

## Chapter HA 3

### PROCEDURE AND PRACTICE FOR FAIR HEARINGS

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| <p>HA 3.01 Authority and purpose.<br/>                 HA 3.02 Definitions.<br/>                 HA 3.03 Right to appeal.<br/>                 HA 3.04 Notification of right to appeal.<br/>                 HA 3.05 Request for a hearing.<br/>                 HA 3.06 Hearing arrangements.</p> | <p>HA 3.07 Witnesses and subpoenas.<br/>                 HA 3.08 Administrative law judge.<br/>                 HA 3.09 Hearing decision.<br/>                 HA 3.10 Rehearing and amendment of decision.<br/>                 HA 3.11 Costs motion.<br/>                 HA 3.12 Wisconsin works.</p> |
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**HA 3.01 Authority and purpose.** (1) This chapter is adopted pursuant to ss. 15.03, 46.016, 49.45 (5) and (10), 227.11 (2) (a), and 227.43, Stats., and to conform with the requirements of 42 USC 8624(b)(13), Titles IV and XIX of the U.S. Social Security Act as amended and the Food Stamp Act of 1977, as amended, 7 USC 2011 to 2029.

(2) This chapter governs the fair hearing process for considering the appeal by affected individuals of decisions made by the departments of health services, children and families, workforce development and administration and decisions by county social and human service departments and tribal agencies concerning medicaid, food stamps, public assistance and social service programs administered by these departments. This chapter also governs the departmental level review process for Wisconsin works.

(3) The purpose of hearings on department and agency decisions is the following:

(a) To provide an opportunity for an applicant to challenge a department or agency finding that he or she is ineligible for medicaid, food stamps, public assistance or social services or to challenge the date of initial eligibility by establishing that the department's or agency's decision on the application was incorrect.

(b) To provide an opportunity for a recipient of medicaid, food stamps, public assistance or social services to assert continuing eligibility for aid when the department or agency has decided to discontinue aid, or to object to aid reduction, sufficiency or form of payment.

**History:** Cr. Register, November, 1999, No. 527, eff. 12-1-99; correction in (1) made under s. 13.93 (2m) (b) 7., Stats., Register September 2001 No. 549; **correction in (2) made under s. 13.92 (4) (b) 6., Stats.**

**HA 3.02 Definitions.** In this chapter:

(1) "Administrative law judge" means an administrative hearing examiner employed by the division of hearings and appeals.

(2) "Agency" means a county department of social services under s. 46.215 or 46.22, Stats., a county department of human services under s. 46.23, Stats., or a tribal agency which administers medicaid, food stamps, social services or public assistance programs.

(3) "COP" means the long term support community options program under s. 46.27, Stats.

(4) "Costs motion" means a request by a prevailing party under s. 227.485, Stats., for a department to pay the costs incurred in connection with a contested case.

(5) "Department" means the Wisconsin department of health services, the Wisconsin department of children and families, the Wisconsin department of workforce development or the Wisconsin department of administration.

(6) "Division" means the division of hearings and appeals.

(7) "Food stamps" means an assistance program under the Food Stamp Act of 1977, as amended, 7 USC 2011 to 2029.

(8) "Fair hearing" or "hearing" means a de novo proceeding before an impartial administrative law judge in which the petitioner or the petitioner's representative presents the reasons why

the agency or department action or inaction in the petitioner's case should be corrected.

(9) "Katie Beckett waiver program" means the medicaid eligibility program authorized by 42 USC 1396a s. 1902 (e) (3).

(10) "Low Income Home Energy Assistance Program" or "LIHEAP" means the federally designated program under 42 USC 8621 as amended, and s. 16.27, Stats., which provides benefits and services to assist low-income households with the costs of energy used for home heating.

(11) "Managed care entity" means an organization which makes available to an enrolled participant health care services provided by providers selected by the organization and which has a contractual arrangement with the department of health services for the provision of services to medicaid enrollees.

(12) "Medicaid" means the medical assistance program under ss. 49.43 to 49.47 and 49.49 to 49.497, Stats., and chs. DHS 101 to 108.

(13) "Medicaid waiver services" means home and community-based services provided under ss. 46.27, 46.275, 46.277, and 46.278, Stats.

(14) "Petitioner" means a person on whose behalf a request for a hearing has been filed.

(15) "Public assistance" means a program, such as, but not limited to, LIHEAP, kinship care under s. 48.57 (3m) and (3p), Stats., caretaker supplement under s. 49.775, Stats., or state supplements under s. 49.77, Stats., which provides cash benefits to needy individuals and which is administered by a department or by an agency for a department. "Public assistance" does not mean the Wisconsin works program under ss. 49.141 to 49.161, Stats.

(17) "Secretary" means the secretary of the department of workforce development, the secretary of the department of health services, the secretary of the department of children and families, or the secretary of the department of administration or their designees.

(18) "Social services" means services, other than under local county-funded programs, which are provided by agencies or the departments to individuals, or paid for by agencies or the departments on behalf of individuals, such as, but not limited to, the Alzheimer's family and caregiver support program under s. 46.87, Stats., or the family support program under s. 46.985, Stats.

(19) "Wisconsin works" or "W-2" means the assistance program for families with dependent children, administered under ss. 49.141 to 49.161, Stats.

**History:** Cr. Register, November, 1999, No. 527, eff. 12-1-99; **corrections in (5), (10), (11), (12) and (17) made under s. 13.92 (4) (b) 6. and 7., Stats.**

**HA 3.03 Right to appeal.** (1) Any person applying for or receiving medicaid, food stamps, social services or public assistance may appeal any of the following administrative actions of the department or an agency:

(a) Denial of an application for benefits or the overt denial of the right to apply.

(b) Failure to act on an application with reasonable promptness.

- (c) Reduction, suspension or termination of program benefits.
- (d) The determination of the amount, sufficiency, initial eligibility date of program benefits excluding COP program benefits.
- (e) A change in the form of payment of benefits.
- (f) For the COP program and medicaid waiver services, the denial of eligibility for services or reduction or termination of services as provided in s. 46.27 (7m), Stats.
- (g) A determination with regard to the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Social Security Act of 1935, as amended.
- (h) A decision to transfer or discharge a resident from a facility subject to the requirements of 42 CFR 483.12.
- (i) A denial or termination of eligibility for medicaid under the Katie Beckett waiver program under section 1902(e)(3) of the Social Security Act.
- (j) A decision to impose a medicaid lien or to deny a hardship waiver under s. 49.496, Stats.
- (k) Any other decision or action affecting a medicaid applicant or enrollee where a hearing is required by law.
- (L) A decision to deny a hardship waiver under s. 49.682 (5), Stats., with regard to the recovery of benefits under a chronic disease program.
- (m) The determination under s. 49.85, Stats., to recover an overpayment of benefits by means of certification to the Wisconsin department of revenue and the determination of the amount of such an overpayment as including an amount they believe has already been repaid or discharged in bankruptcy.
- (n) A denial of an application for kinship care payment on the grounds specified in s. 48.57 (3m) (am) 1., 2., 4., 4m. and 5., Stats., or the termination of kinship care payments.
- (o) Removal of a child or any other decision or order by an agency or department that affects the head of a foster, treatment foster or group home or the children involved, per s. 48.64 (4), Stats.

(2) An applicant for or recipient of medicaid may appeal a decision or order of a managed care entity which denies, reduces, terminates or otherwise limits services, which denies an enrollee's request for disenrollment or exemption from the entity or which otherwise adversely affects the individual.

(3) A former recipient of medicaid, food stamps, aid to families with dependent children or W-2 may appeal the determination that he or she has been overpaid benefits, the amount of such an overpayment still owing or whether it has been discharged in bankruptcy or the determination under s. 49.85, Stats., to recover such an overpayment by means of certification to the Wisconsin department of revenue.

(4) An applicant, recipient or former recipient may appeal any other adverse action or decision by an agency or department which affects their public assistance or social services benefits where a hearing is required by state or federal law or department policy.

**History:** Cr. Register, November, 1999, No. 527, eff. 12-1-99.

**HA 3.04 Notification of right to appeal.** An agency or department shall in writing inform a person at the time the person applies for medicaid, food stamps, public assistance or social services, and at the time an agency takes an action listed under s. HA 3.03, of the person's right to a hearing under this chapter and of procedures for requesting a hearing as set forth in s. HA 3.05.

**History:** Cr. Register, November, 1999, No. 527, eff. 12-1-99.

**HA 3.05 Request for a hearing.** (1) An applicant or recipient who wishes to contest an action specified under s. HA 3.03 may request a hearing.

(2) A request for a hearing may be made by the applicant, recipient or former recipient, by an immediate family member, or someone with legal authority to act on their behalf. The division

in its discretion may require written authorization of such representation in an individual case or a type of case.

(a) A request for a hearing may be made in writing or orally and may be made to the agency or the division. An oral request to the agency shall be reduced to writing by the agency and signed by the petitioner, except that a request involving only food stamps need not be signed. An agency receiving a hearing request shall immediately date-stamp the request and forward it to the division.

(b) The hearing request shall include a short statement of the matter to be reviewed. If it is unclear from the request what action the person seeks to appeal or whether the petitioner has standing to obtain a hearing, the division may request clarification before taking action on the request.

**Note:** A hearing request should be addressed to the Division of Hearings and Appeals, P.O. Box 7875, Madison, Wisconsin 53707. Appeals may be delivered in person to that office at 5005 University Avenue, Room 201, Madison, Wisconsin.

(3) Except as provided in par. (a) or (b), the petitioner shall have 45 days from the effective date of the adverse action specified under s. HA 3.03 in which to file a hearing request.

(a) For a hearing request relating to food stamps, the petitioner has 90 days from the date of the action specified under s. HA 3.03 in which to file the hearing request.

(b) If a different time limit for a hearing request is specified by state statute, administrative rule or federal regulation, that limit shall apply and shall be stated in the notification of Right to Appeal in the decision.

(c) A hearing request shall be considered filed on the date of actual receipt by the division or agency, or the date of the postmark, whichever is earlier. A request filed by facsimile is complete upon transmission. If the request is filed by facsimile transmission and such transmission is completed between 5 p. m. and midnight, 1 day shall be added to the prescribed period.

(4) The division shall deny or dismiss a hearing request under any of the following circumstances:

(a) The division does not have jurisdiction to conduct a hearing on the matter appealed.

(b) The petitioner or the petitioner's representative withdraws the request in writing.

(c) The sole issue is one of state or federal law requiring automatic grant adjustments for classes of recipients, unless the issue being contested is that eligibility or benefits were improperly computed or that federal law or regulation is being misapplied or misinterpreted by the department.

(d) The petitioner has abandoned the hearing request. The division shall determine that abandonment has occurred when the petitioner, without good cause, fails to appear personally or by representative at the time and place set for the hearing. Abandonment may also be deemed to have occurred when the petitioner or the authorized representative fails to respond within a reasonable time to correspondence from the division regarding the hearing.

(e) The hearing request is not received within the time period specified in sub. (3).

(5) In cases involving discontinuance, reduction, suspension of assistance or benefits or change in the form of payment of assistance, the division shall order that the adverse action be stayed and benefits continued unchanged pending the hearing decision if the hearing request was filed within the time limits specified in 42 CFR 431.230 and 431.231 for medicaid or within the time limits specified in 7 CFR 273.13 and subject to the exceptions therein for food stamps or, for social services and public assistance, if the hearing request was filed prior to the effective date of the adverse action.

(6) The division shall acknowledge the receipt of a hearing request to the petitioner and the agency or department which took the action or made the decision under appeal, and shall request that the agency or department promptly provide a summary statement

concerning the action or decision, including the reason for the action or decision.

**History:** Cr. Register, November, 1999, No. 527, eff. 12-1-99.

**HA 3.06 Hearing arrangements. (1)** A hearing shall be held at a time reasonably convenient to the petitioner, department or agency staff and the administrative law judge, shall be easily accessible to the petitioner and, whenever possible, shall be held on department or agency premises, subject to the judgment of the administrative law judge.

**(2)** A petitioner in need of special arrangements for the hearing, such as an interpreter or a hearing site other than the county agency, shall notify the division of this need no later than 5 days prior to the hearing.

**(3)** At least 10 days before the hearing, the division shall provide written notice to the petitioner and the petitioner's representative, if any, of the time, date and place of the hearing.

**(4)** The division may postpone a hearing for good cause. In food stamp cases, a petitioner may request and is entitled to receive a postponement of the scheduled hearing of up to 30 days.

**(5)** The parties may be directed by the administrative law judge to appear at a conference or to participate in a telephone conference to consider how issues might be clarified or simplified, whether facts or documents which may be admitted which will avoid unnecessary proof, or any other matter that may aid in the disposition of the appeal.

**(6)** The petitioner or petitioner's representative shall have an opportunity to do all of the following:

(a) Examine at a reasonable time before the date of the hearing and during the hearing all documents and records to be used or that are used at the hearing, and the content of the applicant's or recipient's case file, in accordance with 7 CFR 273.15(p) or 42 CFR 431.242.

(b) Present the case or have it presented by a representative.

(c) Bring witnesses.

(d) Question or refute any testimony or evidence, and confront and cross-examine adverse witnesses.

(e) Submit relevant evidence to establish all pertinent facts and circumstances in the case.

(f) Advance relevant arguments without undue interference.

**(7)** A hearing shall be tape-recorded by the administrative law judge.

**(8)** If individual issues of fact are not in material dispute and related issues of state or federal law are the sole issues being raised, the division may respond to a series of individual requests for a hearing by conducting one group hearing.

**History:** Cr. Register, November, 1999, No. 527, eff. 12-1-99.

**HA 3.07 Witnesses and subpoenas.** The division or the administrative law judge may issue a subpoena, under the same procedure and in the same form as provided by s. 805.07 (1), Stats., at a party's request if it appears that the testimony will be relevant and reasonably necessary for a full and fair hearing. The administrative law judge may require the party to provide written justification for the subpoena requested. A subpoena requiring the production of material may be issued if the person requesting the subpoena specifies the documents to be presented by the subpoenaed witness and if the request is found reasonable by the administrative law judge. The party requesting the subpoena is responsible for service and for fees.

**History:** Cr. Register, November, 1999, No. 527, eff. 12-1-99.

**HA 3.08 Administrative law judge. (1)** An administrative law judge may do all of the following:

(a) Administer oaths and affirmations.

(b) Rule on offers of proof, accept relevant evidence and exclude from the record evidence that is irrelevant or repetitious.

(c) Dispose of procedural requests or similar matters.

(d) Regulate the conduct and course of the hearing consistent with due process to ensure an orderly hearing.

(e) Exclude individuals from the hearing, adjourn the hearing or otherwise reasonably respond to contemptuous conduct.

(f) Admit into evidence a deposition as a substitute for testimony, but only when the witness is unavailable as defined in s. 908.04, Stats. Depositions sought by the parties for the purpose of discovery are not authorized by this provision.

(g) Exclude individuals from the hearing to preserve the applicant's or recipient's confidentiality or where an individual's presence is not considered essential, depending on the circumstances of the case including space limitations.

(h) Exercise discretion in excluding cameras from the hearing room.

**(2)** An administrative law judge may at any time disqualify himself or herself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of an administrative law judge, the division or administrative law judge shall determine the matter as part of the record and decision in the case.

**(3)** The administrative law judge may grant a continuance or additional time to present evidence once a hearing has started when the administrative law judge finds it necessary to the proceeding or to ensure that the petitioner is given a complete and fair hearing.

**(4)** If the hearing in a medicaid case involves medical issues such as those concerning a diagnosis or an examining physician's report and if the administrative law judge considers it necessary to have a medical assessment other than the one considered in making the original decision, the administrative law judge may order a new assessment to be obtained at department or agency expense and made a part of the record.

**(5)** The administrative law judge may access and use information concerning the petitioner's case history, benefit issuance history, calculations and notice history which is in the departments' official computer systems, such as, but not limited to, the Client Assistance for Reemployment and Economic Support (CARES) system except that such information may not be used for the determination of substantive fact as to any issue in dispute.

**History:** Cr. Register, November, 1999, No. 527, eff. 12-1-99.

**HA 3.09 Hearing decision. (1)** The tape recording of the hearing, the exhibits, papers and requests filed in the proceeding and matters of which the administrative law judge has taken official notice shall constitute the exclusive record for decision.

**(2)** The decision shall be in writing in the name of the department by the department secretary or a designee such as an administrative law judge in the division.

**(3)** The decision shall set forth the names and addresses of all persons who appeared before the division in the proceeding who are considered parties for purposes of judicial review, the issue or issues, the principal relevant facts elicited at the hearing, the reasoning that led to the decision, citation of legal authority, the action taken and the parties' appeal rights. These elements shall be grouped under appropriate headings such as preliminary recitals, findings of fact, discussion, conclusions of law and the order.

**(4)** Unless a different standard is provided by law, the standard for decision shall be by a preponderance of the credible evidence.

**(5)** Where necessary and appropriate, an interim decision may be issued, where a final decision dispositive of the merits of the case is not possible.

**(6)** A copy of the decision shall be mailed to the petitioner, the petitioner's representative, if any, and the agency or the department organizational unit charged with the administration of the assistance or services involved. The petitioner's mailing address shall be the address given for the petitioner on the hearing request, unless the petitioner has notified the division of another address in writing or placed it on the hearing record.

(7) The decision shall include the names and addresses of the petitioner and the department or agency. The division shall serve a copy of the decision on each party. The decision is served on a party as of the date it is mailed by the division.

(8) The petitioner may request a copy of the audio cassette tape recording of the hearing. The division shall furnish the requested recording upon receipt of payment for the cost of duplication and mailing. A written transcript of the hearing shall be prepared only if an appeal is filed with a circuit court pursuant to s. 227.53, Stats. If the petitioner requests a written copy of that transcript following the filing of that appeal, the division may impose a reasonable charge per transcript page.

(9) (a) Except for a proposed decision under par. (b), or by order in a specific case, the decision of the administrative law judge shall be the final decision of the department in proceedings under this chapter.

(b) The administrative law judge shall submit a proposed decision to the secretary or designee for decision in any of the following circumstances:

1. The decision holds that a manual or handbook provision, contract provision, state plan provision, numbered memo administrative directive or other official document is invalid or limited under a statute, administrative rule or federal regulation.

2. The department has not delegated final decision making authority to the division.

(10) When a proposed decision rather than a final decision is issued, the petitioner and the agency or department may file written comments with the division within 15 days from the date of service of the decision. This period may be extended for 10 days upon request of either party. At the close of the comment period, the proposed decision and comments shall be forwarded by the division to the secretary for issuance of a final decision.

(11) The division shall ensure that decisions for Medicaid are issued in a timely manner so that final administrative action may be taken within 90 days from the date of filing of the hearing request, and that decisions for food stamps are issued within 60 days from the date of filing of the hearing request.

(12) When a petition for review is dismissed in its entirety, final administrative action is taken on the date the division mails the decision to the petitioner.

(13) A final decision is binding upon the department and agency involved and may be enforced by appropriate legal and fiscal sanctions. The agency involved shall implement any food stamp decision within 10 days after the date of the decision.

**History:** Cr. Register, November, 1999, No. 527, eff. 12-1-99.

**HA 3.10 Rehearing and amendment of decision.**

(1) When requested by the petitioner or that person's representative, the department or an agency or, upon its own motion, the division, may, within 30 days of the date of the decision, amend or vacate a decision for the purpose of correcting either plain or administrative errors, or as altered conditions may require.

(2) A petitioner or that person's representative, an agency or the department may request a rehearing pursuant to s. 227.49, Stats. Such a request shall state what error of law or fact is asserted as the basis for the rehearing or what newly discovered evidence has been found which could not have been found earlier with due diligence. Upon granting a rehearing, the division shall determine whether or not a proceeding to consider additional evidence is required.

(3) After a decision has been issued dismissing a hearing request as abandoned by the petitioner as provided in s. HA 3.05 (4) (d), the division may vacate that decision upon the assertion by petitioner in writing within 30 days of the date of the decision that the matter has not been abandoned.

**History:** Cr. Register, November, 1999, No. 527, eff. 12-1-99.

**HA 3.11 Costs motion.** (1) A petitioner may file a motion for costs under s. 227.485, Stats., with the division and the department or agency within 30 days of service of the final decision if the petitioner was the prevailing party. The petitioner need not be represented by an attorney to file a costs motion.

(2) Although no specific form or format is required, a complete costs motion shall contain an explanation of why the state agency which was the losing party was not substantially justified in taking its position, and an itemized application for fees and other expenses, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the petitioner stating the actual time expended and the rate at which fees and other expenses were computed. A complete motion shall also contain an affidavit or other proof that the petitioner has federal adjusted gross income of less than \$150,000 in each of the 3 calendar years or corresponding fiscal years immediately prior to the commencement of the case.

(3) The petitioner's costs may include attorney's fees and any of the following items if the item provided evidence relevant to the hearing issue on which the party prevailed:

(a) Expert witness fees.

(b) Any study, analysis, engineering report, test or project determined by the administrative law judge to be necessary for preparation of the case.

(c) Service of process on relevant witnesses.

(d) Certified copies of papers and records in any public office.

(e) Postage.

(f) Telephone, telegraph or FAX expense.

(g) Depositions of unavailable witnesses, including necessary photocopies.

(h) Plats and photographs.

(4) The department or agency may respond in writing to the administrative law judge within 15 days of its receipt of a complete costs motion. If the petitioner's costs motion contains a request for expert witness fees, the response shall indicate the highest rate of compensation paid by the agency or department to an expert witness in the case.

(5) The administrative law judge may deny a costs motion that is not complete.

(6) The administrative law judge shall prepare a written proposed decision which denies or awards some or all of the requested costs. That proposed decision shall be forwarded by the division to the department for issuance of a final decision.

**History:** Cr. Register, November, 1999, No. 527, eff. 12-1-99.

**HA 3.12 Wisconsin works.** (1) Upon receipt of a timely petition under s. DCF 101.22 (2) (b) or (c), the division shall review the fact-finding decision of the Wisconsin works agency.

(2) The division shall deny a petition or refuse to grant relief if the Wisconsin works applicant or recipient withdraws the petition in writing.

(3) Upon receipt of a petition, the division may make any additional investigation it considers necessary.

(4) The Wisconsin works agency shall forward the fact-finding file to the division within 5 days of notification of the request for review.

(5) If the division or administrative law judge determines that the record provided for review is inadequate or incomplete, the division may conduct a hearing, issue an interim decision directing the Wisconsin works agency to supplement the record, or take further action considered necessary to provide for a meaningful review.

**History:** Cr. Register, November, 1999, No. 527, eff. 12-1-99; **correction in (1) made under s. 13.92 (4) (b) 7., Stats.**