

HUMAN SERVICES

DIVISION OF DEVELOPMENTAL DISABILITIES

Appeal Procedure

Readoption with Amendments: N.J.A.C. 10:48

Adopted Repeal: N.J.A.C. 10:48-4.4

Proposed: June 2, 2014, at 46 N.J.R. 1310(a).

Adopted: September 24, 2014, by Jennifer Velez, Commissioner, Department of Human Services.

Filed: October 23, 2014, as R.2014 d.175, **with non-substantial changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 30:1-12 et seq. and 30:4-6 et seq.

Effective Dates: October 23, 2014, Readoption;
 December 1, 2014, Amendments and Repeal.

Expiration Date: October 23, 2021.

Summary of Public Comments and Agency Responses:

The following is a summary of the comments received from the public and the Division's responses. Each commenter is identified at the end of the comment by a number that corresponds to the following list:

1. Jennifer M. Halper, Senior Staff Attorney, Disability Rights New Jersey
2. Valerie Sellers, CEO, New Jersey Association of Community Providers
3. Thomas Baffuto, Executive Director, The Arc of New Jersey

COMMENT: A commenter requests that the rules be clarified to ensure that an individual is not denied an opportunity to appeal if the individual is determined to lack the capacity to appeal and does not have a court-appointed guardian or an authorized representative. (1)

RESPONSE: The rules provide that all individuals the Division serves have the option to appeal agency decisions within the procedures outlined in the chapter. The rules provide that either the individual, the individual's court-appointed guardian or an authorized representative may file an appeal. Where a court has determined that an individual lacks capacity, but a court-appointed guardian has not yet been appointed, any authorized representative, such as a family member, attorney, or other advocate, may appeal on behalf of the individual. The Division does not believe that clarification is required.

COMMENT: A commenter believes that an additional definition should be added to clarify that whenever there is a requirement that something be communicated "in writing," and the most effective means of communicating with the individual is not in written English, then "in writing" shall mean the most effective means of communication to and from the individual. (1)

RESPONSE: The Division agrees that when providing services to the individuals it serves, the most effective means of communication should be used whenever possible. This chapter, however, relates to the procedures to be used when disagreements arise between individuals and the agency. The proper resolution of these disagreements requires a clear written record. Such a written record must be available to an administrative law judge or appellate court to ensure that these bodies can appropriately adjudicate an individual's appeal. The chapter provides that an individual or the individual's legal guardian may obtain the assistance of an authorized representative to file an appeal; the authorized representative may assist where written English is

not the individual's or guardian's most effective means of communication. In addition, translation services may be available, as appropriate.

COMMENT: A commenter requests that N.J.A.C. 10:48-1.6(d), which states that "appeals of services shall be limited to those services indicated in the service plan," be revised to clarify that appeals can also be filed regarding services that were requested but were not included in the service plan. (1)

RESPONSE: The Division agrees that this provision could more clearly indicate that when an individual requests services that would be appropriate for inclusion in a service plan and those services are denied, the individual may file an administrative appeal. Therefore, the Division is changing N.J.A.C. 10:48-1.6(d) upon adoption to add "or appropriate for inclusion in a service plan that were requested and denied."

COMMENT: A commenter notes that the rules contain three categories of appeals: contested cases in which individuals have a right to a Medicaid fair hearing; contested cases eligible for administrative hearings other than Medicaid fair hearings; and non-contested cases. The commenter finds it very difficult to determine how specific appeals will be classified and recommends an easier to follow taxonomy, possibly an appendix. (1)

RESPONSE: The Division does not agree that an easier-to-follow classification or appendix is necessary. The terms "contested matter," "fair hearing," and "non-contested case" are each clearly defined terms within N.J.A.C. 10:48-1.5. N.J.A.C. 10:48-1.6 requires the Division to review each appeal to determine whether it is contested or non-contested. Subchapter 2 describes those cases that are contested, specifically, appeals of waiver-funded services where a

Medicaid fair hearing is required, as well as other contested matters, namely appeals of functional eligibility to receive Division services and appeals of specific offers of placement. Subchapter 3 describes non-contested cases. The Division believes that these provisions appropriately set forth the classifications of appeals, and that an appendix or alternate organization is not necessary.

COMMENT: A commenter believes that the Division incorrectly deleted the denial of waiver eligibility and level of waiver services from N.J.A.C. 10:48-6.2, and notes that the Division did not delete similar language within N.J.A.C. 10:48-1.6. (1)

RESPONSE: The Division modified N.J.A.C. 10:48-6.2 by replacing “appeals of waiver services, denial of waiver eligibility or level of waiver services may be heard” with “appeals of the denial, suspension, reduction, or termination of waiver services shall be heard” in order to reflect and be consistent with the terminology used in the Social Security Act regulations at 42 CFR 431.200 and the Division of Medical Assistance and Health Services rules at N.J.A.C. 10:49. This change in terminology is not a substantive change to the individual’s right to a fair hearing. For purposes of clarity and consistency, the Division is changing N.J.A.C. 10:48-1.6(c) upon adoption to similarly reflect the terminology used in 42 CFR 431.200 and N.J.A.C. 10:49.

COMMENT: A commenter believes that N.J.A.C. 10:48-6.2(b), which requires an individual to request a fair hearing within 20 days of notice of the Division’s action giving rise to the appeal, should be modified to make it clear that an individual has a right to request a fair hearing in the absence of notice from the Division. The commenter believes that “services to an individual are too frequently reduced, suspended, or terminated without written notice from the Division.” (1)

RESPONSE: The Division does not believe that such a clarification is necessary. Federal and State Medicaid rules clearly provide an individual with the right to a fair hearing where Medicaid services are denied, suspended, reduced, or terminated. Lack of notice by the government entity does not negate that right. The time frame within this provision is a procedural rule to allow for the efficient processing of appeals, so that appeals are not initiated months or years after the agency action. The Division is not aware of any systemic issues involving lack of notice, but encourages the commenter to communicate its concerns with the Division, so that issues may be appropriately addressed.

COMMENT: A commenter supports the need for an appeals process, as well as due process protections, for individuals with intellectual and developmental disabilities and their families. The commenter believes that to ensure a timely process, the rules should be amended to require that whenever the agency does not comply with a deadline for the appeals process, the result is automatic approval of the individual's appeal. (2)

RESPONSE: The Division thanks the commenter for expressing its support of the need for an appeals process, but does not believe that such an amendment is necessary. The Division notes that it has amended the rules to extend most deadlines for filing and responding to appeals by 10 business days to more accurately reflect the time needed for compliance. The proper forum to address undue delay in agency action is within the court system.

COMMENT: A commenter believes that the Division should maintain the administrative review conference option at N.J.A.C. 10:48-4.4, because allowing for only paper review lacks flexibility and may not meet the needs of the population served based upon the range of cognitive abilities

present within that population. The commenter states that the individuals served by the Division would benefit from in-person hearings and may face challenges with reading and comprehending written materials. (3)

RESPONSE: The Division has not conducted administrative review conferences for many years, and in practice, utilizes administrative paper reviews to process non-contested appeals. The rules provide that an authorized person may bring an appeal. Authorized person is defined to include the individual, a legal guardian, or the authorized representative of the individual or legal guardian. Thus, individuals appealing agency action may seek assistance from others in reading and comprehending materials. Additionally, N.J.A.C. 10:48-4.1 provides that the Division shall offer an informal conference to the appellant in all non-contested cases. The informal conference is an opportunity for an in-person meeting to assist in resolving issues prior to the administrative paper review. For these reasons, the Division does not believe that it is necessary to maintain the administrative review conference.

COMMENT: A commenter requests clarification regarding Subchapter 5, Settlement Conference. In particular, the commenter recommends that the Division add language indicating that the appellant may have an authorized representative, a family member, a lawyer, or another designated party present during the settlement conference. (3)

RESPONSE: Subchapter 5 requires the Division to offer a settlement conference to the “appellant.” Appellant is a defined term, which includes an individual receiving or applying for Division services, the guardian of an individual receiving or applying for Division services, or an authorized representative of the individual or legal guardian. In addition, paragraph 5 of the definition of “appellant” specifically allows the appellant to be represented by legal counsel

during the settlement conference. For these reasons, the Division does not believe that clarification is required, as the “appellant,” as that term is defined, as well as legal counsel, may be present at the settlement conference.

COMMENT: A commenter requests additional details to help individuals discern the difference between a settlement conference and an alternate dispute resolution (ADR) conference, so that individuals understand when to request a settlement conference as opposed to an ADR conference. The commenter also seeks additional information about the differences in potential outcomes between a settlement conference and an ADR conference. (3)

RESPONSE: Subchapter 2, Contested Cases, contains the general descriptions of contested cases, separated into two parts: contested appeals of services funded through Medicaid waivers and contested appeals of services that are not funded through Medicaid waivers. N.J.A.C. 10:48-2.1 provides that for appeals involving services funded through a waiver, the Division may offer an ADR conference to the appellant, and cross-references the process for an ADR conference at N.J.A.C. 10:48-6.1. N.J.A.C. 10:48-2.2 provides that for contested appeals not involving waiver-funded services, (for example, appeals involving eligibility for Division services) the Division shall offer a settlement conference to the appellant, and cross-references the process for a settlement conference at N.J.A.C. 10:48-5.1. Because Subchapter 2 describes when an ADR or settlement conference is to be offered, the Division does not believe any additional detail is required. With respect to the potential outcomes of these conferences, as set forth in N.J.A.C. 10:48-5.1, a settlement conference may lead to a settlement agreement; if it does not, the appellant may request that the appeal be transmitted to the Office of Administrative Law. As set

forth in N.J.A.C. 10:48-6.1, an ADR conference may also lead to a settlement agreement; if it does not, the appellant may request a fair hearing.

COMMENT: A commenter requests additional clarification of N.J.A.C. 10:48-6.2(e), which provides that: “In the matter of a fair hearing, the Director, DMAHS, shall render the final decision.” The commenter was unable to locate the definition of “DMAHS,” and opposes transferring matters involving the Division’s expertise to DMAHS for final decision. (3)

RESPONSE: The commenter correctly concludes that the agency head of the Division of Medical Assistance and Health Services, DMAHS, prepares the final agency decision in cases involving Medicaid fair hearings. DMAHS is defined in the rules as “the agency under the Department of Human Services that is designated in accordance with 42 CFR 431.10, as the single State agency for the administration of the New Jersey Medicaid program.” As a matter of Federal and State Medicaid law, the agency head of DMHAS renders the final agency decision for all Medicaid fair hearings. Division personnel are fully involved in matters involving fair hearings, however, from participation in the ADR conference, if one is held, through participation in the fair hearing in the Office of Administrative Law.

Federal Standards Statement

The rules readopted with amendments and a repeal do not exceed standards required by Federal law. N.J.A.C. 10:48-6.2, Fair hearing, is subject to the Federal standards for the fair hearing requirements set forth in the Social Security Act regulations at 42 CFR 431.200 et seq. This chapter conforms to the Federal standards.

Full text of the readopted rules can be found in the New Jersey Administrative Code at N.J.A.C. 10:48.

Full text of the adopted amendments follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks ***[thus]***):

10:48-1.6 Process for requesting an appeal

(a) – (b) (No change from proposal.)

(c) Appeals of ***[waiver services, denial of waiver eligibility, or level]*** ***the denial, suspension, reduction, or termination*** of waiver services must be made, in writing, within 20 days from the date of the notice of such action.

(d) Appeals of services shall be limited to those services indicated in the service plan ***or appropriate for inclusion in a service plan that were requested and denied ***.

(e)-(i) (No change from proposal.)