

NMAC

Transmittal Form



Volume: Issue: Publication date: Number of pages: (ALD Use Only) Sequence No.

Issuing agency name and address: Agency DFA code:

Contact person's name: Phone number: E-mail address:

Type of rule action: New Amendment Repeal Emergency Renumber (ALD Use) Recent filing date:

Title number: Title name:

Chapter number: Chapter name:

Part number: Part name:

Amendment description (If filing an amendment):

Amendment's NMAC citation (If filing an amendment):

Are there any materials incorporated by reference?
Yes No

Please list attachments or Internet sites if applicable.

If materials are attached, has copyright permission been received? Yes No Public domain

Specific statutory or other authority authorizing rulemaking:

Notice date(s): Hearing date(s): Rule adoption date: Rule effective date:

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Concise Explanatory Statement For Rulemaking Adoption:

Findings required for rulemaking adoption:

Findings MUST include:

- Reasons for adopting rule, including any findings otherwise required by law of the agency, and a summary of any independent analysis done by the agency;
- Reasons for any change between the published proposed rule and the final rule; and
- Reasons for not accepting substantive arguments made through public comment.

New Mexico's Health Insurance Exchange (NMHIX; aka beWellnm) is transitioning from utilizing the federal IT platform of Healthcare.gov to a state-based IT platform. Given this transition, HSD must collaborate with beWellnm on IT and program integration. One aspect of program integration pertains to appeals rights for adverse actions impacting an enrollee's eligibility for qualified health plans through NMHIX, federal tax credits and cost-sharing reductions, and other issues pertaining to NMHIX coverage. While using the federal Healthcare.gov platform, NMHIX has been working with the federal government on such appeals, when necessary. With the move to a state-based platform, NMHIX has requested that HSD take on the role of providing first tier appeals of adverse actions by enrollees. Thus, HSD must promulgate rules pertinent to providing those appeals for NMHIX enrollees or potential enrollees.

This rule has been updated to integrate functions of providing first tier appeals for New Mexicans purchasing coverage through New Mexico's Health Insurance Exchange (NMHIX; aka beWellnm).

Issuing authority (If delegated, authority letter must be on file with ALD):

Name:

David Scrase

Check if authority has been delegated

Title:

Secretary

Signature: (BLACK ink only OR Digital Signature)

Date signed:

DocuSigned by:

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This is an amendment to 8.100.970 NMAC, Sections 3 and 6 - 15, effective 11/1/2021.

8.100.970.3 STATUTORY AUTHORITY:

A. Section 27 NMSA 1978 (1992 Repl.) provides for the department to "...adopt, amend and repeal bylaws, rules and regulations..." It also provides for administration of public assistance programs.

B. The income support division (ISD) of the human services department (HSD) was created by the HSD secretary under authority granted by ~~[Section 9-8-6-B-(3)-NMSA-1978]~~ Paragraph (3) of Subsection B of Section 9-8-6 NMSA 1978.

C. The New Mexico health insurance exchange (NMHIX) was established by Section 59A-23F-1 of NMSA 1978 et al. Pursuant to 45 CFR 155.505(c) and 155.510(a), NMHIX has designated to the New Mexico human services department the authority to conduct fair hearings of NMHIX eligibility appeals pursuant to 45 CFR 155 Subpart F.

[8.100.970.3 NMAC - Rp, 8.100.970.3 NMAC, 11/27/2013, A/E, 11/1/2021]

8.100.970.6 OBJECTIVE: The objective of these regulations is to provide general policy and procedures for the public assistance programs administered by the department, as well as policy and procedures for the department to conduct hearings for claimants of adverse actions by NMHIX.

[8.100.970.6 NMAC - Rp, 8.100.970.6 NMAC, 11/27/2013; A/E, 11/1/2021]

8.100.970.7 DEFINITIONS:

A. Agency review conference (ARC): means an optional conference offered by the department to households adversely affected by a department action that is normally held prior to a fair hearing. An ARC may be attended by all parties responsible for and affected by the adverse action taken by the department, including but not limited to, the ISD field office staff, the child support enforcement division (CSED), a New Mexico works (NMW) representative and the household or its authorized representative for the purpose of informally resolving the dispute. The ARC is optional and shall in no way delay or replace the fair hearing process. This subsection does not apply to appeals of adverse actions by NMHIX.

B. Authorized representative: means an individual designated by a household to represent and act on its behalf during the fair hearing process. The household must provide formal documentation authorizing the named individual(s) 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 ad litem, or any other individual(s) designated by the household.

C. Claimant or Appellant: means the household requesting a fair hearing that is claiming to be adversely affected by an action(s) taken by the department or NMHIX.

D. Informal resolution process: means an opportunity for informal resolution between NMHIX and a household adversely affected by an NMHIX action in accordance with the requirements of 45 CFR Section 155.535(a). The informal resolution process happens prior to a fair hearing. The appellant's right to a hearing is preserved in any case in which the appellant remains dissatisfied with the outcome of the informal resolution process. If the appeal does not advance to a hearing, the informal resolution is final and binding.

[8.100.970.7 NMAC - N, 11/27/2013; A/E, 11/1/2021]

8.100.970.8 FAIR HEARINGS:

A. ~~[A household aggrieved by an adverse action taken by the department that affects the participation of the household in a department administered public assistance program may appeal the department's decision by requesting a fair hearing in accordance with federal and state laws and regulations. Medicaid recipients wanting to request a fair hearing due to termination, modification, reduction or suspension of services must do so in accordance with any applicable federal and state laws and regulations, including 8.200.430.12 NMAC and 8.352 NMAC, et seq.]~~ A household aggrieved by an adverse action taken by the department or NMHIX that affects the participation of the household in a department administered public assistance program or in the New Mexico health insurance exchange, if applicable, may appeal the department's or NMHIX's decision by requesting a fair hearing in accordance with federal and state laws and regulations.

(1) Medicaid recipients wanting to request a fair hearing due to termination, modification, reduction or suspension of services must do so in accordance with any applicable federal and state laws and regulations, including 8.200.430.12 NMAC and 8.352 NMAC, et seq.

(2) Fair hearings related to adverse actions by NMHIX shall be held in accordance with any applicable federal and state laws and regulations, including those set forth in 45 CFR 155 Subpart F.

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B. A household may designate an authorized representative to request a hearing on its behalf and to represent them during the fair hearing process. The claimant or his or her authorized representative must complete a request for access to a case record each time he or she wishes to have access to the record outside what is provided to the claimant in the summary of evidence (SOE). If the claimant wishes to have his or her authorized representative review the record in his or her absence, the claimant must provide formal documentation authorizing the named individual(s) to access the identified case information for a specified purpose and time frame.

C. Hearing rights: Each household has the right to request a fair hearing and:

- (1) to be advised of the nature and availability of a fair hearing and an ARC, if applicable;
- (2) to be represented by counsel or other authorized representative of the claimant's choice;
- (3) to receive reasonable assistance in completing procedures necessary to request a fair hearing; and
- (4) to receive a copy of the SOE and any document contained in the claimant's case record in order to prepare for the fair hearing in accordance with Subsection B of 8.100.970.8 NMAC; the department shall forward the SOE and any other document(s) submitted to the fair hearings bureau for admission into the fair hearing record to the claimant's authorized representative once the department or NMHIX becomes aware that an authorized representative has been designated by the claimant;
- (5) to have a fair hearing that safeguards the claimant's opportunity to present a case;
- (6) where applicable/for non-NMHIX matters, to elect to continue to receive the current level of benefit, provided the request for hearing is received by the department before the close of business of the ~~thirteenth (13th)~~ 13th day immediately following the date of the notice of adverse action; a claimant that elects to continue to receive the same level of benefit pending the fair hearing decision shall be informed that a hearing decision in favor of the department may result in an overpayment of benefits and a requirement that the household repay the benefits; a claimant may waive a continuation of benefits pending the outcome of the fair hearing;
- (7) in matters involving NMHIX, to be considered eligible while an appeal is pending, in accordance with the provisions of 45 CFR Section 155.525;
- ~~(7)~~ (8) to have prompt notice and implementation of the final fair hearing decision; and
- ~~(8)~~ (9) to be advised that judicial review may be invoked to the extent such review is available under state or federal law; and
- (10) in matters involving NMHIX, to be advised that a second-tier appeal to the United States department of health and human services is available.

D. The department and NMHIX will neither provide representation for, nor pay for any costs incurred by a claimant or the authorized representative in preparation for, or attendance at an ARC, fair hearings or judicial appeals.

E. Notice of rights:

- (1) At the time of application for assistance, the department shall inform each applicant of the applicant's right to request a fair hearing if the applicant disagrees with an action taken by the department. In matters involving NMHIX, NMHIX shall provide notice of appeal rights and appeal procedures, including the right to request a fair hearing, at the time that the applicant submits an application and the notice of eligibility determination is sent under 45 CFR Section 155.310(g), 155.330(e)(1)(ii), 155.335(h)(1)(ii), and 155.610(i). The applicant may choose to receive the notice by mail or in electronic format.
- (2) The notice shall inform the applicant of the procedure by which a fair hearing may be requested and that the claimant's case may be presented by the claimant or an authorized representative.
- (3) The department shall remind the household of its right to request a fair hearing any time the household expresses disagreement with an action taken on its case by the department.
- (4) Each county office shall post a notice of the right to request a fair hearing and an ARC, and a copy shall be given, upon request, to any person that has requested a hearing.
- (5) Each notice provided to a claimant pursuant to this section shall include a statement that free legal assistance, by an individual or organization outside of the department, may be available to assist with the fair hearing process.
- (6) A claimant may request special accommodations for a disability or a language or speech interpreter be available during [a] an informal resolution process, a fair hearing or ARC. An interpreter or special accommodations shall be provided by the department or NMHIX, as applicable, at no cost to the claimant. A request for a language interpreter, a speech interpreter or other disability accommodation must be made within ~~ten (10)~~ 10 days of the date of the fair hearing. If an interpreter or disability accommodations are not requested timely, the claimant can request postponement of the hearing in accordance with Subsection B of 8.100.970.10 NMAC.

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F. Special provisions pertaining to mass changes: Special provisions apply in situations involving mass changes. These provisions are contained at 8.100.180.12 and 15 NMAC, 8.139.120.13 NMAC, 8.139.500.8 and 9 NMAC, 8.106.630.10 and 11 NMAC, 8.102.501.9 NMAC and 8.102.630.10 NMAC.

G. Continuing benefit for cash assistance: If a claimant who is a cash assistance recipient requests a fair hearing before the close of business of the [~~thirteenth-(13th)~~] 13th day immediately following the date of the notice of adverse action, the claimant may elect to waive or continue receiving the same amount of cash assistance and services issued immediately prior to the notice of adverse action until a final decision is issued. If there is no indication that the claimant has waived a continuation of benefits, the department will assume a continuation of benefits is desired. The household is required to comply with the reporting and renewal provisions at 8.102.120 NMAC and 8.106.120 NMAC. Cash assistance recipients are to continue compliance with the NMW compliance requirements at 8.102.460 NMAC.

H. Continuing SNAP benefits: If a claimant who is a SNAP recipient requests a fair hearing before the close of business of the [~~thirteenth-(13th)~~] 13th day immediately following the date of the notice of adverse action, the claimant may elect to waive or continue receiving the same amount of SNAP benefits issued immediately prior to the adverse action until a final decision is issued. If there is no indication that the claimant has waived a continuation of benefits, the department will assume a continuation of benefits is desired. The claimant is required to comply with the reporting and renewal provisions at 8.139.120 NMAC.

I. Continuing eligibility for a medical assistance program: If a claimant who is a recipient of a medical assistance program requests a fair hearing before the close of business of the [~~thirteenth-(13th)~~] 13th day immediately following the date of the notice of adverse action, the claimant may elect to waive or continue receiving the same medical assistance benefit issued immediately prior to the adverse action until a final decision is issued. If there is no indication that the claimant has waived a continuation of benefits, the department will assume a continuation of benefits is desired. If the hearing is regarding the termination, modification, reduction or suspension of medical assistance program services, a continuation of services is governed by all applicable federal and state laws and regulations, including 8.352 NMAC, et seq.

J. Continuing eligibility in cases involving NMHIX: In matters involving NMHIX, eligibility pending appeal is governed by the provisions of 45 CFR Section 155.525.
[8.100.970.8 NMAC - Rp, 8.100.970.8 NMAC, 11/27/2013; A/E, 11/1/2021]

8.100.970.9 THE HEARING PROCESS:

A. Initiation of the hearing process:

- (1) A request for a fair hearing can be made by the claimant or an authorized representative orally or in writing.
- (2) If a claimant requests a fair hearing orally, the department shall take such actions as are necessary to initiate the fair hearing process.
- (3) The fair hearings bureau shall promptly send written acknowledgement to the claimant and the authorized representative upon its receipt of a written or oral hearing request.

B. Time limits:

(1) A household or its authorized representative shall request a fair hearing no later than close of business on the [~~ninetieth-(90th)~~] 90th day following the date of the notice of adverse action. If the [~~ninetieth-(90th)~~] 90th day falls on a weekend, holiday or other day the department is closed, a request received the next business day will be considered timely.

(2) The department shall assure that the fair hearing is conducted, a fair hearing decision is reached and the claimant and the authorized representative are notified of the decision within the specified program time limit set forth below, except in instances where the time limit may be extended pursuant to Subsection B of 8.100.970.10 NMAC or Subsection G of 8.100.970.12 NMAC.

(a) **SNAP program:** The final fair hearing decision shall be issued to the claimant and the authorized representative within [~~sixty-(60)~~] 60 days from the date the department receives the hearing request unless extended pursuant to Subsection B of 8.100.970.10 NMAC or Subsection G of 8.100.970.12 NMAC.

(b) **Cash assistance programs:** The final fair hearing decision shall be issued to the claimant and the authorized representative within [~~ninety-(90)~~] 90 days from the date that the department receives the hearing request unless extended pursuant to Subsection B of 8.100.970.10 NMAC or Subsection G of 8.100.970.12 NMAC.

(c) **LIHEAP:** The final fair hearing decision shall be issued to the claimant and the authorized representative within [~~sixty-(60)~~] 60 days from the date that the department receives the hearing request unless extended pursuant to Subsection B of 8.100.970.10 NMAC or Subsection G of 8.100.970.12 NMAC.

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(d) **Medical assistance programs:** The final fair hearing decision shall be issued to the claimant and the authorized representative within ~~ninety (90)~~ 90 days from the date that the department receives the hearing request unless extended pursuant to Subsection B of 8.100.970.10 NMAC or Subsection G of 8.100.970.12 NMAC. Fair hearing decisions regarding the termination, modification, reduction or suspension of services is governed by all applicable federal and state laws and regulations, including 8.352 NMAC, et seq.

(e) **NMHIX matters:** The final fair hearing decision shall be issued to the claimant and the authorized representative within 90 days from the date of the appeal request. Fair hearing decisions regarding adverse actions by NMHIX are governed by all applicable federal and state laws and regulations, including 45 CFR 155 Subpart F. In the case of an appeal request submitted under 45 CFR 155.540 that the department determines meets the criteria for an expedited appeal, the department must issue the notice fair hearing decision notice as expeditiously as reasonably possible.

C. Jurisdiction of the fair hearings bureau:

(1) An applicant for, or recipient of, a department administered public assistance program may request a fair hearing, and the department's fair hearings bureau shall have jurisdiction over the matter, if:

- (a) an application for benefits or services is denied in whole or in part, or not processed timely;
- (b) assistance or services are reduced, modified, terminated, suspended or not provided, or the form of payment is changed;
- (c) a good cause request for not participating in the work program or CSED is denied in whole or in part;
- (d) the department refuses or fails to approve a work program participation plan, or the supportive services related to it, that have been developed by a participant; or
- (e) the claimant is aggrieved by any other action affecting benefit level or participation in an assistance program administered by HSD.

(2) An applicant for, or enrollee in, health insurance coverage or insurance affordability programs through the New Mexico health insurance exchange may request a fair hearing, and the department's fair hearings bureau shall have jurisdiction over the matter, if the applicant or enrollee is appealing:

- (a) An eligibility determination made in accordance with 45 CFR Subpart D, including:
 - (i) an initial determination of eligibility, including the amount of advance payments of the premium tax credit and level of cost-sharing reductions, made in accordance with the standards in 45 CFR Section 155.305(a) through (h); and
 - (ii) a redetermination of eligibility, including the amount of advance payments of the premium tax credit and level of cost-sharing reductions, made in accordance with 45 CFR Section 155.330 and 155.335;
 - (iii) a determination of eligibility for an enrollment period, made in accordance with 45 CFR Section 155.305(b); and
- (b) A failure by NMHIX to provide timely notice of an eligibility determination in accordance with 45 CFR Section 155.310(g), 45 CFR Section 155.330(e)(1)(ii), 45 CFR Section 155.335(h)(1)(ii), or 45 CFR Section 155.610(i).

~~(2)~~ (3) Fair hearing requests submitted to the local county office shall be immediately forwarded to the fair hearings bureau for scheduling. The fair hearings bureau shall promptly inform the applicable local county office upon its receipt of a written or oral fair hearing request submitted directly to the fair hearings bureau to ensure timely scheduling of an ARC.

D. Denial or dismissal of request for hearing: The fair hearings bureau shall deny or dismiss, as applicable, a request for a fair hearing when:

- (1) the request is not received by the close of business on the ~~ninetieth (90th)~~ 90th day following the date of the notice of adverse action; in instances where the fair hearings bureau schedules a hearing prior to becoming aware of the lateness of the fair hearing request, the fair hearings bureau shall, upon learning of the late request, promptly dismiss the matter and provide notice thereof to all parties;
- (2) the request for a fair hearing is withdrawn or canceled, either orally or in writing, by the claimant or claimant's authorized representative; if withdrawn orally, the claimant and the authorized representative shall be provided written verification of the withdrawal and given ~~ten (10)~~ 10 calendar days from the date of the notification to request reinstatement of the hearing;
- (3) the sole issue presented concerns a federal or state law requiring an adjustment of assistance for all or certain classes of clients, including but not necessarily limited to a reduction, suspension or

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cancellation of benefits, unless the reason for the hearing request involves alleged error in the computation of benefits (e.g. mass changes);

- (4) the claimant fails to appear, without good cause, at a scheduled fair hearing;
- (5) the same issue has already been appealed and a hearing decision made;
- (6) there is no adverse action or delay of benefits or services for which a fair hearing may be requested; or

(7) the issue is one that the fair hearings bureau does not have jurisdiction as provided by federal or state laws and regulations.

(8) Requests for fair hearings for medical assistance cases involving the termination, modification, reduction or suspension of services are governed by all applicable federal and state laws and regulations, including 8.352 NMAC, et seq.

(9) In matters involving NMHIX, an appeal will be dismissed if the appellant:

- (a) withdraws the appeal request in writing or orally;
- (b) fails to appear at a scheduled hearing without good cause;
- (c) fails to submit a valid appeal request as specified in Section 155.520(a)(4); or
- (d) dies while the appeal is pending, except if the executor, administrator, or other

duly authorized representative of the estate requests to continue the appeal.

E. Good cause for failing to appear:

(1) If the claimant or the claimant's authorized representative fails to appear for a fair hearing at the scheduled time and place, the claimant's appeal will be considered abandoned and the fair hearings bureau shall dismiss the matter, unless the claimant or authorized representative presents good cause. A claimant or authorized representative may present good cause for failing to appear to the scheduled fair hearing at any time no later than close of business on the ~~tenth (10th)~~ 10th calendar day immediately following the scheduled hearing date. If the ~~tenth (10th)~~ 10th calendar day falls on a weekend, holiday or other day that the department is closed, a request received the next business day will be considered timely. If good cause is submitted timely and permitted, the fair hearings bureau shall reschedule the hearing or, where appropriate, reinstate a matter previously dismissed.

(2) If the department fails to appear due to circumstances beyond its control, the department may present good cause within ~~ten (10)~~ 10 calendar days after the scheduled hearing. If good cause is submitted timely and permitted, the fair hearings bureau shall reschedule the fair hearing.

(3) Good cause includes, but is not limited to, a death in the family, disabling personal illness, or other significant emergencies. At the discretion of the hearing officer, other exceptional circumstances may be considered good cause.

[8.100.970.9 NMAC - Rp, 8.100.970.9 NMAC, 11/27/2013; A/E, 11/1/2021]

8.100.970.10 PRE-HEARING PROCEDURE

A. Notice of hearing: Unless the claimant or authorized representative requests an expedited scheduling of a fair hearing, the fair hearings bureau shall provide written notice of the scheduling of a fair hearing to all parties not less than ~~ten (10)~~ 10 calendar days prior to date of the fair hearing, or not less than 15 calendar days prior to the date of the fair hearing if the hearing involves an adverse action by the New Mexico health insurance exchange (NMHIX). The notice of hearing shall include:

- (1) the date, time and place of the hearing;
- (2) the name, address and phone number of the hearing officer;
- (3) information regarding the fair hearing process and the procedures to be followed by the

respective parties;

(4) the right of the claimant and the authorized representative to receive a copy of the SOE and any document, not specifically prohibited by federal and state law and regulation, contained in the claimant's case record in order to prepare for the fair hearing in accordance with Subsection B of 8.100.970.8 NMAC;

(5) notice that the appeal will be dismissed if the claimant or the authorized representative fails to appear without good cause;

(6) information about resources in the community that may provide free legal assistance with the fair hearing process; and

(7) notice that the department will not pay for any costs of the claimant or authorized representative, including legal counsel, that are incurred in the preparation for, or attendance at, an ARC, fair hearing or judicial appeal.

B. Postponement: A claimant or authorized representative is entitled to, and the fair hearings bureau shall grant, at least one postponement of a scheduled fair hearing. The department may request and be approved for

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one postponement at the discretion of the fair hearings bureau due to the unavailability of any department witness to appear at the scheduled fair hearing. Requests for more than one postponement are considered at the discretion of the fair hearings bureau, on a case-by-case basis. A request for postponement must be submitted not less than ~~one~~ (1) one business day prior to the scheduled fair hearing, unless otherwise allowed by the fair hearings bureau, and is subject to the following limitations:

(1) **SNAP and LIHEAP cases:** A postponement may not exceed ~~thirty (30)~~ 30 days and the time limit for action on the decision is extended for as many days as the fair hearing is postponed.

(2) **Cash assistance cases:** The fair hearing may be postponed, but must be rescheduled to assure a final decision is made no more than ~~ninety (90)~~ 90 days from the date of the request for fair hearing.

(3) **Medical assistance cases:** The fair hearing may be postponed, but must be rescheduled to assure a final decision is made no more than ~~ninety (90)~~ 90 days from the date of the request for fair hearing. Fair hearings for medical assistance cases involving the termination, modification, reduction or suspension of services are governed by all applicable federal and state laws and regulations, including 8.352 NMAC, et seq.

(4) **NMHIX cases:** The fair hearing may be postponed but must be rescheduled to assure a final decision is made not more than 90 days from the date of the appeal request.

~~(4)~~ (5) The fair hearings bureau shall issue notice of the rescheduling of a postponed fair hearing not less than ~~ten (10)~~ 10 calendar days before the rescheduled date, unless oral agreements are obtained from all parties to reschedule the fair hearing with less notice in an effort to meet the required timeframes. Documentation of the oral agreement shall be maintained in the fair hearing record.

C. Expedited hearing:

(1) **SNAP cases:** Hearing requests from SNAP households, such as migrant farm workers that plan to move out of the state before the hearing decision would normally be made should be scheduled on an expedited basis.

(2) **NMHIX cases:** an appellant may request an expedited appeals process where there is an immediate need for health services because a standard appeal could jeopardize the appellant's life, health, or ability to attain, maintain, or regain maximum function. If the request for an expedited appeal is denied, the appeal request must be handled under the standard process and the appellant must be promptly informed of the denial, through electronic or oral notification, if possible. If notification is oral, the appeals entity must follow up with the appellant by written notice. Written notice of the denial must include:

(a) the reason for the denial;

(b) an explanation that the appeal request will be transferred to the standard process;

and

(c) an explanation of the appellant's rights under the standard process.

D. Group hearings: A hearing officer may respond to a series of individual requests for hearings by conducting a single group hearing. Group hearing procedures apply only to cases in which individual issues of fact are not disputed and where related issues of state or federal law, regulation or policy are the sole issues being raised. In all group hearings, the regulations governing individual hearings are followed. Each individual claimant is permitted to present the claimant's own case or to be represented by an authorized representative. If a group hearing is scheduled, any individual claimant may withdraw from the group hearing and request an individual hearing. The confidentiality of client records is to be maintained in accordance with federal and state laws and regulations.

E. Agency review conference (ARC): [The] Except in matters involving NMHIX, the department and the claimant are encouraged to meet for an ARC before the scheduled fair hearing to discuss the department's action(s) that the claimant has appealed. The ARC is optional and does not delay or replace the fair hearing process. An ARC will be held within ~~ten (10)~~ 10 calendar days from the date of the fair hearing request. If the claimant submits a hearing request to the field office, in person or by telephone, the ARC may, at the claimant's option, be conducted at that time. An appeal may not be dismissed by the department for failure of the claimant or authorized representative to appear at a scheduled ARC.

(1) The department shall send a written notice of the scheduled ARC to the claimant and authorized representative. The claimant may choose to receive the notice by mail or in electronic format.

(2) An ARC may be attended by all parties responsible for and affected by the adverse action taken by the department, including but not limited to, the ISD field office staff, the CSED, a NMW representative and the claimant or its authorized representative.

(3) The purpose of the ARC is to informally review the adverse action taken by the department and to determine whether the dispute can be resolved in accordance with federal and state law and regulation. The ARC is optional and shall in no way delay or replace the fair hearing process, unless the outcome of the ARC is the claimant withdrawing the fair hearing request.

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(4) For cases in which the household appeals a denial of expedited SNAP service, the ARC shall be scheduled within [~~two (2)~~] two business days, unless the household requests that it be scheduled at a later date or does not wish to have an ARC.

(5) A household may request an ARC in order to discuss an adverse action taken by the department against the household, regardless of whether or not a fair hearing is requested.

F. Summary of evidence (SOE): An SOE shall be prepared by the department or NMHIX, if applicable, and submitted to the fair hearings bureau and the claimant and authorized representative no less than [~~ten (10)~~] 10 calendar days prior to the date of the fair hearing. Failure to provide the SOE within the prescribed timeframe may result in its exclusion or a postponement or continuance of the hearing at the discretion of the hearing officer pursuant to Subsection B of 8.100.970.10 NMAC and Subsection D of 8.100.970.12 NMAC. Unless the hearing request is withdrawn by the claimant or authorized representative, an SOE shall be prepared and submitted in accordance with this paragraph, regardless of the results of an ARC. The SOE shall contain at least the following information:

(1) identifying information, including but not limited to, claimant's name, at least the last four digits of the claimant's social security number, the claimant's individual identification number, [~~or~~] case identification number or reference identification number, the claimant's last known address, and the type of assistance involved, if applicable;

(2) the issue(s) on appeal that outlines the adverse action taken by the department against the household;

(3) documentation in support of the department's adverse action, including any facts, information and department findings related to the fair hearing issue(s);

(4) applicable federal and state laws and regulations, internal department policy documents, and any additional supportive legal documentation; and

(5) results of the ARC, if completed at the time of submission of the SOE.

G. Availability of information: The department staff shall:

(1) allow the claimant and the authorized representative to examine the case record and provide the claimant and the authorized representative a copy of the SOE and any document, not specifically prohibited by federal and state laws and regulations, contained in the claimant's case record in order to prepare for the fair hearing in accordance with Subsection B of 8.100.970.8 NMAC; and

(2) provide accommodations for a disability or a language or speech interpreter in accordance with Paragraph (6) of Subsection E of 8.100.970.8 NMAC and 45 CFR Section 155.505(f), as applicable.

[8.100.970.10 NMAC - Rp, 8.100.970.10 NMAC, 11/27/2013; A/E, 11/1/2021]

8.100.970.11 HEARING STANDARDS

A. Rights during the fair hearing: The claimant or authorized representative shall be given an opportunity to:

(1) examine the SOE and case record prior to, and during, the hearing in accordance with Subsection B of 8.100.970.8 NMAC;

(2) present his or her case or have it presented by an authorized representative;

(3) introduce witnesses;

(4) establish all pertinent facts and circumstances;

(5) advance any arguments without undue interference; and

(6) question or refute any testimony or evidence, including an opportunity to confront and cross-examine the department's witnesses.

B. Hearing officer: Fair hearings are conducted by an impartial official who:

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

(2) was not directly involved in the initial determination of the action which is being contested;

(3) was not the immediate supervisor of the worker who took the action that is being contested and, in hearings involving adverse actions by NMHIX, has not been directly involved in the eligibility determination or any prior appeal decisions in the same matter;

(4) may not discuss the merits of any pending fair hearing with anyone outside the fair hearings bureau, unless all parties or their authorized representatives are present.

C. Disqualification and withdrawal: If the appointed hearing officer had any involvement with the department action(s) being appealed, including giving advice or consulting on the issue(s) presented, or is related in

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any relevant degree to the claimant, the claimant's authorized representative, or ISD worker that took the action being appealed, the appointed hearing officer shall be disqualified as the hearing officer for that case. In addition, an appointed hearing officer shall, prior to the date of the fair hearing, withdraw from participation in any proceedings that the hearing officer determines that he cannot afford a fair and impartial hearing or where allegations of bias have arisen and have not been resolved prior to the deadline for a fair hearing decision to be issued pursuant to Paragraph (2) of Subsection B of 8.100.970.9 NMAC.

D. Authority and duties of the hearing officer: The authority and duties of the hearing officer are to:

- (1) explain how the fair hearing will be conducted to participants at the start of the hearing;
- (2) administer oaths and affirmations;
- (3) insure that all relevant issues are considered during the fair hearing;
- (4) request, receive and make part of the fair hearing record all evidence necessary to decide the issues being raised;
- (5) regulate the content, conduct and the course of the hearing to ensure an orderly hearing; if a claimant, the claimant's authorized representative, any witness or other participant in the fair hearing refuses to cooperate or comply with rulings on the procedures and issues as determined by the hearing officer, or acts in such a manner that an orderly fair hearing is not possible, the hearing officer may take appropriate measures to ensure that order is fully restored so that the claimant's opportunity to fairly present his or her case is safeguarded; such measures shall include, but not be limited to, excluding or otherwise limiting the presentation of irrelevant evidence, or terminating the fair hearing and making the recommendation based on the record that has been made up to the point that the fair hearing was terminated;
- (6) limit cross-examination that is repetitive or harassing;
- (7) request, if appropriate, and except in matters involving NMHIX, an independent medical assessment or professional evaluation from a source mutually satisfactory to the claimant and the department; and
- (8) provide a fair hearing record and report and recommendation for review and final decision by the appropriate division director; and
- (9) in matters involving adverse action by NMHIX, provide a written final decision.

E. Appointment of hearing officer: A hearing officer is appointed by the fair hearings bureau upon receipt of the request for hearing.

F. Process: Formal rules of evidence and civil procedure do not apply to the fair hearing process. All relevant evidence is admissible, subject to the hearing officer's authority to limit evidence that is repetitive or unduly cumulative. Evidence that is not available to the claimant may not be presented to the hearing officer or used in making the final fair hearing decision, unless the unavailability of evidence was in accordance with federal and state laws and regulations.

(1) **Confidentiality:** The confidentiality of client records is to be maintained in accordance with federal and state laws and regulations. Confidential information that is protected from release and other documents or records that the claimant will not otherwise have an opportunity to contest or challenge shall not be introduced at the fair hearing or affect the hearing officer's recommendation.

(2) **Administrative notice:** The hearing officer may take administrative notice of any matter for which judges of this state may take judicial notice.

(3) **Privilege:** The rules of privilege apply to the extent that they are requested and recognized in civil actions in New Mexico.

(4) **Medical issues:** In a case involving medical care or a medical condition, the claimant waives confidentiality and both parties shall have the right to examine any medical documents that are admitted into evidence.

(5) When the evidence presented at the fair hearing does not adequately address the relevant medical issues, additional medical information may be obtained at the discretion of the hearing officer. The additional medical information may include, but is not limited to, a medical evaluation or analysis obtained at the department's expense, from a source satisfactory to the claimant.

G. Motions: Motions shall be decided by the hearing officer without a hearing, unless permitted by the hearing officer upon written request of the department, the claimant or the authorized representative.

H. Burden of proof: The department has the burden of proving the basis for its action, proposed action or inaction by a preponderance of the evidence.

I. Record of the fair hearing: A record of each fair hearing shall be made by the hearing officer, in accordance with the following.

(1) The fair hearing proceedings, including testimony and exhibits, shall be recorded electronically.

(2) The hearing officer's electronic recording shall be the official transcript of the fair hearing, and shall be retained by the fair hearings bureau in accordance with all federal and state laws and regulations.

(3) The record of the fair hearing includes: the recorded fair hearing, including testimony and exhibits, any pleadings filed in the proceeding, any and all papers and requests filed in the proceeding, the report and recommendation of the hearing officer, except in matters involving NMHIX; and, the final fair hearing decision made by the division director, or the hearing officer in matters involving NMHIX. The fair hearing record will be maintained in the department's secure electronic data management system, but may be made available to the claimant or the authorized representative for copying and inspection at a reasonable time.

(4) If a final fair hearing decision is appealed, a written verbatim transcript of the fair hearing shall be prepared by the department and a copy of the transcript shall be provided to the claimant or authorized representative, free of charge.

[8.100.970.11 NMAC - Rp, 8.100.970.11 NMAC, 11/27/2013; A/E, 11/1/2021]

8.100.970.12 CONDUCTING THE FAIR HEARING: A fair hearing is conducted in an orderly manner and in an informal atmosphere. The fair hearing is not open to the public. The fair hearing is conducted by telephone, unless the claimant or the authorized representative makes a special request for the fair hearing to be held in person and the request is justified by special circumstances, as determined by the hearing officer on a case-by-case basis. In cases involving NMHIX, the fair hearings shall also be conducted in accordance with 45 CFR 155.535(c)-(f).

A. Opening the fair hearing: The fair hearing is opened by the hearing officer who will explain the telephonic fair hearing procedures to all present at the fair hearing. The hearing officer will then explain his or her role in the proceedings, and that the final fair hearing decision on the issue(s) appealed will be made by the appropriate department division director after review of the hearing officer's report and recommendation, including the fair hearing record. On the record, the individuals present are asked to identify themselves, the order of testimony is explained, the oath is administered to all witnesses who will testify during the hearing, the issue is identified, and all pleadings, papers, and requests, including but not limited to, the SOE and any evidence being presented, will be identified and entered into the record with any objections handled in accordance with applicable federal and state laws and regulations.

B. Order of testimony: The order of testimony is as follows:

(1) **Presentation of the department's case:** The department or NMHIX will present its case and the evidence, including testimony and exhibits, in support of the adverse action taken against the household, and:

- (a) the claimant or authorized representative may cross-examine the department representative;
- (b) the hearing officer may ask further clarifying questions; and
- (c) if the department calls other witnesses, the order of examination of each witness

is as follows:

- (i) direct testimony by the witness(es);
- (ii) cross-examination by the claimant or the authorized representative; and
- (iii) examination or further clarifying questions by the hearing officer or, if requested, follow up questions from the department representative.

(2) **Presentation of the claimant's/appellant's case:** The claimant or the authorized representative will present its case and the evidence, including testimony and exhibits, in support of its position, and:

- (a) the department may cross-examine the claimant or the authorized representative;
- (b) the hearing officer may ask further clarifying questions; and,
- (c) if the claimant calls other witnesses, the order of examination of each witness is

as follows:

- (i) direct testimony by the witness(es);
- (ii) cross-examination by the department representative; and
- (iii) examination or further clarifying questions by the hearing officer or, if requested, follow up questions from the claimant or the authorized representative.

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(3) The claimant may offer evidence on the points at issue without undue interference, may request proof or verification of evidence or statements submitted by the department or its witnesses, and may present evidence in rebuttal.

(4) The hearing officer may ask the parties to summarize and present closing arguments.

C. Written closing argument: If the claimant or the department is represented by legal counsel, the hearing officer may request that the closing argument be submitted in writing to the fair hearings bureau.

D. Continuance: The hearing officer may continue the hearing upon the request of either party, or on the hearing officer's own motion, for admission of additional testimony or evidence. A party seeking a continuance in order to obtain additional evidence must make a showing that the evidence was not available at the time of the hearing despite a reasonable attempt having been made to obtain it. The granting of a continuance is at the discretion of the hearing officer is subject to the same limitations set forth in Subsection B of 8.100.970.10 NMAC. The reason(s) for the continuance and if any oral agreements were reached in regards to the continuance shall be stated for the hearing record. The fair hearings bureau shall issue notice of the rescheduling of a continued fair hearing not less than [~~ten (10)~~] 10 calendar days before the rescheduled date, unless oral agreements are obtained from all parties to reschedule the fair hearing with less notice in an effort to meet the required timeframes.

E. Additional documentary evidence: If the hearing officer requests additional documentary evidence based on testimony heard during the fair hearing, the hearing officer may close the fair hearing but keep the record open subject to production of the additional evidence being submitted by a party or parties.

(1) The hearing officer shall set a date and time for production of the requested evidence, not to exceed [~~ten (10)~~] 10 calendar days; the party producing the additional evidence shall submit copies to the hearing officer and each party.

(2) Within [~~ten (10)~~] 10 calendar days of its receipt of the additional evidence, the non-producing party may submit a written response to the hearing officer and each party that will become part of the fair hearing record; or, the hearing officer may continue the hearing until such a date and time that the non-producing party may respond to the additional evidence on the record.

(3) The hearing officer shall close the record at the close of business on the [~~tenth (10th)~~] 10th calendar day following its receipt of the additional evidence.

(4) The hearing officer may only request additional evidence pursuant to this paragraph if it will not result in a violation of the limitations set forth in Subsection B of 8.100.970.10 NMAC.

F. Re-opening a fair hearing: The hearing officer, at the hearing officer's discretion, may re-open a fair hearing when the evidentiary record fails to address an issue that is relevant to resolution of a fair hearing request. The fair hearing can only be re-opened if the parties have agreed to an extension of the timeframes in accordance with Paragraph (2) of Subsection B of 8.100.970.9 NMAC and the limitations set forth in Subsection B of 8.100.970.10 NMAC. Written notice of the date, time and place of the re-opened fair hearing is sent to the parties, not less than [~~ten (10)~~] 10 days before the date of the re-opened hearing, or not less than 15 days in matters involving NMHIX, unless oral agreements are obtained from all parties to reschedule the fair hearing with less notice in an effort to meet the required timeframes.

[8.100.970.12 NMAC - Rp, 8.100.970.12 NMAC, 11/27/2013; A/E, 11/1/2021]

8.100.970.13 FAIR HEARING DECISION: The final fair hearing decision shall be made by the appropriate department division director after review of the fair hearing record and the hearing officer's report and recommendation.

A. Hearing officer recommendation: The hearing officer reviews the record of the fair hearing and all appropriate regulations, and evaluates the testimony and evidence admitted during the hearing. The hearing officer submits the complete record of the fair hearing, along with the hearing officer's report and recommendation, in a standard format to the appropriate division director(s) within [~~fifteen (15)~~] 15 days of the hearing, or sooner, to ensure the timeframes set forth in Paragraph (2) of Subsection B of 8.100.970.9 NMAC are met.

B. Content of recommendation: The hearing officer specifies the reason(s) for all factual conclusions, identifies the supporting evidence, references the relevant federal and state laws and regulations, along with appropriate department policy and procedural guidance, and responds to the arguments of the parties in a written report and recommendation. The hearing officer shall submit a recommendation:

(1) in favor of the claimant when the adverse action taken by the department is not supported by a preponderance of the evidence available as a result of the fair hearing;

(2) in favor of the department when the preponderance of the evidence, available as a result of the fair hearing, supports the adverse action taken by the department is in accordance with federal and state laws and regulations; or

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(3) any other result supported by the fair hearing record.

C. Review of recommendation: The fair hearing record and report and recommendation are reviewed by the appropriate department division director(s) or designee to ensure conformity with applicable federal and state laws and regulations.

D. Final decision: The hearing officer's recommendation may be adopted or rejected, in whole or in part, in a final written decision by the appropriate department division director. The final fair hearing decision shall be based solely on the fair hearing record as defined in Paragraph (3) of Subsection I of 8.100.970.11 NMAC. The final fair hearing decision must summarize the facts of the case, specify the reasons for the decision, and identify the supporting evidence and relevant federal and state laws and regulations. No person who participated in the original action under appeal may participate in arriving at the final fair hearing decision. The final fair hearing decision becomes part of the fair hearing record.

E. Notice to claimant: The claimant, the authorized representative and the department shall be notified in writing of the final fair hearing decision and its effect on the benefits. If a claimant has an authorized representative, the authorized representative is mailed a copy of the final fair hearing decision. When a final fair hearing decision is adverse to the claimant, the decision shall include:

(1) a statement that the claimant has exhausted all administrative remedies available;
(2) the claimant's right to pursue judicial review of the final fair hearing decision; and
(3) information on how to file an appeal of the final fair hearing decision, the timeframe for filing an appeal and where the appeal may be filed.

F. Fair hearing decisions involving adverse actions by NMHIX: The provisions of Subsections A through E of 8.100.970.13 NMAC do not apply to fair hearings involving adverse actions by NMHIX. For hearings involving adverse actions by NMHIX, there shall be no recommendation by the hearing officer. The hearing officer shall instead issue a written final fair hearing decision, which shall become part of the fair hearing record, and which shall:

(1) be based exclusively on:
(a) the information used to determine the appellant's eligibility as well as any additional relevant evidence presented during the course of the appeals process, including at the hearing; and
(b) the eligibility requirements under Subpart D or G of 45 CFR Part 155, as applicable.
(2) state the decision, including a plain language description of the effect of the decision on the appellant's eligibility;
(3) summarize the facts relevant to the appeal;
(4) identify the legal basis, including the regulations that support the decision;
(5) state the effective date of the decision;
(6) provide an explanation of the appellant's right to pursue the appeal before the HHS appeals entity, including the applicable timeframe, if the appellant remains dissatisfied with the eligibility determination; and
(7) indicate that the decision of the fair hearing officer is final, unless the appellant pursues a second-tier appeal before the United States department of health and human services.
[8.100.970.13 NMAC - Rp, 8.100.970.13 NMAC, 11/27/2013; A/E, 11/1/2021]

8.100.970.14 IMPLEMENTATION OF DECISION: Unless stayed by court order, the department's final fair hearing decision is binding on all issues that have been the subject of the fair hearing as to that claimant. The local county office is responsible for assuring that decisions are implemented within the timeframes specified below. The final fair hearing decision serves as advanced notice for changes in benefits or services.

A. Decision favorable to the department: If assistance or benefits have been continued pending the outcome of the fair hearing and the decision is favorable to the department, the department shall take immediate action to adjust the payment and submit a claim for the excess benefit amount(s) paid pending the outcome of the fair hearing.

B. Decision favorable to the claimant:

(1) **Cash assistance programs:** When a fair hearing decision is favorable to the claimant, the department authorizes corrective payment. For incorrectly denied cases, corrected benefits are issued retroactively in the following manner:

(a) to the date of adverse action or to the ~~[thirtieth-(30th)]~~ 30th day from the application date, whichever is earlier; or
(b) to the first day of the month that the case is actually eligible for benefits;

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(c) for ongoing cases, the corrected cash assistance payments are retroactive to the first day of the month that the incorrect action became effective.

(2) **SNAP:** Decisions that result in an increased benefit shall be reflected in the claimant's next authorized allotment. The final fair hearing decision serves as verification for increased benefits.

(3) **Medical assistance programs:** When a fair hearing decision is favorable to the claimant and a case was incorrectly denied, corrected benefits are issued retroactively in the following manner:

(a) to the date of adverse action or to the ~~thirtieth (30th)~~ 30th day from the application date, whichever is earlier; or

(b) to the first day of the month that the case is actually eligible for benefits;

(c) for ongoing cases, the corrected benefit is retroactive to the first day of the month that the incorrect action became effective;

(d) fair hearings for medical assistance programs involving the termination, modification, reduction or suspension of services are governed by applicable federal and state law and regulations, including 8.352 NMAC, et seq.

C. Implementation of decisions related to NMHIX: Unless stated by court order, the department's final fair hearing decision is binding on all issues that have been the subject of the fair hearings as to that claimant. NMHIX, upon receiving notice of the final fair hearing decision, must promptly:

(1) Implement the decision effective:

(a) Prospectively, on the first day of the month following the date of the notice of appeal decision, or consistent with 45 CFR Section 155.330(f)(2), (3), (4), or (5), if applicable; or

(b) Retroactively, to the coverage effective date the appellant did receive or would have received if the appellant had enrolled in coverage under incorrect eligibility determination that is the subject of the appeal, at the option of the appellant.

(2) Redetermine the eligibility or household members who have not appealed their own eligibility determinations but whose eligibility may be affected by the appeal decision, in accordance with the standards specified in 45 CFR Section 155.305.

[8.100.970.14 NMAC - Rp, 8.100.970.14 NMAC, 11/27/2013; A/E, 11/1/2021]

8.100.970.15 JUDICIAL REVIEW

A. Right of appeal: If a final fair hearing decision upholds the department's or NMHIX's original action, the claimant has the right to pursue judicial review of the final fair hearing decision and is notified of that right in the department's final fair hearing decision. In matters involving NMHIX, the claimant may submit a second-tier appeal to the United States department of health and human services and is notified of that right in the department's final fair hearing decision.

B. Timeliness:

(1) **SNAP, LIHEAP, general assistance (GA), and medical assistance programs:** Unless otherwise provided by law, within ~~thirty (30)~~ 30 days of the issuance of the department's final fair hearing decision, the claimant may appeal the final fair hearing decision by filing a notice of appeal with the appropriate district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

(2) **NMW:** Unless otherwise provided by law, within ~~thirty (30)~~ 30 days of the issuance of the department's final fair hearing decision, the claimant may appeal the final fair hearing decision by filing a notice of appeal with the court of appeals pursuant to the provisions of Section 27-2B-13 NMSA 1978.

C. Jurisdiction and standard of review:

(1) The district court's jurisdiction is defined by statute at Section 27-3-3 NMSA 1978 and Section 39-3-1.1 NMSA 1978. The court of appeals jurisdiction is defined by statute at Section 27-2B-13 NMSA 1978.

(2) The court of appeals or district court may set aside, reverse or remand the department's final fair hearing decision if it determines that:

(a) the department acted fraudulently, arbitrarily or capriciously;

(b) the final fair hearing decision was not supported by substantial evidence; or,

(c) the department did not act in accordance with federal and state laws and

regulations.

D. Benefits pending an appeal: If the court decides in favor of the claimant, the department must immediately act in accordance with the court's final hearing decision. If the decision is in favor of the department, the department shall take any and all appropriate actions in accordance with Subsection A of 8.100.970.14 NMAC and 8.100.640 NMAC.

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E. Effect of appeal: If the court of appeals decides in favor of the claimant, the HSD office of general counsel immediately notifies the county office as to the appropriate benefit issuance and adjustments, if any. If the decision is in favor of HSD, and a reduction has been pending the decision on appeal, an overpayment claim retroactive to the date the change should have been made is filed.

F. Appealing the appellant court's decision:

(1) SNAP, LIHEAP, GA and medical assistance programs: A party to the appeal to district court may appeal the district court's decision by filing a petition for writ of certiorari with the court of appeals, which may exercise its discretion to grant review. A party may seek further review by filing a petition for writ of certiorari with the supreme court. Section 39-3-1.1 NMSA 1978.

(2) NMW: A party may seek further review by filing a petition for writ of certiorari with the supreme court.

[8.100.970.15 NMAC - Rp, 8.100.970.15 NMAC, 11/27/2013; A/E, 11/1/2021]