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MEMORANDUM

DATE: January 30, 2012

TO: Ms. Sharon L. Summers, DSS
Policy, Program & Development Unit

FROM: Daniese McMullin-Powell, ^{DMP/kt} Chairperson
State Council for Persons with Disabilities

RE: 15 DE Reg. 971 [DSS Proposed Fair Hearing Notice & Response to Fair Hearing Request Regulation]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Social Services' (DSS) proposal to adopt some discrete amendments to its fair hearing regulations. The proposed regulation was published as 15 DE Reg. 971 in the January 1, 2012 issue of the Register of Regulations. SCPD has the following observations.

First, in the "notice" context, the Council's 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 Council's 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, SCPD recommends 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.

Second, in the context of fair hearing summaries, the Council’s 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 Council's 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. SCPDs 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"

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations and recommendations on the proposed regulation.

cc: Ms. Elaine Archangelo
Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

15reg971 dss-fair hearing 1-27-12

§ 205.5

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- 205.45 Federal financial participation in relation to State emergency welfare preparedness.
- 205.50 Safeguarding information for the financial assistance programs.
- 205.51 Income and eligibility verification requirements.
- 205.52 Furnishing of social security numbers.
- 205.55 Requirements for requesting and furnishing eligibility and income information.
- 205.56 Requirements governing the use of income and eligibility information.
- 205.57 Maintenance of a machine readable file; requests for income and eligibility information.
- 205.58 Income and eligibility information; specific agreements required between the State agency and the agency supplying the information.
- 205.60 Reports and maintenance of records.
- 205.70 Availability of agency program manuals.
- 205.100 Single State agency.
- 205.101 Organization for administration.
- 205.120 Statewide operation.
- 205.180 State financial participation.
- 205.150 Cost allocation.
- 205.160 Equipment—Federal financial participation.
- 205.170 State standards for office space, equipment, and facilities.
- 205.190 Standard-setting authority for institutions.

AUTHORITY: 42 U.S.C. 602, 603, 606, 607, 1302, 1306(a), and 1320b-7; 42 U.S.C. 1973gg-5.

§ 205.5 Plan amendments.

(a) *State plan requirements.* A State plan under title I, IV-A, X, XIV, or XVI (AABD) of the Social Security Act must provide that the plan will be amended whenever necessary to reflect new or revised Federal statutes or regulations, or material change in any phase of State law, organization, policy or State agency operation.

(b) *Federal financial participation.* Except where otherwise provided, Federal financial participation is available in the additional expenditures resulting from an amended provision of the State plan as of the first day of the calendar quarter in which an approvable amendment is submitted or the date on which the amended provision becomes effective in the State, whichever is later.

[39 FR 34542, Dec. 26, 1974, as amended at 53 FR 36579, Sept. 21, 1988]

§ 205.10 Hearings.

(a) *State plan requirements.* A State plan under title I, IV-A, X, XIV, or XVI(AABD) of the Social Security Act shall provide for a system of hearings under which:

(1) The single State agency responsible for the program shall be responsible for fulfillment of hearing provisions which shall provide for:

(i) A hearing before the State agency, or

(ii) An evidentiary hearing at the local level with a right of appeal to a State agency hearing. Where a State agency adopts a system of evidentiary hearings with an appeal to a State agency hearing, it may, in some political subdivisions, permit local evidentiary hearings, and in others, provide for a single hearing before the State agency. Under this requirement hearings shall meet the due process standards set forth in the U.S. Supreme Court decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970) and the standards set forth in this section.

(2) Hearing procedures shall be issued and publicized by the State agency. Such procedures shall provide for a face-to-face hearing or, at State option, a hearing by telephone when the applicant or recipient also agrees. Under this provision, the State shall assure that the applicant or recipient is afforded all rights as specified in this section, whether the hearing is face-to-face or by telephone;

(3) Every applicant or recipient shall be informed in writing at the time of application and at the time of any action affecting his claim:

(i) Of his right to a hearing, as provided in paragraph (a)(5) of this section;

(ii) Of the method by which he may obtain a hearing;

(iii) That he may be represented by an authorized representative, such as legal counsel, relative, friend, or other spokesman, or he may represent himself.

(4) In cases of intended action to discontinue, terminate, suspend or reduce assistance or to change the manner or form of payment to a protective, vendor, or two-party payment under § 234.60:

(i) The State or local agency shall give timely and adequate notice, except as provided for in paragraphs (a)(4)(ii), (iii), or (iv) of this section. Under this requirement:

(A) *Timely* means that the notice is mailed at least 10 days before the date of action, that is, the date upon which the action would become effective;

(B) *Adequate* means a written notice that includes a statement of what action the agency intends to take, the reasons for the intended agency action, the specific regulations supporting such action, explanation of the individual's right to request an evidentiary hearing (if provided) and a State agency hearing, the circumstances under which assistance is continued if a hearing is requested, and 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.

(ii) The agency may dispense with timely notice but shall send adequate notice not later than the date of action when:

(A) The agency has factual information confirming the death of a recipient or of the AFDC payee when there is no relative available to serve as new payee;

(B) The agency receives a clear written statement signed by a recipient that he no longer wishes assistance, or that gives information which requires termination or reduction of assistance, and the recipient has indicated, in writing, that he understands that this must be the consequence of supplying such information;

(C) The recipient has been admitted or committed to an institution, and further payments to that individual do not qualify for Federal financial participation under the State plan;

(D) The recipient has been placed in skilled nursing care, intermediate care or long-term hospitalization;

(E) The claimant's whereabouts are unknown and agency mail directed to him has been returned by the post office indicating no known forwarding address. The claimant's check must, however, be made available to him if his whereabouts become known during

the payment period covered by a returned check;

(F) A recipient has been accepted for assistance in a new jurisdiction and that fact has been established by the jurisdiction previously providing assistance;

(G) An AFDC child is removed from the home as a result of a judicial determination, or voluntarily placed in foster care by his legal guardian;

(H) For AFDC, the agency takes action because of information the recipient furnished in a monthly report or because the recipient has failed to submit a complete or a timely monthly report without good cause. (See §233.37);

(I) A special allowance granted for a specific period is terminated and the recipient has been informed in writing at the time of initiation that the allowance shall automatically terminate at the end of the specified period;

(J) The agency has made a presumption of mismanagement as a result of a recipient's nonpayment of rent and provides for post hearings in such circumstances;

(K) An individual's payment is suspended or reduced for failure to meet a payment after performance obligation as set forth at §233.101(b)(2)(iv) (B) or (C) of this chapter. In addition to the contents set forth in paragraph (a)(4)(i)(B) of this section, the adequate notice must advise the individual of the right to have assistance immediately reinstated retroactive to the date of action at the previous month's level pending the hearing decision if he or she makes a request for a hearing and reinstatement within 10 days after the date of the notice.

(iii) When changes in either State or Federal law require automatic grant adjustments for classes of recipients, timely notice of such grant adjustments shall be given which shall be "adequate" if it includes a statement of the intended action, the reasons for such intended action, a statement of the specific change in law requiring such action and a statement of the circumstances under which a hearing may be obtained and assistance continued.

(iv) When the agency obtains facts indicating that assistance should be discontinued, suspended, terminated, or reduced because of the probable

fraud of the recipient, and, where possible, such facts have been verified through collateral sources, notice of such grant adjustment shall be timely if mailed at least five (5) days before action would become effective.

(5) An opportunity for a hearing shall be granted to any applicant who requests a hearing because his or her claim for financial assistance (including a request for supplemental payments under §§ 233.23 and 233.27) is denied, or is not acted upon with reasonable promptness, and to any recipient who is aggrieved by any agency action resulting in suspension, reduction, discontinuance, or termination of assistance, or determination that a protective, vendor, or two-party payment should be made or continued. A hearing need not be granted when either State or Federal law requires automatic grant adjustments for classes of recipients unless the reason for an individual appeal is incorrect grant computation.

(i) A request for a hearing is defined as a clear expression by the claimant (or his authorized representative acting for him), to the effect that he wants the opportunity to present his case to higher authority. The State may require that such request be in written form in order to be effective;

(ii) The freedom to make such a request shall not be limited or interfered with in any way. The agency may assist the claimant to submit and process his request;

(iii) The claimant shall be provided reasonable time, not to exceed 90 days, in which to appeal an agency action;

(iv) Agencies may respond to a series of individual requests for hearing by conducting a single group hearing. Agencies may consolidate only cases in which the sole issue involved is one of State or Federal law or policy or changes in State or Federal law. In all group hearings, the policies governing hearings must be followed. Thus, each individual claimant shall be permitted to present his own case or be represented by his authorized representative;

(v) The agency may deny or dismiss a request for a hearing where it has been withdrawn by the claimant in writing, where the sole issue is one of State or Federal law requiring automatic grant

adjustments for classes of recipients, where a decision has been rendered after a WIN hearing before the manpower agency that a participant has, without good cause, refused to accept employment or participate in the WIN program, or has failed to request such a hearing after notice of intended action for such refusal, or where it is abandoned. Abandonment may be deemed to have occurred if the claimant, without good cause therefor, fails to appear by himself or by authorized representative at the hearing scheduled for such claimant.

(6) If the recipient requests a hearing within the timely notice period:

(i) Assistance shall not be suspended, reduced, discontinued or terminated (but is subject to recovery by the agency if its action is sustained), until a decision is rendered after a hearing, unless:

(A) A determination is made at the hearing that the sole issue is one of State or Federal law or policy, or change in State or Federal law and not one of incorrect grant computation;

(B) A change affecting the recipient's grant occurs while the hearing decision is pending and the recipient fails to request a hearing after notice of the change;

(C) The recipient specifically requests that he or she not receive continued assistance pending a hearing decision; or

(D) The agency has made a presumption of mismanagement as a result of a recipient's nonpayment of rent and provides for the opportunity for a hearing after the manner or form of payment has been changed for such cases in accordance with § 234.60 (a)(2) and (a)(11).

(ii) The agency shall promptly inform the claimant in writing if assistance is to be discontinued pending the hearing decision; and

(iii) In any case where the decision of an evidentiary hearing is adverse to the claimant, he shall be informed of and afforded the right to make a written request, within 15 days of the mailing of the notification of such adverse decision, for a State agency hearing and of his right to request a de novo hearing. Unless a de novo hearing is specifically requested by the appellant,

the State agency hearing may consist of a review by the State agency hearing officer of the record of the evidentiary hearing to determine whether the decision of the evidentiary hearing officer was supported by substantial evidence in the record. Assistance shall not be continued after an adverse decision to the claimant at the evidentiary hearing.

(7) A State may provide that a hearing request made after the date of action (but during a period not in excess of 10 days following such date) shall result in reinstatement of assistance to be continued until the hearing decision, unless (i) the recipient specifically requests that continued assistance not be paid pending the hearing decision; or (ii) at the hearing it is determined that the sole issue is one of State or Federal law or policy. In any case where action was taken without timely notice, if the recipient requests a hearing within 10 days of the mailing of the notice of the action, and the agency determines that the action resulted from other than the application of State or Federal law or policy or a change in State or Federal law, assistance shall be reinstated and continued until a decision is rendered after the hearing, unless the recipient specifically requests that continued assistance not be paid pending the hearing decision.

(8) The hearing shall be conducted at a reasonable time, date, and place, and adequate preliminary written notice shall be given.

(9) Hearings shall be conducted by an impartial official (officials) or designee of the agency. Under this requirement, the hearing official (officials) or designee shall not have been directly involved in the initial determination of the action in question.

(10) When the hearing involves medical issues such as those concerning a diagnosis, an examining physician's report, or a medical review team's decision, a medical assessment other than that of the person or persons involved in making the original decision shall be obtained at agency expense and made part of the record if the hearing officer considers it necessary.

(11) In respect to title IV-C, when the appeal has been taken on the basis of a

disputed WIN registration requirement, exemption determination or finding of failure to appear for an appraisal interview, a representative of the local WIN manpower agency shall, where appropriate, participate in the conduct of the hearing.

(12) The hearing shall include consideration of:

(i) An agency action, or failure to act with reasonable promptness, on a claim for financial assistance, which includes undue delay in reaching a decision on eligibility or in making a payment, refusal to consider a request for or undue delay in making an adjustment in payment, and discontinuance, termination or reduction of such assistance;

(ii) Agency decision regarding:

(A) Eligibility for financial assistance in both initial and subsequent determinations,

(B) Amount of financial assistance or change in payments,

(C) The manner or form of payment, including restricted or protective payments, even though no Federal financial participation is claimed.

(13) The claimant, or his representative, shall have adequate opportunity:

(i) To examine the contents of his case file and all documents and records to be used by the agency at the hearing at a reasonable time before the date of the hearing as well as during the hearing;

(ii) At his option, to present his case himself or with the aid of an authorized representative;

(iii) To bring witnesses;

(iv) To establish all pertinent facts and circumstances;

(v) To advance any arguments without undue interference;

(vi) To question or refute any testimony or evidence, including opportunity to confront and cross-examine adverse witnesses.

(14) Recommendations or decisions of the hearing officer or panel shall be based exclusively on evidence and other material introduced at the hearing. The transcript or recording of testimony and exhibits, or an official report containing the substance of what transpired at the hearing, together with all papers and requests filed in the proceeding, and the recommendation or decision of the hearing officer or

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panel shall constitute the exclusive record and shall be available to the claimant at a place accessible to him or his representative at a reasonable time.

(15) Decisions by the hearing authority shall:

(i) In the event of an evidentiary hearing, consist of a memorandum decision summarizing the facts and identifying the regulations supporting the decision;

(ii) In the event of a State agency de novo hearing, specify the reasons for the decision and identify the supporting evidence and regulations.

Under this requirement no persons who participated in the local decision being appealed shall participate in a final administrative decision on such a case.

(16) Prompt, definitive, and final administrative action shall be taken within 90 days from the date of the request for a hearing.

(17) The claimant shall be notified of the decision in writing and, to the extent it is available to him, of his right to appeal to State agency hearing or judicial review.

(18) When the hearing decision is favorable to the claimant, or when the agency decides in favor of the claimant prior to the hearing, the agency shall promptly make corrective payments retroactively to the date the incorrect action was taken.

(19) All State agency hearing decisions shall be accessible to the public (subject to provisions of safeguarding public assistance information).

(b) *Federal financial participation.* Federal financial participation is available for the following items:

(1) Payments of assistance continued pending a hearing decision.

(2) Payments of assistance made to carry out hearing decisions, or to take corrective action after an appeal but prior to hearing, or to extend the benefit of a hearing decision or court order to others in the same situation as those directly affected by the decision or order. Such payments may be retroactive in accordance with applicable Federal policies on corrective payments.

(3) Payments of assistance within the scope of Federally aided public assist-

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ance programs made in accordance with a court order.

(4) Administrative costs incurred by the agency for:

(i) Providing transportation for the claimant, his representative and witnesses to and from the place of the hearing;

(ii) Meeting other expenditures incurred by the claimant in connection with the hearing;

(iii) Carrying out the hearing procedures, including expenses of obtaining an additional medical assessment.

[38 FR 22007, Aug. 15, 1973, as amended at 44 FR 17941, Mar. 23, 1979; 45 FR 20480, Mar. 28, 1980; 47 FR 5873, Feb. 5, 1982; 47 FR 47827, Oct. 28, 1982; 51 FR 9202, Mar. 18, 1986; 53 FR 86579, Sept. 21, 1988; 57 FR 30425, July 9, 1992]

§ 205.25 Eligibility of supplemental security income beneficiaries for food stamps or surplus commodities.

(a) In respect to any individual who is receiving supplemental security income benefits under title XVI of the Social Security Act, the State agency shall make the following determinations:

(1) The amount of assistance such individual would have been entitled to receive for any month under the appropriate State plan in effect for December 1973, under title I, X, XIV, or XVI, and for such purpose such individual shall be deemed to be aged, blind, or permanently and totally disabled, as the case may be, under the provisions of such plan.

(2) The bonus value of the food stamps (according to the Food Stamp Schedule effective for July 1973) such individual would have been entitled to receive for such month, assuming the individual were receiving the assistance determined under paragraph (a)(1) of this section.

(3) The amount of benefits such individual is receiving for such month under Title XVI, plus supplementary payments as defined in section 1616(a) of the Social Security Act and payments pursuant to section 212 of Pub. L. 93-66, if any.

(b) If the amount determined in paragraph (a)(1) of this section plus the amount determined in paragraph (a)(2)

File

From Wikipedia, the free encyclopedia

File or **filing** may refer to:

Tools:

- File (tool)
- Filing (metalworking)
- Nail file

Paper or computer records:

- File folder, a folder for holding loose papers
- Filing cabinet or file cabinet
- Filing (legal), submitting a document to the clerk of a court
- Computer file
- File URI scheme
- File (command), a Unix program for determining the type of data contained in a computer file

Other:

- File (formation), a single column of men one in front of the other
- File (chess), a column of the chessboard
- Filé powder, a culinary ingredient used in Cajun and Creole cooking
- Filé (band), an Cajun musical ensemble from Louisiana, U.S
- Fili or file, a class of Irish poets
- Electronic Language International Festival, an art and technology festival held yearly in São Paulo, Brazil

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Categories: Disambiguation pages

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