



State of New Mexico
Human Services Department
Human Services Register



I. DEPARTMENT

NEW MEXICO HUMAN SERVICES DEPARTMENT (HSD)

II. SUBJECT

8.352.2 ADMINISTRATIVE HEARINGS, CLAIMANT HEARINGS

III. PROGRAM AFFECTED

(TITLE XIX) MEDICAID

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FINAL RULES

V. BACKGROUND SUMMARY

The Human Services Register Vol. 37 No. 21, dated March 31, 2014, issued the proposed repeal and replacement of 8.352.2 NMAC, *Administrative Hearings, Claimant Hearings*.

A public hearing was held on Tuesday, May 6, 2014, to receive public testimony on this proposed rule. This register summarizes public comment, testimony and the Human Services Department's (Department) response.

The Department received two written comments, no recorded comments or public testimony.

Summary of Comments:

• **8.352.2.7 Definitions**

C Authorized representative:

One commenter questioned the Department's use of "*guardian ad litem*" instead of "*guardian*."

Department Response: The Department agrees with the commenter and the wording has been amended to say "*guardian*."

One commenter requested clarification if a claimant's power of attorney must include a specified purpose and time frame in order for his or her authorized representative to have access the claimant's case information.

Department Response: The Department's intent is the power of attorney content must be sufficient to substantiate the authorized representative's right to receive the claimant's information.

D. Claimant and 8.385.2.7.7 Notice of Action:

One commenter requested clarification if 8.100.970 NMAC or 8.352.2 NMAC governs Medical Assistance Division (MAD) administrative hearings.

Department Response: The Income Support Division's (ISD) 8.100.970.9B (1) NMAC rule provides for a HSD administrative hearing specific to Medical Assistance Program (MAP) eligibility determinations. The Department added clarifying language to this proposed rule that a claimant is to follow 8.100.970 NMAC when the adverse action is a MAP eligibility determination and to follow 8.352.2 NMAC for non-MAP eligibility HSD administrative hearings.

One commenter questioned the roles of ISD and MAD in determining MAP eligibility and which agency's NMAC rules are utilized in this determination.

Department Response: ISD utilizes NMAC MAD rules to determine if an individual meets MAP eligibility. ISD is a partner in the eligibility determination based on MAD rules. An adverse eligibility enrollment action taken by ISD is on behalf of MAD based on its NMAC eligibility rules, not NMAC ISD rules. ISD participates in the HSD administrative hearing to present how, using the NMAC MAD eligibility rules, the determination was made. The language stands as proposed.

- **8.352.2.9 Claimant or the Claimant's Authorized Representative and HSD Administrative Hearing Process**

One commenter request HSD to provide AHU contact information to comply with this rule's requirement that legal counsel must submit an entry of appearance to both the Fair Hearing Bureau (FHB) and the MAD Administrative Hearings Unit (MAD AHU).

Department Response: The Department amended this language to instruct the FHB to provide MAD AHU a copy of the entry of appearance to assist the claimant from additional responsibilities.

- **8.352.2.10 Adverse Action**

One commenter requested new language be included in the rule addressing situations when MAD, its UR contractor or a HSD MCO fails to act on either an individual's MAP eligibility determination or an individual's request for services with reasonable promptness.

Department Response: The Department directs the commenter to 8.352.2.10.D: "*The failure of MAD, its UR contract or the MCO to approve a service or item in a timely manner.*" As stated above, MAP eligibility determination hearing processes are detailed in 8.100.970 NMAC, not in 8.352.2 NMAC. The language stands as proposed.

One commenter questioned the use of "*an authorized service or item*" in Subsection A. The commenter contends the use of "*authorized*" could lead to denials of legal rights to administrative hearings and the HSD administrative hearing process should determine if a service or item should be authorized.

Department Response: The Department's use of "*authorized service or item*" refers to the benefit package MAD must offer its MAP eligible recipients and the MCO must offer its members. If a service or item is not contained within the NMAC MAD rules, a claimant cannot file an appeal with his or her MCO nor request a HSD administrative hearing as stated in 8.352.2 NMAC. The language stands as proposed.

- **8.352.2.11: Right to a HSD Administrative Hearing**

One commenter stated 8.352.2.11 leaves out a MAP eligible recipient that is not a member of a HSD MCO or when the adverse action is not taken by MAD, its UR contractor or the MCO.

Department Response: The Department directs the commenter to: 8.352.2.7.D NMAC "*...an individual, or in the case of eligibility determinations, the household requesting a fair hearing that is claiming to be affected by an adverse action or actions taken or intended to be taken by a MCO, utilization review (UR) contractor, or HSD.*"; and to 8.352.2.9 A (1-3) NMAC which describes an eligible claimant. As previously addressed in this register, NMAC MAD rules are utilized by ISD to reach an eligibility determination, not NMAC ISD rules. The NMAC ISD rule, 8.100.970, does describe the HSD administrative hearing process for MAP eligibility adverse determination based on NMAC MAD eligibility rules. The language stands as proposed.

One commenter requests the Department to include new language that allows the ALJ to conduct an in-person HSD administrative hearing. This rule as proposed states all HSD administrative hearings are conducted telephonically.

Department Response: The Department directs the commenter to this proposed rule Section 13 Subsection A "*If an accommodation is necessary for a disability, the claimant or the claimant's authorized representative must notify FHB at least 10 calendar days prior to the HSD administrative hearing.*" The Department authorizes the ALJ to determine if an accommodation is necessary for an in-person hearing or other appropriate accommodations a claimant may require to fully participate in his or her HSD administrative hearing. The language stands as proposed.

- **8.308.15.11, 12, 14 and 15:**

One commenter expressed concern at the length of time the HSD MCOs are taking to complete their internal appeal process. The commenter requests specific MCO appeal timelines and deadlines to be incorporated into this rule.

Department Response: The Department will work with its contracted MCOs to ensure federal CFR requirements and HSD-MCO contractual requirements are implemented and followed. The Department thanks the commenter for bring this to its attention. The language stands as proposed.

- **8.352.2.12 Notice, Time Limits, Postponement, or the Dismissal of MCO Appeal or a HSD Administrative Hearing Request**

Two commenters requested the Department to re-instate the 13-calendar day timeframe for an individual to request a continuation of his or her MAD benefit for which his or her MCO, MAD or its UR contraction intends to or has taken an adverse action pending his or her HSD administrative hearing final decision. The commenters cited 8.100.970 NMAC rule as in conflict with the proposed 8.352.2.12 rule.

Department Response: The Department is allowed under CFR to set the timeframe for an individual to request a continuation of his or her MAD benefit pending a HSD administrative hearing final decision. The language stands as proposed.

As stated earlier in this register, 8.100.970 NMAC pertains to MAP eligibility adverse action determinations, and as such the 13-calendar day timeframe in which an individual may request a continuation of his or her currently approved MAD benefit pending his or her MAP eligibility HSD administrative hearing final decision applies. The language stands as proposed.

One commenter contends the proposed amendment requirement that the deadline to request a continuation of an individual's MAD benefit should not begin on the date of the mailing of the Notice of Action to the individual. Instead, the commenter requests the Department to re-instate the date of the Notice of Action deadline.

Department Response: The Department's intent to utilize the date of the mailing is to afford the individual possible additional days in which to request a continuation of his or her MAD benefit. If the Notice of Action is delayed in its mailing for some reason, the individual would have fewer days in which to request a continuation. The language stands as proposed.

One commenter requests the Department to detail legal requirements for notice as provided in 42 CFR Section 431.210. The commenter states HSD MCO notices are failing to explain the reasons for the MCO's adverse action, fail to cite a specific legal support, and fail to fully explain the individual's HSD administrative hearing rights or a member's MCO appeal rights.

Department Response: The Department will work its contracted MCOs and the MAD UR contractor to ensure their Notices of Action and subsequent correspondence with a MAP eligible recipient or member meets federal CFR requirements and HSD MCO contractual requirements. The Department requires its MCOs and MAD's UR contractor to detail in its Notice of Action to clearly state who within the MCO or UR contractor the claimant must request for a continuation of the his or her benefit pending a MCO appeal or HSD administrative hearing final decision. Language was amended in Section 18 of this proposed rule directing a MAP eligible recipient to request a continuation of his or her MAD benefit through MAD or its UR contractor. Language in this Section of the rule stands as proposed.

One commenter requests the Department to include new language requiring FHB to register the date the claimant leaves a message on the FHB voice mail requesting a HSD administrative hearing or a continuation of benefits. The commenter states FHB repeatedly registers the date the *claimant left the message* as the date *FHB retrieves* the message.

Department Response: The Department directs the commenter to this proposed rule Section 18 which requires a HSD MCO and the MAD UR contractor to include information on his or her right to the continuation of his or her MAD benefit pending a HSD administrative hearing final decision. The Department will amend the rule to specifically direct a Fee-for-Service claimant to request a continuation of his or her benefit from MAD or its UR contractor. The Department will work with its contracted MCOs and the MAD UR contractor to ensure their Notices of Action and subsequent correspondence with a MAP eligible recipient or a member meet federal CFR requirements and HSD MCO contractual requirements. The Department will work with FHB to ensure its staff refers a claimant's request for a continuation of his or her benefit to either the claimant's MCO or MAD UR contractor, whichever is appropriate and the date the request for a

HSD administrative hearing left on FHB's voice mail is to be recorded as the date of the request, not the date FHB staff retrieved the message from the bureau's voice mail. The language in this Section stands as proposed.

One commenter questioned why the Department is shortening the time limit from 90-calendar days to 30-calendar days for a claimant to request a HSD administrative hearing after his or her MCO appeal final decision. The commenter referenced 8.100.970 NMAC.

Department Response: ISD 8.100.970.9B (1) NMAC rule provides for a HSD administrative hearing specific to MAP eligibility determinations. The Department added clarifying language in this rule that a claimant is to follow 8.100.970 NMAC when the adverse action is a MAP eligibility determination and to follow 8.352.2 NMAC for non-MAP eligibility adverse actions. The language stands as proposed.

The process of a MCO appeal affords the claimant the opportunity to: (1) within 90 calendar days after the MCO's Notice of Action to research and reach a determination whether to request an appeal of his or her MCO's adverse action; (2) prepare his or her evidence for review by the MCO, and (3) to review the documentation the MCO utilized in reaching its determination of the adverse action against the claimant. A Fee-for-Service claimant has the comparable 90-calendar days to research and reach a determination whether to request a HSD administrative hearing. The Department has determined a claimant appealing his or her MCO appeal final decision has the documentation from the MCO appeal process to move forward to request a HSD administrative hearing. The language stands as proposed.

8.352.2.12.D (5) The Dismissal of a hearing request

One commenter questioned if 42 CFR Sections 431.201 and 431.220 are in conflict with paragraph (5) of Section D of this proposed rule. The commenter contends a HSD administrative hearing is required in order to determine if the adverse action is solely based on a NMAC MAD rule rather than the application of the rule to an individual. One commenter requests the Department to delete the first sentence and replace it with "*HSD authorizes FHB to recommend the dismissal of a claimant or member's request for a HSD administrative fair hearing when.*" The commenter further requests the Department to include new language to Subsection 7 stating "*Under this section, the HSD administrative hearing final decision must be made pursuant to 8.352.2.17 NMAC.*"

Department Response: The Department reviewed the CFR citations and concludes there is no conflict. The CFR citations discuss who is deemed a claimant and the rights of a claimant to request a HSD administrative hearing. The Department has established a process to determine when an individual has the right to request a HSD administrative hearing. An individual who does not meet this criteria does not have standing to request a HSD administrative hearing; therefore, the FHB ALJ has the right to dismiss the request if the ALJ can determine prior to the hearing the individual has no standing. The language stands as proposed.

The second issue pertains to the right of the ALJ to determine if the issue of the appeal is based solely on NMAC MAD rules and not on the application of the rules to the individual. The CFR provides the Department a process to dismiss a request for a HSD administrative hearing as found in 42 CFR Section 431.220(b) "*agency need not grant a hearing if the sole issue is a federal or state law requiring an automatic change adversely affecting some or all recipients.*" The language stands as proposed.

The third issue raised questions whether the Department has the authority to designate an ALJ to render a final decision to dismiss a request for a HSD administrative hearing and questions whether the claimant has standing to file a judicial appeal in a State district court.

Department Response: The CFR allows the State to designate individuals to render a HSD administrative hearing final decision. Specifically to a dismissal by an ALJ, the Department asserts its right to designate the ALJ to render this type of HSD administrative hearing final decisions. As this is a HSD final decision, the individual does have the right to file a request for a judicial appeal in a State district court. The Department has added clarifying language to address the commenter's concerns.

- **8.352.2.14 Summary of Evidence (SOE)**

One commenter contends under the proposed rule a claimant would have insufficient time to prepare his or her SOE and have it submitted to the ALJ not less than three working days of his or her HSD administrative hearing date.

Department Response: In the current version of 8.352.2 NMAC, a claimant must provide the ALJ his or her summary of evidence at least 10 working days of his or her pre-hearing conference. The proposed language affords the claimant additional time in which to submit his or her SOE; specifically, the claimant has seven working days *after* he or she has received MAD's SOE to review and to respond. If the claimant submits his or her SOE in advance of the three working days, the claimant retains the right to submit an amended SOE three working days in prior to his or her HSD administrative hearing date. The proposed language affords additional time to the claimant. The language stands as proposed.

One commenter requests a change to prohibit MAD from submitting an amendment to its previously submitted SOE.

Department Response: The burden of a preponderance of evidence is on MAD through its SOE, through testimony and cross examination of a claimant's witnesses. The ability to respond to a claimant's SOE submitted three working days prior to his or her HSD administrative hearing allows MAD only one day to review, prepare a response, and submit the amended SOE to the ALJ and claimant. The language stands as proposed.

One commenter requests a change in the proposed rule language to exclude any SOE submitted by MAD if it fails to meet the required time lines when a claimant requested a continuation of benefit, but failed to make such a request within the required time lines.

Department Response: The claimant has the right to request the ALJ to exclude a late MAD SOE and present arguments to support the request. The determination whether to grant a postponement to MAD in order for it to submit a SOE is at the discretion of the ALJ. The language stands as proposed.

One commenter contends MAD through 8.3252.2.14.C is attempting to limit a claimant's right to his or her file.

Department Response: The Department directs the commenter to Section 13 of 8.310.2 NMAC which states a MAP eligible recipient has the right, free of any charges, to his or her medical records (some limits apply to the claimant's behavioral health records) from any MAD provider for whom a MAD service was rendered to him or her. The proposed 8.352.2 rule is specific to HSD administrative hearings; not general medical records for which 8.310.2 NMAC

addresses. The proposed language directs MAD, its UR contractor or the claimant's MCO to provide any document they have in their possession concerning the adverse action intended or taken against the claimant in a timely manner and at no cost to the claimant. If a claimant requires for the production of a SOE medical records, he or she will utilize 8.310.2 NMAC to compel his or her MAD medical provider to produce such records. The language stands as proposed.

One commenter requested the Department to include new language in this rule of "*The recommendation to the medical assistance division director shall include the resolution of any due process and other legal claims.*" The commenter contends ALJs do have the authority and jurisdiction to decide due process or other legal challenges to a proposed reduction or denial of services. The commenter further contends without the inclusion of the proposed language, claimants will be forced to seek remedy through State district court judicial appeals, lengthening the time the claimant goes without services or the claimants must bear the financial burden of such judicial appeals.

Department Response: The Department will research this request to determine if an ALJ has sufficient training and knowledge to determine if due process for a claimant has been denied or determine other legal challenges the claimant may assert during his or her HSD administrative hearing process. Based upon the research results, the Department may elect to promulgate amendments to the rule. The language stands as proposed.

- **8.352.2.15 Administrative Hearing Standards**

One commenter requested the Department to include rule language that specifically addresses the standards an ALJ utilizes to determine what constitutes MAD meeting a *preponderance of evidence* threshold if his or her recommendation upholds MAD's intended or taken adverse action against the claimant.

Department Response: The Department will research this request to determine if FHB has or may require training and procedures to determine a *preponderance of evidence* threshold. Based upon the research results, the Department may elect to promulgate amendments to this rule. The language stands as proposed.

One commenter requested the Department to allow any evidence submitted to the ALJ be included in his or her HSD administrative hearing record, even when such evidence was not accepted into evidence by the ALJ.

Department Response: The Department directs the commenter to Section 15 Subsection D (1) of this rule which states "*Admissibility: all relevant evidence is admissible subject to the ALJ's authority to limit repetitive, scandalous or unduly cumulative evidence and his or her ability to conduct an orderly HSD administrative hearing. The ALJ must admit evidence that is relevant to the intended or taken adverse action by MAD, its UR contractor, or the MCO.*" The language stands as proposed.

One commenter requested the Department to separate Section 15 Subsection D paragraph (2) of this rule into two paragraphs.

Department Response: The Department agrees and has amended the language.

One commenter contends by limiting the ALJ's review to the evidence presented into the HSD administrative hearing and the testimony of witnesses, the ALJ will not have the right to examine any document the ALJ believes may influence his or her HSD administrative hearing recommendation.

Department Response: The Department directs the commenter to the proposed 8.352.2.15.D (1) rule which states that **all** relevant evidence is admissible subject to an ALJ limited authority. The Department's intent is to ensure the ALJ does not take into consideration any information the claimant may not have reviewed or was afforded the opportunity to question or refute at any point in his or her HSD administrative hearing process. The language stands as proposed.

VI. RULES

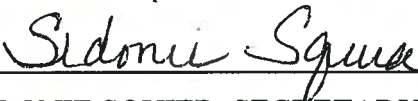
The rules referenced above will be contained in the Medicaid Program Rule Manual, available on the HSD website at <http://www.hsd.state.nm.us/providers/rules-nm-administrative-code-.aspx> This register and the final rule will be posted on the HSD website at <http://www.hsd.state.nm.us/LookingForInformation/registers.aspx> . If you do not have internet access, a copy of the register and rules may be requested by contacting MAD at 505-827-3152.

EFFECTIVE DATE:

The Department will implement these rules effective June 1, 2014.

VIII. PUBLICATION

Publication of these rules approved by:



SIDONIE SQUIER, SECRETARY
HUMAN SERVICES DEPARTMENT