

**“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.

~~“State Presenter”~~; The agency employee advocating the State’s case in a hearing.]

**“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.)

*(Break in Continuity of Sections)*

## **5501 Corrective Payments MAKING CORRECTIVE PAYMENTS OR ACTIONS**

When the hearing decision is favorable to the appellant, or when the agency decides in favor of the appellant prior to

the hearing, the agency will promptly make corrective payments (retroactive to the date incorrect action was taken). For the purpose of this section, "prompt" means action must be taken to initiate the corrective payments or other remedy within five (5) business days of the date of the hearing decision. Benefits will be restored to food stamp households which are leaving a project area before their departure, whenever possible. If benefits are not restored prior to the household's departure, the agency shall forward an authorization for benefits to the household or new project area if this information is known.

When the hearing decision upholds the agency's action, a claim against the household for any overissuance will be prepared.

7 CFR 273.15(s), 42 CFR 431.246, 45 CFR 205.10(a)(16)

This policy applies any time a hearing decision requires an adjustment in benefits. It also applies when an error that favors the appellant/claimant is discovered by the Division of Social Services (DSS) or the Division of Medicaid & Medical Assistance (DMMA).

**1. The State Agency Initiates Corrective Actions**

Staff will take corrective action (retroactive to the date an incorrect action was taken) when:

- A. A hearing decision is favorable to the appellant
- B. The agency decides in favor of the appellant prior to the hearing

Staff will take action to initiate the corrective payments or other remedy within 5 business days of the date of the hearing decision.

DSS or DMMA staff will restore benefits to food benefit households that are leaving the State before the household's departure, whenever possible.

NOTE: **[For food benefits and cash assistance, Ss]**taff must always prepare a claim against the household for any over-issuance when the hearing decision upholds the agency's action.

**5502 ~~Public Access to Hearing Decisions~~ PROVIDING PUBLIC ACCESS TO HEARING DECISIONS**

~~Decisions are accessible to the public subject to provisions for safeguarding public assistance information. Under 31 Delaware Code 1101, "no person may reveal information concerning applicants for or recipients of public assistance except for the purposes directly connected with the administration of the program."~~

7 CFR 272.1(c), 7 CFR 273.15(q)(5), 42 CFR 431.244(g), 45 CFR 205.10(19), 45 CFR 205.50, 31 Del.C. §1101

This policy applies to all hearing decisions made by the Division of Social Services (DSS) or the Division of Medicaid & Medical Assistance (DMMA).

**1. Hearing Decisions are Available to The Public**

Hearing decisions are available to the public on the Division of Social Services and Division of Medicaid & Medical Assistance websites.

DSS: (<http://www.dhss.delaware.gov/dhss/dss/redactedfairhearings.html>)

DMMA: (<http://www.dhss.delaware.gov/dhss/dmma/fairhearings.html>).

**2. DSS and DMMA Take Steps to Keep Identities Confidential**

DSS and DMMA remove information that might identify the appellant/claimant before the decision is made available.

No information concerning applicants or recipients of public assistance is revealed except for the purposes directly connected with the administration of the program.

*(Break in Continuity of Sections)*

**5600 ~~Admission of Hearsay Evidence~~ ADMITTING HEARSAY EVIDENCE**

~~1) Hearsay evidence is evidence of a statement made outside the hearing which is introduced at the hearing as proof of the truth of its content.~~

~~2) Hearsay evidence is not admissible over objection unless it meets one of the exceptions to the hearsay rule (evidence which, although it falls within definition of hearsay, is nevertheless admissible because of special necessity) listed in the Delaware Uniform Rules of Evidence. Admissible hearsay evidence includes:~~

- ~~a) Any statements where the claimant has had an opportunity to cross-examine the witness at a prior proceeding or~~

statements of agency staff who could be available as witnesses upon a claimant's request; and-

b) Evidence which falls within recognized hearing exceptions where cross-examination of the witness would not be meaningful, such as those enumerated in Federal Rule of Evidence 803. (See Ortiz v. Eichler, 794 F2d 889,896 (3rd Cir. 1986).

c) Official records of the Department of Health and Social Services and other official records when authenticated by a custodian of the record.

d) Evidence recognized by official notice as an exception to the hearsay rule (see 5603).

Recognized exceptions to the hearsay rule include statements for purposes of medical diagnosis, records of regularly conducted activity (such as E&T logs), records of vital statistics, records of religious organizations, records of or statements in documents affecting an interest in property. For other exceptions, refer to 803 Delaware Uniform Rules of Evidence.

#### Federal Rule of Evidence 803, Delaware Uniform Rules of Evidence

This policy applies to applicants and recipients for any public assistance program administered by the Division of Social Services or the Division of Medicaid & Medical Assistance.

#### **1. The Hearing Officer Decides if Hearsay Evidence is Admissible**

Admissible hearsay evidence includes:

- A. Statements where the claimant has had an opportunity to cross examine the witness at a prior proceeding
- B. Statements of agency staff who could be available as witnesses upon a claimant's request
- C. Evidence which falls within recognized hearing exceptions where cross-examination of the witness would not be meaningful
- D. Official records of the Department of Health and Social Services and other official records when authenticated by a custodian of the record
- E. Evidence recognized by official notice as an exception to the hearsay rule (see DSSM 5603)

Exception: Recognized exceptions to the hearsay rule include:

- 1. Statements for purposes of medical diagnosis
- 2. Records of regularly conducted activity (such as Employment and Training logs)
- 3. Records of vital statistics
- 4. Records of religious organizations
- 5. Records of or statements in documents affecting an interest in property

See Delaware Uniform Rules of Evidence §803 for more exceptions.

#### **2. Hearsay Evidence is Not Admissible if There is an Objection**

If a party to the hearing objects to the use of hearsay evidence, the evidence will not be admitted.

Exception: Hearsay evidence is admissible, regardless of objections, if it meets one of the exceptions to the hearsay rule listed in the Delaware Uniform Rules of Evidence.

#### **5600.1 Admissible Evidence ADMITTING EVIDENCE**

Evidence admitted at the hearing shall be limited to evidence having a bearing on the issue(s) on appeal. Such issues include those offered by the appellant at the time of his/her appeal and those offered by the State or other party as a basis for the action or inaction under appeal. No other evidence or issues shall be considered.

45 CFR 205.10(14)

This policy applies to applicants and recipients for any public assistance program administered by the Division of Social Services or the Division of Medicaid & Medical Assistance.

#### **1. Hearing Officer Determines if Evidence is Admissible**

Evidence must meet the following minimum criteria to be admissible.

- A. Relevance - In order for evidence to be admissible in a fair hearing it must be relevant. Evidence is relevant if an average person believes that the evidence makes a significant fact more probable.
- B. Reliability - In order for evidence to be admissible in a fair hearing it must be reliable.
- C. Competence - In addition to relevance and reliability, evidence admitted at a hearing must be competent.
- D. Privilege - Appellants may decline to present testimony or evidence at a fair hearing under claim of privilege.

**[The hearing officer may make a negative assumption when a party declines to give testimony under a claim of privilege.]**

Privilege may include the privilege against self-incrimination or communication to an attorney, a religious advisor, or doctor.

Exception: Privilege may not be disclosed without the consent of the person who sought the professional assistance unless:

1. It has been waived
2. The person attempting to claim it has put the subject of the privilege at issue in the fair hearing

**1. Claimants or Witnesses May Waive Privilege**

Privileges are waived by a claimant or witness if he or she testifies to some part of the privileged matter.

**[Privileges are waived by a claimant if the information is relevant to the defense of the action or inaction under appeal.]**

EXAMPLE: A person who makes his or her medical condition an issue may not use Doctor/Patient privileges to exclude any information relating to his or her condition.

**2. Hearing Officer Limits Admissible Evidence**

Only evidence relating to the issue under appeal is admissible at the hearing. Issues under appeal include those offered by:

- A. The appellant at the time of his or her appeal
- B. The State as a basis for the action or inaction under appeal
- C. Another party as a basis for the action or inaction under appeal

**3. Hearing Officer May Admit Other Evidence**

Information concerning matters of common knowledge and generally accepted as true may be relied on in a fair hearing whether or not it is introduced by evidence or testimony.

The behavior of a party to a hearing may be taken by a hearing officer into evidence only when the behavior has been noted in the hearing record.

**5601 Rule of Legal Residuuum RESERVED**

Findings of fact must be supported by at least some evidence which is admissible in a court of law.

**5602 Exclusionary Rules of Evidence RESERVED**

1) Relevance—In order for evidence to be admissible in a fair hearing it must be relevant. Evidence is relevant if a reasonable person could feel that, assuming the evidence is true, it renders a significant fact more probable than it appeared before the introduction of the evidence.

2) Reliability—In order for evidence to be admissible in a fair hearing it must be reliable.

3) Competence—In addition to relevance and reliability, evidence admitted at a hearing must be competent.

4) 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, or physician (and may not be disclosed without the consent of the person who sought the professional assistance unless it has been waived or the person attempting to claim it has put the subject of the privilege at issue in the fair hearing).

Privileges are waived by a claimant or witness if he/she testifies to some part of the privileged matter or, in the case of a claimant, the matter is relevant to a claim in defense that is the subject of the hearing.

EXAMPLE: A person who makes his/her medical condition an issue may not use Doctor/ Patient privileges to exclude any information relating to his/her condition), or

The hearing officer may take a negative inference when a party declines to give testimony under a claim of privilege.

**5603 Official Notice RESERVED**

Information concerning matters of common knowledge and generally accepted as true may be relied on in a fair hearing whether or not it is introduced by evidence or testimony.

**5604 Protocol DISCUSSING THE CASE**

1) If a hearing is requested, a party to the hearing may not discuss the merits of the case with the hearing officer before the hearing.

2) Agency employees may not discuss the merits of the case with the hearing officer after the hearing is adjourned. However, after the hearing decision is made final, the parties may discuss the results of the hearing with the hearing officer.

An exception to this is if the hearing officer has remanded or sent the case back with instructions for further action and the agency worker expects to receive another request for a fair hearing.

This policy applies to all parties involved with a hearing for any public assistance program administered by the Division of Social Services or the Division of Medicaid & Medical Assistance.

### **1. Discussions About the Case Are Prohibited**

#### **A. Before the Hearing:**

A party to the hearing may not discuss the merits of the case with the hearing officer.

#### **B. After the Hearing**

Agency employees may not discuss the merits of the case with the hearing officer after the hearing is adjourned.

**[However, after the hearing decision is made final, the parties may discuss the results of the hearing with the hearing officer.]**

**[Exception: The parties may not discuss the results of the hearing with the hearing officer if the hearing officer sends the case back with instructions for further action and the agency worker expects to receive another request for a fair hearing.]**

### **5605 Requests for Continuance REQUESTING A CONTINUANCE**

Either party to a hearing may request that the hearing officer continue the hearing on a different date.

A witness or party in interest to the hearing does not have standing to request that the date of a hearing be continued.

A request for a continuance must be made at least twenty-four (24) hours in advance of the hearing so that the other party may be notified.

The request for a continuance must specify the reason that a continuance is needed.

Examples of requests for which a continuance should be granted, include, but are not limited to:

- 1) Illness of a party or witness;
- 2) Extreme inclement weather;
- 3) Request for additional time to prepare for the hearing.

The hearing officer will respond to the request not later than ten (10) days after the request is received.

No continuance will be granted to the State or its agent if the continuance would result in the State exceeding the time limits specified in §5305 and §5309 or any statutory time limit.

7 CFR 273.15(c)(4)

This policy applies to every appellant, appellant's authorized agent, and agency staff involved in the hearing. It applies to any public assistance program administered by the Division of Social Services or the Division of Medicaid & Medical Assistance.

### **1. Either Party To A Hearing May Request A Continuance**

Either party to a hearing may request that the hearing officer continue the hearing on a different date.

**Exception: A witness or party in interest to the hearing may not request a continuance.**

### **2. Requests For A Continuance Meet Specific Requirements**

A request for a continuance must:

- A. [Be Should be] made at least 24 hours in advance of the hearing so that the other party may be notified**
- B. [Specify must specify] the reason that a continuance is needed**

Examples of requests for which a continuance should be granted, include, but are not limited to:

1. Illness of a party or witness
2. Extreme inclement weather
3. Request for additional time to prepare for the hearing

### **3. Hearing Officer Responds to Requests**

The hearing officer will respond to the request not later than 10 days after the request is received.

No continuance will be granted to the State or its agent if the continuance would result in the State exceeding the time limits specified in DSSM 5305 and DSSM 5309 or any statutory time limit.

#### **5606 ~~Recusation~~ DISQUALIFYING A HEARING OFFICER**

~~Either party at a hearing may request that a hearing officer disqualify himself from hearing the issue for reasons of interest or prejudice. A hearing officer may disqualify himself sua sponte (on his own motion). If disqualified, a hearing officer will immediately notify the Director of the Division of Social Services who will promptly appoint a new hearing officer.~~

7 CFR 273.15(m), 42 CFR 431.240(a)(3), 45 CFR 205.10(a)(9)

This policy applies to every hearing officer, appellant, appellant's authorized agent, and agency staff involved in the hearing. It applies to any public assistance program administered by the Division of Social Services or the Division of Medicaid & Medical Assistance.

**1. Hearing Officer Is Impartial**

The hearing officer must be impartial with no personal stake or involvement in the case. The hearing officer is prohibited from having any involvement in the initial determination of the action in question.

**2. Hearing Officer May Disqualify Himself**

**3. Either Party May Ask to Disqualify a Hearing Officer**

The appellant, the appellant's authorized agent, or the agency employee may ask the hearing office to disqualify himself or herself from the hearing. This could happen if they believe the hearing officer has an interest in or prejudice against an issue of the hearing.

**4. Hearing Officer Gives Notice of Disqualification**

If a hearing officer is disqualified, the officer will immediately notify the Director of the Division of Social Services. The Director will promptly appoint a new hearing officer.

#### **5607 ~~Demeanor Evidence~~ RESERVED**

~~The behavior of a party to a hearing may be taken by a hearing officer into evidence only when the behavior has been noted in the hearing record.~~

**15 DE Reg. 973 (01/01/12) (Prop.)**

**15 DE Reg. 1343 (03/01/12) (Final)**