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TITLE 8 SOCIAL SERVICES
CHAPTER 352 ADMINISTRATIVE HEARINGS
PART 2 CLAIMANT HEARINGS

8.352.2.1 ISSUING AGENCY: New Mexico Human Services Department (HSD).
[8.352.2.1 NMAC - Rp, 8.352.2.1 NMAC, 6-15-14]

8.352.2.2 SCOPE: The rule applies to the general public.
[8.352.2.2 NMAC - Rp, 8.352.2.2 NMAC, 6-15-14]

8.352.2.3 STATUTORY AUTHORITY: The New Mexico medicaid program and other health care programs are administered pursuant to regulations promulgated by the federal department of health and human services under Title XIX of the Social Security Act as amended or by state statute. See Section 27-1-12 et seq NMSA 1978.
[8.352.2.3 NMAC - Rp, 8.352.2.3 NMAC, 6-15-14]

8.352.2.4 DURATION: Permanent.
[8.352.2.4 NMAC - Rp, 8.352.2.4 NMAC, 6-15-14]

8.352.2.5 EFFECTIVE DATE: June 15, 2014, unless a later date is cited at the end of a section.
[8.352.2.5 NMAC - Rp, 8.352.2.5 NMAC, 6-15-14]

8.352.2.6 OBJECTIVE: The objective of this rule is to provide instruction for the service portion of the New Mexico medical assistance programs.
[8.352.2.6 NMAC - Rp, 8.352.2.6 NMAC, 6-15-14]

8.352.2.7 DEFINITIONS:

A. "Administrative law judge (ALJ)" means the hearing officer appointed by the HSD fair hearings bureau (FHB) to oversee the claimant's administrative hearing process, to produce and evidentiary record and render a recommendation to the medical assistance division director.

B. "Appeal" means the process open to a managed care organization's member when his or her managed care organization (MCO) has taken, or intends to take, an adverse action related to the member's benefits or services.

C. "Authorized representative" means the individual designated to represent and act on the claimant's behalf during the appeal process. The claimant or authorized representative must provide formal documentation authorizing the named individual or individuals to access the identified case information for a specified purpose and time frame. An authorized representative may be an attorney representing a person or household, a person acting under the authority of a valid power of attorney, a guardian, or any other individual or individuals designated in writing by the claimant.

D. "Claimant" means the individual, or in case of eligibility determinations, the household, requesting a HSD administrative hearing that is claiming to be affected by an adverse action or actions taken or intended to be taken by MAD, its UR contractor or a MCO.

E. "HSD administrative hearing" or "fair hearing" means an informal evidentiary hearing that is conducted by the FHB so that evidence may be presented as it relates to an adverse action taken, or intended to be taken, by MAD, its UR contractor, or the MCO; see Section 10 of this rule for definitions of an adverse action.

F. "MAD" means the medical assistance division, which administers medicaid and other medical assistance programs under HSD.

G. "MAP" means the medical assistance programs administered by MAD.

H. "MCO" means a member's HSD contracted managed care organization.

I. "MCO appeal decision" means the MCO's final decision regarding a member's appealed adverse action it intends to take or has taken against its member.

J. "Member" means a MAP eligible recipient enrolled in a HSD contracted MCO.

K. "Notice of action" means the notice issued by MAD or its UR contractor or a MCO. Adverse actions include:

(1) the intent of MAD or its UR contractor or the MCO to take an adverse action against an individual in the form of a termination, suspension, change or reduction, of an existing service including level of

care (LOC) or the transfer or discharge of a nursing facility (NF) resident. If the notice of action is for one of the listed adverse actions, MAD or its UR contractor or the MCO must send the notice of action 10 calendar days prior to the date of the intended adverse action; or

(2) an adverse determination made with regard to preadmission or annual resident review (PASRR) requirements; or

(3) the denial or reduction, or a limited authorization of a service including the type or level of care of a request for a new service or item.

L. "Parties to the hearing" are MAD and as appropriate, its designees, the individual's MCO or the MAD UR contractor, and the claimant or authorized representative.

M. "UR contractor" is a MAD contractor responsible for physical and behavioral health level of care (LOC) reviews, medical necessity reviews, and other determinations as directed by MAD when a MAP eligible recipient is enrolled in a medicaid fee-for-service plan.

[8.352.2.7 NMAC - Rp, 8.352.2.7 NMAC, 6-15-14]

8.352.2.8 MISSION STATEMENT: To reduce the impact of poverty on people living in New Mexico by providing support services that help families break the cycle of dependency on public assistance.

[8.352.2.8 NMAC - Rp, 8.352.2.8 NMAC, 6-15-14]

8.352.2.9 CLAIMANT OR THE CLAIMANT'S AUTHORIZED REPRESENTATIVE AND HSD

ADMINISTRATIVE HEARING PROCESS: MAD has established a process to determine if an individual is eligible to request a HSD administrative hearing. MAD has also established a process for an individual or the individual's authorized representative to request a HSD administrative hearing when an adverse action is intended or has been taken by MAD, its UR contractor or the MCO against the individual; see Section 10 of this rule.

A. Eligible claimant:

(1) When an adverse eligibility determination is made by HSD against a MAP applicant, he or she may file as a claimant to request a HSD administrative hearing. See 8.100.970 NMAC for the rules governing a HSD administrative hearing for a MAP adverse eligibility determination.

(2) When an adverse action is taken or intended to be taken against a MAP eligible recipient by MAD or its UR contractor, the MAP eligible recipient may file as a claimant to request a HSD administrative hearing.

(3) When an adverse action is taken or intended to be taken against a member by his or her MCO, and the member has exhausted his or her MCO's appeal process, he or she may file as a claimant to request a HSD administrative hearing.

B. A claimant or the claimant's authorized representative may have legal counsel assist him or her during the MCO appeal and HSD administrative hearing process. If a claimant or the claimant's authorized representative, MAD, its UR contractor or the MCO retains legal counsel, that legal counsel must submit an entry of appearance to the assigned ALJ and the ALJ will forward this information to the MAD administrative hearings unit (MAD AHU).

[8.352.2.9 NMAC - Rp, 8.352.2.9 NMAC, 6-15-14]

8.352.2.10 ADVERSE ACTION: The following constitute an adverse action for which an individual may request a MCO appeal and a HSD administrative hearing.

A. The denial or reduction by MAD, its UR contractor, or a MCO of an authorized service or item, including level of care (with the exception of a MCO value-added service).

B. When a notice of action against a member is not from his or her MCO, but instead is from an entity MAD has authorized to make utilization of service determinations, the member may request a HSD administrative hearing rather than request a MCO appeal.

C. The denial in whole or in part of an individual's provider claim by MAD, its UR contractor, or the MCO which results in the individual becoming liable for payment of all or part of the claim when the denial is based on medical necessity.

D. The failure of MAD, its UR contractor or the MCO to approve a service or item in a timely manner.

E. The failure of the MCO to act on an appeal within the time-frames specified in 42 CFR Section 438.408(b).

F. The MCO's final decision to deny a member a MCO expedited appeal hearing. The HSD administrative hearing will only address the member's request for a MCO expedited appeal hearing.

G. The denial of an individual's application for MAP enrollment.

H. A determination that an individual is to be transferred or discharged.

I. The belief of an individual or the individual's authorized representative that the MAD UR contractor or the MCO's preadmission, change in condition, or annual resident review (PASRR) requirements determination is erroneous. When a claimant requests a HSD administrative hearing due to an adverse PASRR determination, the parties to the hearing will comply with 8.354.2 NMAC in place of this rule. [8.352.2.10 NMAC - Rp, 8.352.2.10 NMAC, 6-15-14]

8.352.2.11 RIGHT TO A HSD ADMINISTRATIVE HEARING: MAD must grant an individual or his or her authorized representative the opportunity for a HSD administrative hearing under specific circumstances pursuant to 42 CFR Section 431.220(a) and 27-3-3 NMSA 1978. A HSD administrative hearing occurs telephonically between the parties to the hearing and the assigned ALJ.

A. An individual or the individual's authorized representative may request a HSD administrative hearing based on his or her belief that MAD or its UR contractor intends to take, or has taken, an adverse action.

B. A member shall have the right to request a HSD administrative hearing after he or she has exhausted the MCO's appeal process and:

- (1) the member does not agree with the MCO's final decision;
- (2) the member requests an HSD administrative hearing within 30 calendar days of the date of the MCO's final decision; and
- (3) the basis for the member's request for an HSD administrative hearing meets one of the definitions of an adverse action in Section 10 of this rule.

C. MAD, its UR contractor or the MCO will not be responsible for any fees or costs, incurred by the individual or his or her authorized representative as a result of a MCO appeal or a HSD administrative hearing, or if he or she files an appeal of the HSD administrative hearing final decision to a New Mexico district court.

[8.352.2.11 NMAC - Rp, 8.352.2.11 NMAC, 6-15-14]

8.352.2.12 NOTICE, TIME LIMITS, POSTPONEMENT, OR THE DISMISSAL OF MCO APPEAL OR A HSD ADMINISTRATIVE HEARING REQUEST:

A. **Notice:**

(1) MAD or its UR contractor shall issue a "notice of action" to an individual when it intends to take an adverse action against an individual. When the notice of action relates to a reduction or termination of a service, LOC, or another benefit the individual already receives, the notice of action shall be sent not less than 10 calendar days prior to the date of MAD's or its UR contractor's intended adverse action.

(2) The MCO appeal process is governed by and set forth in detail in 8.308.15 NMAC.

B. **Exceptions to a notice of action:** Notwithstanding the notice requirement set forth in the preceding subsection, MAD, its UR contractor or the MCO may mail a notice of action to the individual or the individual's authorized representative or estate (in the event of an individual's death) no later than the actual date of the intended adverse action when:

- (1) MAD, its UR contractor or the MCO has confirmed the death of the individual;
- (2) MAD, its UR contractor or the MCO has received a clear written statement signed by the individual or the individual's authorized representative that all or a portion of an authorized service is no longer wanted;
- (3) the individual or the individual's authorized representative provides information to MAD, its UR contractor or the MCO that indicates his or her understanding that such information may require MAD, its UR contractor or the MCO to take the adverse action;
- (4) MAD, its UR contractor or the MCO learns the individual is residing in an institution, which renders the individual ineligible for MAP enrollment and MAD services;
- (5) MAD, its UR contractor or the MCO cannot determine the physical location of either the individual, or if designated, his or her authorized representative;
- (6) MAD, its UR contractor or the MCO has established that the individual has been accepted for medicaid services outside of the state; or
- (7) the primary care provider for the individual has prescribed a change in his or her LOC.

C. **Time limits:** An individual or his or her authorized representative must adhere to the time limits for requesting both a continuation of a benefit and a HSD administrative hearing.

(1) Requesting a HSD administrative hearing: an individual who is not enrolled in a MCO has 90 calendar days from the date of the "notice of action" to request a HSD administrative hearing. To be considered timely, the request must be received by FHB, the individual's local income support division (ISD) office or by the

MAD director's office no later than the close of business on the 90th calendar day immediately following the date of the notice of action. If the request for a HSD administrative hearing is mailed by the individual, the request must be postmarked by the 90th calendar day from the date of the notice of action. For a member of a MCO, see 8.308.15 NMAC for detailed description of the MCO appeal process.

(2) Continuation of a benefit:

(a) An individual who is not a member of a MCO, may request that the benefit that is the subject of an adverse action continue while his or her HSD administrative hearing proceeds. A request for a continuation of the benefit shall be accorded to any claimant who requests the continuation within 10 calendar days of the mailing of the notice of action by MAD or its UR contractor. The continuation of a benefit is only available to an individual that is currently receiving the appealed benefit and will be the same as the individual's current allocation, budget or LOC. MAD or its UR contractor must provide information in its notice of action of an individual's rights and limitations to continue a benefit during his or her HSD administrative hearing process and of the responsibility to repay MAD for the continued benefit if the HSD administrative hearing final decision is against the individual.

(b) A member of a MCO must follow his or her MCO appeal process. The member may request the benefit that is the subject of an adverse action continue while his or her MCO appeal process proceeds. A request for a continuation of a benefit shall be accorded to any member who requests the continuation within 10 calendar days of his or her MCO's mailing of the notice of action. The continuation of a benefit is only available to a member that is currently receiving the appealed benefit. The continuation of the benefit will be the same as the member's current allocation, budget or LOC. The MCO must provide information in its notice of action of a member's rights and limitations to continue a benefit during his or her MCO appeal process and of the responsibility to repay the MCO for the continued benefit if the MCO final appeal decision is against a member and, if the member requests a HSD administrative hearing, its final decision is also against the member as a claimant. The MCO appeal process is outlined in 8.308.15 NMAC.

(3) For a member who is enrolled in a MCO and who is dissatisfied with the MCO's final appeal process, the time limit to request a HSD administrative hearing is 30 calendar days following the MCO's final decision of his or her appeal.

(a) Upon requesting a HSD administrative hearing within this time limit, the member is referred to as the claimant and is governed by the remaining sections of this rule.

(b) If the member had a continuation of his or her benefit during the MCO appeal process, the claimant automatically maintains his or her continuation of the benefit throughout the remaining HSD administrative hearing process. If the claimant or the claimant's authorized representative opts to discontinue his or her benefit during the HSD administrative hearing process, the claimant or the claimant's authorized representative must contact the MCO to end services.

(4) The HSD administrative hearing is concluded within 90 calendar days from the date the claimant or the claimant's authorized representative requests a HSD administrative hearing unless the claimant or the claimant's authorized representative agrees to extend the HSD administrative hearing time frame in order to facilitate the process.

D. Dismissal of a hearings request: HSD authorizes FHB to issue a dismissal of a claimant or member's request for a HSD administrative hearing when:

(1) the request is not received within the time periods specified in the rules and notice of action, or if the claimant is a MCO member and the member has not followed or exhausted the appeal process available under the MCO;

(2) the request is withdrawn or cancelled in writing by the individual or the individual's authorized representative;

(3) the sole issue presented concerns a federal or state statute, regulation or rule requiring an adjustment of benefits for all or certain classes of individuals, including, but not limited to, a termination, modification, reduction, or suspension of a service;

(4) the same issue involving the individual has already been subject to a final decision by the MAD director following a HSD administrative hearing;

(5) the sole issue presented is regarding a New Mexico administrative code (NMAC) rule rather than the application of the rule to the claimant or the member; or

(6) the claimant, the member, or the authorized representative fails to appear telephonically or in person at a scheduled hearing without good cause at which time a HSD administrative hearing may be considered abandoned and therefore dismissed. However, if the claimant or the claimant's authorized representative presents to the ALJ good cause for failure to appear within 10 calendar days after the date of the scheduled HSD administrative

hearing, the HSD administrative hearing may be rescheduled. Good cause includes a death in the family, a disabling personal illness or another significant emergency or at the discretion of the ALJ, as appropriate, another exceptional circumstance. If the ALJ determines that the claimant or the claimant's authorized representative has shown good cause, the HSD administrative hearing will be rescheduled.

(7) When an ALJ dismisses a claimant's request for a HSD administrative hearing, that decision becomes HSD's administrative hearing final decision. A claimant may elect to then file a state district court judicial appeal.

[8.352.2.12 NMAC - Rp, 8.352.2.13 NMAC, 6-15-14]

8.352.2.13 SCHEDULING OF A HSD ADMINISTRATIVE HEARING:

A. **Scheduling:** The ALJ will assign a date for a HSD administrative hearing that affords the MAD director the opportunity to render his or her HSD administrative hearing final decision within the 90 calendar day time limit. The claimant or the claimant's authorized representative must agree via a recorded message to the assigned ALJ or in writing to the assigned ALJ to extend the 90 calendar day time limit up to an additional 30 calendar days to provide the necessary time for the HSD administrative hearing to be conducted and a final decision rendered. The ALJ has the authority on a case-by-case basis to extend the 90-calendar day time limit to more than 30-calendar days when the claimant or the claimant's authorized representative requests such an extension in writing. 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.

B. **Rescheduling:** Any party to a HSD administrative hearing may request, and is entitled to receive, one postponement of a HSD administrative hearing, as long as it does not interfere with the HSD administrative hearing final decision time frames.

(1) A request for more than one postponement is at the ALJ's discretion on a case-by-case basis.

(2) The claimant or the claimant's authorized representative must agree to allow the ALJ to extend the 90 calendar day time limit up to an additional 30 calendar days to provide the necessary time for the HSD administrative hearing to be conducted and a final decision rendered.

C. **Expedited HSD administrative hearing:** Any party may request an expedited HSD administrative hearing in cases involving a claimant's health, safety, or service availability issues. The request must be made in writing to the claimant's assigned ALJ. The request must state in detail the reasons why an expedited HSD administrative hearing is necessary. The granting of an expedited HSD administrative hearing is at the discretion of the ALJ.

D. **Group hearing:** An ALJ may respond to a series of individual claimant or the claimant's authorized representative requests for HSD administrative hearings by conducting a single group hearing. In all group hearings, the rules governing an individual HSD administrative hearing are followed. Each claimant or the claimant's authorized representative is permitted to present his or her own case. If a group hearing is arranged, any claimant or a claimant's authorized representative has the right to withdraw from the group hearing in favor of an individual HSD administrative hearing.

[8.352.2.13 NMAC - Rp, 8.352.2.15 NMAC, 6-15-14]

8.352.2.14 SUMMARY OF EVIDENCE (SOE):

A. Summary of evidence.

(1) At a HSD administrative hearing, MAD has the burden to prove through the preponderance of the evidence that an adverse action against a claimant is correct. A summary of evidence (SOE) provides information concerning the basis of MAD, its UR contractor or the MCO's adverse action. MAD may have its designee complete an SOE for final review by MAD; however, MAD is ultimately responsible for the submission of its SOE. An SOE is submitted by MAD to the ALJ and claimant or the claimant's authorized representative within specified timeframes.

(2) A claimant or the claimant's authorized representative may submit an SOE to provide the ALJ with information to refute MAD's SOE. A claimant or the claimant's authorized representative is not required to provide a SOE, as the burden of proof falls on MAD.

(3) The MAD SOE shall, at a minimum, contain:

(a) the claimant's name, and as applicable, his or her authorized representative's or legal counsel's telephone number and address, and the status of any previous or concurrent appeal through his or her MCO or MAD UR contractor;

(b) the adverse action against the claimant;

(c) the documentation supporting MAD, its UR contractor, or the MCO basis for the intended

or taken adverse action; and

(d) any applicable federal or state statutes, regulations, rules or any combination of these; however, that a failure by MAD, the UR contractor or a MCO to submit an applicable statute, regulation or rule shall not constitute per se grounds for the ALJ to find that MAD, the UR contractor or the MCO failed to meet its burden of proof.

B. Timeframes.

(1) The HSD administrative hearing.

(a) MAD's SOE shall be delivered to the ALJ and the parties to the HSD administrative hearing at least 10 working days prior to the HSD administrative hearing.

(b) MAD's SOE may be amended by MAD at any point prior to the HSD administrative hearing if the ALJ and the claimant or the claimant's authorized representative is delivered copies of the amended SOE at least two working days prior to the HSD administrative hearing. MAD is responsible for providing its UR contractor or MCO the amended SOE.

(c) If the claimant or his or her authorized representative has an SOE that he or she wants entered into evidence for the HSD administrative hearing, he or she must provide the ALJ the SOE not less than three working days prior to the HSD administrative hearing. The ALJ will provide MAD AHU with a copy of the claimant's SOE within one working day of its receipt. The MAD AHU will provide a copy of the SOE to either its UR contractor or the MCO within one working day of its receipt.

(d) If the claimant or the claimant's authorized representative has an amendment to his or her SOE, he or she shall follow the process in Subparagraph (c) of Paragraph (1) of Subsection B of this section.

(2) The failure of MAD to provide its SOE in a timely manner may, at the ALJ's discretion result in its exclusion or a postponement of the HSD administrative hearing charged against MAD.

(3) If the claimant or the claimant's authorized representative fails to provide the assigned ALJ a SOE or any amendments to the SOE within the specified timeframes, and the claimant or the claimant's authorized representative wishes to submit such documents for consideration at the HSD administrative hearing, the claimant or the claimant's authorized representative will utilize his or her one allowed postponement opportunity in which to submit the SOE or any amendments to the ALJ. The ALJ will follow the process in Subparagraph (b) of Paragraph (1) of Subsection B of this section for the disbursement of the amended SOE.

C. Availability of information to the claimant or the claimant's representative: MAD, its UR contractor or the MCO shall:

(1) provide upon request to the claimant or his or her authorized representative, any document in its possession concerning its adverse action against the claimant that is not already in its SOE;

(2) provide the claimant or the claimant's authorized representative the requested documents; such documents will be provided by MAD, its UR contractor or MCO to the claimant or the claimant's authorized representative in a timely manner and without charge.

D. No party to a HSD administrative hearing may present into evidence, as part of an amended SOE, any document or record that any other party of the hearing has not received at least two working days prior to the HSD administrative hearing. The ALJ will not take such information into consideration when reaching his or her recommendation.

[8.352.2.14 NMAC - Rp, 8.352.2.16 NMAC, 6-15-14]

8.352.2.15 ADMINISTRATIVE HEARING STANDARDS:

A. Administrative law judge.

(1) A HSD administrative hearing is conducted by an impartial official who:

(a) does not have any personal stake or involvement in the case; and

(b) was not involved in the determination or the action which is being contested; if the ALJ had any involvement with the action in question, including giving advice or consultation on the points at issue, or is personally related in any relevant degree to the parties, the ALJ must disqualify his or herself as the assigned ALJ for that case.

(2) In conducting a HSD administrative hearing, the ALJ must:

(a) explain how the HSD administrative hearing will be conducted to participants at the start of the hearing, before administering oaths;

(b) administer oaths and affirmations;

(c) request, receive, and make part of the record all evidence that has been provided to each party within the required time-frames that the ALJ considers necessary to decide the issues raised;

(d) regulate the conduct and the course of the HSD administrative hearing to ensure an orderly

HSD administrative hearing:

- (e) request, if appropriate, an independent physical or behavioral health assessment or a professional evaluation from a source mutually satisfactory to the parties at no cost to the claimant; and
- (f) produce the ALJ HSD administrative hearing report that includes findings of fact and recommendations for the MAD director's consideration.

(3) Appointment of the ALJ: the ALJ is appointed by FHB upon receipt of the request for a HSD administrative hearing. The ALJ will be copied on all written communications between the parties to HSD administrative hearing to ensure all parties are free of undue influence and receive written notices and documents within the required time-frames.

B. Record of the hearing: A HSD administrative hearing is digitally recorded. The digital recording, findings of fact, SOEs and any amendments, pleadings, documents, NMAC rules, other relevant statutes or other exhibits admitted into evidence, as well as the ALJ's recommendations will be available to the parties for one calendar year following the HSD administrative hearing final decision. These items are referred to as the record of the HSD administrative hearing. Parties to the HSD administrative hearing may request one copy of the record without charge. Subsequent copies will be charged at a pre-determined rate set by HSD.

C. Rights at an administrative hearing: A claimant or the claimant's authorized representative will provide the assigned ALJ a signed release-of-information in order for a designated spokesperson to assist or represent the claimant or the claimant's authorized representative in presenting the claimant's case at a HSD administrative hearing. If the claimant or the claimant's authorized representative, MAD, its UR contractor or MCO have retained legal counsel, that legal counsel will submit a notice appearance to the assigned ALJ and the ALJ will forward this information to the MAD administrative hearings unit (MAD AHU). The parties are given an opportunity to:

- (1) call witnesses to present information relevant to the case;
- (2) submit evidence to establish all pertinent facts and circumstances in the case;
- (3) advance arguments without undue interference; and
- (4) question or contradict any testimony or evidence, including an opportunity to confront and cross-examine opposing witnesses.

D. Evidence and procedure: Formal rules of evidence and civil procedure do not apply to a HSD administrative hearing. A free, orderly exchange of relevant information is necessary for the decision-making process.

(1) 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.

(2) Confidentiality: the confidentiality of records is to be maintained;

(3) Information not entered in the hearing record: information which is not presented during the HSD administrative hearing in the presence of the claimant or the claimant's authorized representative, MAD, its UR contractor, or the MCO may not be used by the ALJ in making his or her record of fact finding and recommendation.

(4) Administrative notice: the ALJ may take administrative notice of any matter in which courts of this state may take judicial notice.

(5) Privilege: the rules of privilege apply to the extent that they are required to be recognized in civil actions in the district courts of New Mexico.

(6) Medical issues: in a case involving physical or behavioral health issues, the parties may submit expert testimony, reports, affidavits or health care records into evidence as necessary. Admission of this evidence is at the discretion of the ALJ and must meet the SOE time-frames for submission. All parties of the HSD administrative hearing have the right to examine any documents which may influence the HSD administrative hearing final decision.

[8.352.2.15 NMAC - Rp, 8.352.2.17 NMAC, 6-15-14]

8.352.2.16 CONDUCTING THE HSD ADMINISTRATIVE HEARING: A HSD administrative hearing is conducted in an orderly manner and in an informal atmosphere. The HSD administrative hearing is normally conducted telephonically and is not open to the general public. The assigned ALJ has the authority to limit the number of persons in attendance as necessary for the ALJ to control the hearing.

A. Opening the hearing: The HSD administrative hearing is opened by the assigned ALJ. All individuals present at the hearing must identify themselves for the record, including when the claimant or the

claimant's authorized representative has other representation or legal counsel to assist him or her during the HSD administrative hearing. The ALJ shall explain his or her role in conducting the HSD administrative hearing that he or she will submit the record of the HSD administrative hearing to the MAD director and that the final decision of the HSD administrative hearing will be made by the MAD director or designee after review of the record of the HSD administrative hearing.

B. **Order of testimony:** The order of testimony is described, and the oath is administered to all who will testify at the HSD administrative hearing. Because the burden of proof is with MAD, it is at the claimant or the claimant's authorized representative's discretion to call witnesses or to present evidence. The order of testimony at the HSD administrative hearing is as follows:

- (1) opening statements of parties, authorized representatives, or designees, or if the claimant or the claimant's authorized representative through a signed statement has identified a designated spokesperson or legal counsel to assist him or her during the HSD administrative hearing process;
- (2) presentation of MAD's case; if witnesses are called, the order of examination of each witness is:
 - (a) examination by MAD, its UR contractor, the MCO, or another MAD designee;
 - (b) cross examination by the claimant, the claimant's authorized representative, designated spokesperson, or his or her legal counsel; and
 - (c) MAD's opportunity to redirect the witness;
- (3) presentation of the claimant's case is at the claimant or the claimant's authorized representative discretion, if witnesses are called, the order of examination of each witness is:
 - (a) examination by claimant or the claimant's authorized representative, designated spokesperson or legal counsel;
 - (b) cross examination by MAD, its UR contractor, the MCO or another MAD designee; and
 - (c) the claimant, claimant's authorized representative or designated spokesperson, or legal counsel's opportunity to redirect the witness;
- (4) presentation of rebuttal evidence by MAD, its UR contractor, the MCO or another designee and the claimant or the claimant's authorized representative, designated spokesperson or legal counsel respectively;
- (5) the ALJ may direct further questions to any of the parties to the HSD administrative hearing to clarify inconsistencies or obtain an adequate evidentiary record; and
- (6) the ALJ may ask specific parties to summarize and present closing arguments.

C. **Points of law:** The ALJ may direct the parties who have legal counsel to submit memoranda on points of law to assist the ALJ develop the HSD administrative hearing record and recommendation letter. The ALJ may dictate the length and scope of these submissions.

D. **Written closing argument:** At the discretion of the ALJ, the parties may be directed to make closing arguments, or submit written memoranda on points of law.

E. **Continuance:** The ALJ may, at his or her discretion, continue the HSD administrative hearing upon the request of the parties to the HSD administrative hearing or the ALJ's own motion, to allow for the admission of additional testimony or evidence. The reasons for the continuance must be clearly stated for the record. Written notice of the date, time, and place of the continued HSD administrative hearing shall be sent to the parties if they are not set at the time of the approval of the continuance.

F. **Additional evidence:** If the ALJ requires additional evidence to further clarify documentary evidence presented during the HSD administrative hearing, he or she may close the HSD administrative hearing but keep the record open and direct the parties to submit such clarifying evidence. The assigned ALJ shall provide each party to the HSD administrative hearing with a copy of the direction for further evidence and the documentary evidence to be submitted. Any party may respond to the ALJ's direction, in writing, within 10 calendar days of its receipt of the ALJ's notice. The ALJ will provide the other parties to the HSD administrative hearing a copy of any such submissions and the additional evidence and responses, subject to the ALJ's discretion and appropriate objections by any of the parties to the HSD administrative hearing, shall become part of the HSD administrative hearing record.

G. **Re-opening a closed HSD administrative hearing:** The ALJ, at his or her discretion or subject to an order from a court of competent jurisdiction, may re-open a closed HSD administrative hearing when the evidentiary record fails to address an issue that is relevant to resolution of the HSD administrative hearing request. Written notice of the date, time and place of the re-opened HSD administrative hearing shall be sent by the ALJ to the parties not less than 10 calendar days before the re-opened HSD administrative hearing. Once the MAD director or designee has issued a HSD administrative final decision, the HSD administrative hearing cannot be re-opened absent an order from a court of competent jurisdiction. A claimant or the claimant's authorized representative may request a new HSD administrative hearing if additional material information becomes available that was not

available at the time of the first HSD administrative hearing. The previously assigned ALJ has the discretion to determine if the additional information would necessitate a new HSD administrative hearing.
[8.352.2.16 NMAC - Rp, 8.352.2.18 NMAC, 6-15-14]

8.352.2.17 HSD ADMINISTRATIVE HEARING FINAL DECISION: The final decision concerning the HSD administrative hearing is made by the MAD director or designee after the review of the HSD administrative hearing record and the ALJ's recommendation. If the ALJ had rendered a decision to dismiss a HSD administrative hearing request, that decision becomes the HSD administrative hearing final decision and the following process detailed in this section of the rule does not apply.

A. **Decision based on the record:** The ALJ's HSD administrative hearing recommendation must be based solely on the record of the HSD administrative hearing.

B. **ALJ recommendation:** The ALJ shall review the record of the HSD administrative hearing and submit a complete copy of the record to the MAD director.

(1) **Content of the ALJ recommendation:** the ALJ shall specify the reasons for his or her conclusions, identifies the supporting evidence, references the pertinent federal and state statutes, regulations, and NMAC rules, and responds to the arguments of the parties within his or her written report.

(2) **The ALJ recommends:**

(a) in favor of the claimant if MAD, its UR contractor or the MCO's intended or taken adverse action is not supported by a preponderance of the evidence submitted during the HSD administrative hearing. The ALJ will provide specific recommendations to each appealed adverse action;

(b) in favor of MAD, if the preponderance of evidence submitted during the HSD administrative hearing supports the intended or taken of adverse action or actions; or

(c) any other result supported by the record of the HSD administrative hearing which may be a combination of recommendations for and against the claimant or MAD. If the HSD administrative hearing covered a number of services or components of a service, the ALJ will provide specific recommendations to each intended or taken adverse action.

C. **Review of the record:** The record of the HSD administrative hearing and the report and recommendation of the ALJ is reviewed by the MAD director or designee to ensure conformity with applicable federal and state statutes, regulations, and rules.

D. **Final decision:** The ALJ's recommendation may be adopted or rejected in a final written decision by the MAD director or designee on issues that were the subject of the HSD administrative hearing. The MAD director's final decision letter shall specify the reasons for his or her decision and identify the regulatory authority and those portions of the record, applicable federal and state law, rules and policies or any combination of these that support the final decision. No person who participated during the HSD administrative hearing process may participate in arriving at a HSD administrative hearing final decision.

E. **Notice to parties:** MAD shall promptly provide all parties with a copy of the HSD administrative hearing final written decision. When the claimant is represented by legal counsel or an authorized representative, each must receive a copy of the final decision. The HSD administrative hearing final decision letter shall include an explanation that the parties have exhausted all HSD administrative remedies and a claimant or the claimant's authorized representative may pursue judicial review of this decision.
[8.352.2.17 NMAC - Rp, 8.352.2.19 NMAC, 6-15-14]

8.352.2.18 CONTINUATION OF BENEFITS PURSUANT TO A TIMELY APPEAL AND A HSD ADMINISTRATIVE HEARING PROCEEDING: A continuation of an existing benefit is provided to a claimant who is not a member of a MCO when the claimant requests a continuation of the benefit through MAD or its UR contractor as directed on the claimant's notice of action within 10 calendar days of the mailing of the MAD or its UR contractor's notice of action. A continuation of the benefit is provided to a member who requests a continuation of the benefit through his or her MCO within 10 calendar days of the mailing of the MCO's notice of action. The MAD, its UR contractor or the MCO's notice of action will include information on the rights to the continued benefit and on the claimant or member's responsibility for repayment if the MCO final appeal decision and, as applicable, the HSD administrative hearing decision is not in his or her favor. The continuation of a benefit is only available to a member or claimant that is currently receiving the appealed benefit. The continuation of the benefit will be the same as the member or claimant's current allocation, budget or LOC.
[8.352.2.18 NMAC - Rp, 8.352.2.20 NMAC, 6-15-14]

8.352.2.19 IMPLEMENTATION OF THE HSD ADMINISTRATIVE FINAL DECISION: The HSD

administrative hearing final decision is binding on all issues that have been the subject of the HSD administrative hearing as to the claimant unless stayed by either a court order or by the MAD director or designee. MAD is responsible for ensuring that the HSD administrative hearing final decision is fulfilled.

A. If the claimant is a member and he or she received a benefit under his or her approved continuation of the benefit and the decision is favorable to the MCO, the claimant's MCO will take action to file a repayment claim to the claimant or the claimant's authorized representative for the services received during the MCO appeal and the HSD administrative hearing process up to the date of the HSD administrative hearing final decision. The claimant is responsible for repayment to his or her MCO the amount of paid claims for the continuation of the benefit beginning on the first date of service of the claimant's approved continuation of the benefit up to and including the date of the HSD administrative hearing final decision. The claimant's MCO is charged with the collection of this amount. The repayment amount must be used by the claimant's MCO to benefit its members.

B. If the claimant is not enrolled in a MCO and the HSD administrative hearing final decision is favorable to MAD or its UR contractor, MAD will take action to file a repayment claim to the claimant or the claimant's authorized representative for the services received during the HSD administrative hearing process up to the date of the HSD administrative hearing final decision.

C. When the HSD administrative hearing final decision is favorable to the claimant, MAD, its UR contractor or MCO will authorize the benefit and coverage set forth in the HSD administrative hearing final decision.

D. A request for a HSD administrative hearing concerning the MAD or MCO repayment claim is limited to alleging errors in how the repayment amount was determined. The HSD final administrative hearing decision serves as the claimant's notice of action from either the MCO or MAD to start collection proceedings. [8.352.2.19 NMAC - Rp, 8.352.2.21 NMAC, 6-15-14]

8.352.2.20 JUDICIAL APPEAL: If the HSD administrative hearing final decision upholds MAD, its UR contractor or the MCO's intended or taken adverse action, the claimant or the claimant's authorized representative has the right to pursue judicial review of the HSD administrative hearing final decision and is notified of that right in the HSD administrative final decision letter. Judicial appeals for the HSD administrative hearing final decision are governed by New Mexico statutes and court rules. While the following subsections highlight applicable procedures, they should not be considered a substitute for examining the statutes and rules themselves.

A. **Jurisdiction:** Administrative appeals for a claimant are governed by the Section 39-3-1.1 NMSA 1978 and by Rule 1-074, Rules of Civil Procedures for the District Courts.

B. **Timeliness:** Unless otherwise provided by law, a claimant or the claimant's authorized representative must appeal the HSD administrative hearing final decision within 30 calendar days of the date of the HSD administrative hearing final decision by filing a notice of appeal with the clerk of the appropriate New Mexico district court.

C. **Jurisdiction and standard of review:** All judicial appeals are based on the record made at the HSD administrative hearing, and in accordance with state statute and court rules. HSD files a copy of the HSD administrative hearing record with the court clerk and furnishes one copy to the claimant or the claimant's authorized representative and if applicable, his or her legal counsel within 30 calendar days after receipt of the notice of appeal. The court may set aside the HSD administrative hearing final decision if it finds the decision is:

- (1) arbitrary, capricious, or an abuse of discretion;
- (2) is not supported by substantial evidence in the record as a whole; or
- (3) is otherwise not in accordance with the applicable law, statutes or rules.

D. **Benefits pending state district court appeal:** The filing of a notice of appeal shall not stay the enforcement of the HSD administrative hearing final decision. The claimant or the claimant's authorized representative may seek a stay upon a motion to the court or the claimant may request the MAD director or designee to stay the HSD administrative hearing final decision while the adverse action is on appeal in a New Mexico district court. If the court orders a stay, MAD, its UR contractor or the MCO will maintain the benefit at issue in accordance with the state district court's order. If the New Mexico district court's final decision is in favor of MAD, its UR contractor or the MCO and the claimant continued utilizing his or her benefit during the district court appeal process, see 8.352.2.19 NMAC for the repayment process.

[8.352.2.20 NMAC - Rp, 8.352.2.22 NMAC, 6-15-14]

HISTORY OF 8.352.2 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records

Center:

SP-004.0200 Section 4, General Program Administration Hearing For Applicants, 1-23-81

SP-004.2800 Section 4, General Program Administration Appeals Process For Skilled Nursing Facilities And Intermediate Care Facilities, 3-5-81

NMAC History: 8 NMAC 4.MAD.970 Oversight Policies, Recipient Hearing Policies, Recipient Hearings, 10-16-96

8 NMAC 4.MAD.970 Oversight Policies, Recipient Hearing Policies, Recipient Hearings; 12-15-99.

History of Repealed Material:

8.352.2 NMAC, Recipient Hearings, filed 6-15-01 - Repealed effective, 1-1-14.

8.352.2 NMAC, Claimant Hearings, filed 12-17-13 - Repealed effective, 6-15-14.