

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

8.352.2.1 ISSUING AGENCY: New Mexico Human Services Department (HSD).
[8.352.2.1 NMAC - Rp, 8.352.2.1 NMAC, 1-1-14]

8.352.2.2 SCOPE: The rule applies to the general public.
[8.352.2.2 NMAC - Rp, 8.352.2.2 NMAC, 1-1-14]

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

8.352.2.4 DURATION: Permanent.
[8.352.2.4 NMAC - Rp, 8.352.2.4 NMAC, 1-1-14]

8.352.2.5 EFFECTIVE DATE: January 1, 2014, unless a later date is cited at the end of a section.
[8.352.2.5 NMAC - Rp, 8.352.2.5 NMAC, 1-1-14]

8.352.2.6 OBJECTIVE: The objective of this rule is to provide instruction for the service portion of the New Mexico medical assistance programs.
[8.352.2.6 NMAC - Rp, 8.352.2.6 NMAC, 1-1-14]

8.352.2.7 DEFINITIONS:

- A. "Administrative law judge (ALJ)" means the HSD fair hearings bureau's appointed judge to oversee the claimant's administrative hearing process and render a recommendation to the medical assistance division direction.
- B. "Authorized representative" means an individual that has been legally appointed by the appropriate court to act on behalf of the claimant.
- C. "Date of action" means the date on which an adverse action becomes effective.
- D. "Denial" means the decision not to authorize the claimant's requested service, prior approval, utilization review request, or level of care (LOC).
- E. "Hearing" or "administrative hearing" or "fair hearing" means an evidentiary hearing that is conducted so that evidence may be presented as it relates to the denial or an adverse action by HSD, the MAD UR contractor, or the HSD managed care organization(MCO). This hearing is conducted by the HSD fair hearings bureau (FHB).
- F. "HSD" or "the department" means the New Mexico human services department.
- G. "MAD" means the medical assistance division which administers medicaid and medical assistance programs under HSD.
- H. "MAP" means the medical assistance programs administered by MAD.
- I. "MCO final decision" means the HSD managed care organization (MCO) final decision regarding an appealed adverse action it intends to take or has taken against its member.
- J. "Parties to the hearing" are HSD and as appropriate its designee and the claimant. If the hearing issue is a decision made by a HSD contractor, the parties are then HSD and as appropriate its designee, the contractor, and the claimant.
- K. "Request for an administrative hearing" means a clear expression by the claimant or his or her authorized representative that the claimant wants the opportunity to present his or her case to the FHB.
- L. "State coverage insurance (SCI)" means the SCI- health insurance flexibility and accountability waiver program for coverage of uninsured working adults. Effective January 1, 2014, only adverse actions that occurred prior to this date may a claimant file a request for an administrative hearing.
- M. "Utilization review (UR) contractor" is a HSD contractor responsible for medical and behavioral health level of care reviews and medical necessity reviews for only medical assistance programs services, prior approvals, LOC or other UR actions.

N. "Premium assistance" is a premium assistance program for children and pregnant women who are ineligible for other federally and state funded public assistance programs. Effective January 1, 2014, only adverse actions that occurred prior to this date may a claimant file a request for an administrative hearing.
[8.352.2.7 NMAC - Rp, 8.352.2.7 NMAC, 1-1-14]

8.352.2.8 MISSION STATEMENT: To reduce the impact of poverty on people living in New Mexico by providing support services that help families break the cycle of dependency on public assistance.
[8.352.2.8 NMAC - Rp, 8.352.2.8 NMAC, 1-1-14]

8.352.2.9 CLAIMANT: A claimant is a MAP enrolled recipient or an individual not currently a MAP enrolled recipient. When a MCO member requests a HSD administrative hearing, he or she is referred to as a claimant. The claimant may have an authorized representative act on behalf of him or her. To assist a claimant to whom an adverse action is intended or has been taken by MAD or its MAD UR contractor resulting in a denial of service, prior approval, UR action, or a specific level of care (LOC), MAD has established the process for a claimant to:

- A. request a HSD administrative hearing;
 - B. request continuation of a benefit; and
 - C. present evidence on behalf of the claimant's request for approval of a specific services, prior approval, UR action, or LOC.
- [8.352.2.9 NMAC - N, 1-1-14]

8.352.2.10 ADVERSE ACTION: The following listings are adverse actions.

- A. The termination, modification, reduction, or suspension of a covered MAD service.
- B. The denial or limiting of a MAD authorized service, including type or level of service (with the exception of a HSD contracted MCO value-added service); request for a prior authorization of such service; or a utilization review (UR) decision or the UR's reconsideration decision.
- C. The denial in whole or in part of the claimant's provider claim by MAD, its UR contractor, or a HSD MCO which results in the claimant becoming liable for the payment.
- D. The failure of MAD, its UR contractor or a HSD MCO to approve a service in a timely manner.
- E. The failure of a MAP UR contractor to act on an appeal within the timeframes specified in 42 CFR 438.408 (b).
- F. A claimant's MCO final decision upholding its denial or limitation of a MAD authorized service, with the exception of the MCO's value-added services.

[8.352.2.10 NMAC - Rp, 8.352.2.9 NMAC, 1-1-14]

8.352.2.11 RIGHT TO AN ADMINISTRATIVE HEARING: An administrative hearing is an evidentiary hearing that is conducted so that evidence may be presented as it relates to an adverse action by MAD, its UR contractor, or a HSD MCO. The hearing is conducted by the HSD fair hearing bureau (FHB). MAD, its UR contractor, or the claimant's MCO must grant a claimant the opportunity for a HSD administrative hearing under specific circumstances pursuant to 42 CFR Section 431.220(a) and New Mexico Statutes Annotated 1978, 27-3-3.

A. A claimant or the claimant's authorized representative may request a HSD administrative hearing based on his or her belief that MAD, its UR contractor or the claimant's MCO has taken an adverse action erroneously.

B. A claimant or the claimant's authorized representative may request a HSD administrative hearing when the service, prior approval, UR action or LOC of a claimant is terminated, modified, reduced, suspended, or denied. A member of a HSD MCO shall have the right to request a HSD administrative hearing after the member has exhausted his or her MCO's appeal process. See 8.100.970 NMAC for hearings procedures on MAP eligibility determination issues.

C. A MCO member may request a HSD administrative hearing when:

- (1) the member has exhausted his or her internal MCO appeal process;
- (2) the member does not agree with his or her MCO's final decision;
- (3) the member has requested a HSD administrative hearing within 90 calendar days of his or her MCO's final decision; and
- (4) the member's request for a HSD administrative hearing meets one of the definitions of an adverse action in Section 10 of this rule.

[8.352.2.11 NMAC - Rp, 8.352.2.10 NMAC, 1-1-14]

8.352.2.12 HEARING PROCESS REFERENCE: HSD has established a hearing process for a claimant who meets the criteria described above in Section 10 of this rule and who disagrees with a MAD decision concerning his or her MAD or MCO services or his or her LOC determination.

A. See 8.354.2 NMAC for rules on HSD administrative hearings requests that may be made by a resident of a nursing facility: (1) who believes the facility's determination that he or she be transferred or discharged is erroneous; or (2) for requests by the claimant who believes that the HSD determination with regard to the preadmission and annual resident review requirements is erroneous.

B. See 8.308.15 NMAC for a detailed description of a member's MCO appeal process for resolving a member's dispute with his or her MCO, its contractors or subcontractors.

C. See 8.349.2 NMAC for a detailed description for services and level of care determinations made through a MAD coordinated service contractor.

D. Issues of late premium payment or failure to pay the premium addressed through the MCO appeal process which is not resolved at that level may be appealed to the New Mexico (the State) district court at the appellant's (member's) expense. Effective January 1, 2014, only eligibility determination actions that occurred prior to this date for an applicant or a recipient of MAD premium assistance may file an appeal through the HSD administrative hearing process.

[8.352.2.12 NMAC - Rp, 8.352.2.11 NMAC, 1-1-14]

8.352.2.13 NOTICES, TIME LIMITS, POSTPONEMENTS, AND DISMISSAL OF ADMINISTRATIVE HEARINGS:

A. **Notices:** MAD shall issue a notice to a claimant when it or its UR contractor intends to take an adverse action, deny prior authorization request or an UR action leading to the termination, modification, reduction, or suspension of a MAD service or LOC. The "notice of action" is issued within three working days of HSD or its contractor's determination of its intent to take action and not less than 13-calendar days prior to MAD's or its contractor's intended date to take the action.

B. **Exceptions to advance notice:** MAD or its contractor will mail an "advance notice of action" to terminate, modify, reduce, or suspend a MAD service, denial of a prior authorization request, an UR action, or a change in the claimant's LOC no later than the actual date the action will take place by MAD or its contractor:

(1) has factual information that confirms the death of the claimant;

(2) receives a clear written statement signed by the claimant that the service is no longer wanted, or he or she provides information which requires a termination, modification, reduction or suspension of a MAD service, prior authorization request or an UR action which indicates the claimant's understanding that such information may result in the termination, modification, reduction or suspension of a service, the denial of a prior authorization request or an UR adverse action;

(3) learns the claimant is residing in a public institution which makes the claimant ineligible for MAP enrollment and MAD services while he or she resides in such an institution;

(4) does not know the claimant's whereabouts and the claimant's United States postal office returns mail directed to the claimant indicating he or she has no known forwarding address;

(5) has established the fact the claimant has been accepted for medicaid services outside of the state;

or

(6) the primary care provider for the claimant has prescribed a change in his or her LOC.

C. **Time limits:** There are two specific time limits to which a claimant must adhere. One is for a request for a continuation of a benefit and the second is for a request for a HSD administrative hearing.

(1) **Continuation of a benefit:** A continuation of a benefit may be provided to a claimant who requests a hearing within 13 calendar days of issuance of MAD or its UR contractor's "advance notice of action." The notice will include information on the rights to continued benefits and on the claimant's responsibility for repayment if the hearing decision is not in his or her favor. The continuation of a benefit is only available to a claimant that is currently receiving the appealed service. In order to receive a continuation of a benefit while the hearing process goes forward, this request must be received by the claimant's MAD UR contractor no later than the close of business on the 13th calendar day of the date of the "advance notice of action." His or her MAD UR contractor is responsible for the determination to either approve or deny the request for the continuation of a claimant's benefit. The continuation of a benefit will be the same as the claimant's current allocation, budget or LOC.

(2) A claimant has 90 calendar days from the date of the "notice of action" to request a HSD administrative hearing. To be considered timely, the request must be received by the FHB or the claimant's local

income support division (ISD) office or by MAD's director's office no later than the close of business on the 90th calendar day.

(3) The HSD administrative hearing is conducted within the 90 calendar day requirement unless the claimant or the claimant's authorized agent agrees to extend the administrative hearing in order facilitate the process.

(4) For a MCO member, the time limit to request a HSD administrative hearing is within 90 calendar days of his or her MCO's final decision.

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

(b) The member may request a continuation of benefits from his or her MCO within 13 calendar days of the MCO's final decision.

D. Dismissal of a hearings request: The FHB may recommend to the MAD director or designee a dismissal of a request for hearing when:

(1) the request is not received in a timely manner or within the time period set out in the "notice of action" or the claimant's MCO final decision;

(2) the request is withdrawn or cancelled in writing, by the claimant or the claimant's authorized agent;

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

(4) the same issue has already been appealed or decided upon as to this claimant and fact situation;

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

(6) the claimant fails to appear at a scheduled hearing without good cause; a request for a hearing may be considered abandoned and therefore dismissed if the claimant or the claimant's authorized representative appears at the time and place of the hearing, unless, within 10 calendar days after the date of the scheduled hearing, the claimant, or the claimant's authorized representative presents good cause for failure to appear; good cause includes a death in the family, a disabling personal illness, or another significant emergency, or at the discretion of the ALJ for another exceptional circumstance is considered good cause.

[8.352.2.13 NMAC - Rp, 8.352.2.12 NMAC, 1-1-14]

8.352.2.14 INFORMAL RESOLUTION CONFERENCE: Any party may request an informal resolution conference by contacting the FHB. The parties are encouraged to hold an informal resolution conference before the administrative hearing to discuss the issues in dispute. The informal resolution conference is optional and does not delay or replace the hearing process. Conference parties may include the claimant or the claimant's authorized representative, MAD, its UR contractor, or the claimant's MCO. The purpose of the informal resolution conference is to informally review MAD or the MCO's action and to determine whether the issues can be resolved by mutual agreement. The issues to be decided at the administrative hearing may also be clarified or further defined. Regardless of the outcome of the informal resolution conference, an administrative hearing is still held, unless the claimant or the claimant's authorized representative makes a written withdrawal of the request of the hearing.
[8.352.2.14 NMAC - N, 1-1-14]

8.352.2.15 NOTICE OF PRE-HEARING AND ADMINISTRATIVE HEARING DATES:

A. Scheduling:

(1) Pre-hearing: Not less than 30 calendar days before the pre-hearing, the assigned ALJ provides written notice to all parties involved detailing the time, date, and place of the both pre-hearing and administrative hearing. If an accommodation is necessary, the party must notify the ALJ at least 10 calendar days prior to the pre-hearing or administrative hearing. The claimant or the claimant's authorized representative is provided in the notice an explanation of the hearing process and procedures, and informed that MAD, its UR contractor or his or her MCO does not pay fees or costs incurred by the claimant or the claimant's authorized representative as a result of the hearing or if he or she files an appeal of the hearing decision to a state district court.

(2) Administrative hearing: If all matters in the request for a hearing are not resolved at the pre-hearing conference, the ALJ sets an administrative hearing date within 30 calendar days of the last conference date, or at a later time agreed to by the parties, recognizing the 90-calendar-day time constraint.

B. **Rescheduling:** Any party may request, and is entitled to receive, one postponement of the scheduled pre-hearing and administrative hearing, as long as it does not interfere with the decision time frames. A request for more than one postponement is at the ALJ's discretion on a case-by-case basis.

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

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

[8.352.2.15 NMAC - Rp, 8.352.2.13 NMAC, 1-1-14]

8.352.2.16 PRE-HEARING CONFERENCE: Within 30 calendar days of the receipt of a request for an administrative hearing, the ALJ assigned to a case schedules a pre-hearing conference. A pre-hearing conference is an informal proceeding and may occur telephonically.

A. **Purpose of conference:** The purposes of the pre-hearing conference include, but are not limited to:

- (1) expediting the disposition towards a final decision;
- (2) identification, clarification, formulation and simplification of issues;
- (3) resolution of some or all issues;
- (4) exchange of documents and information;
- (5) preparing stipulations of fact to avoid unnecessary introduction of evidence at the hearing;
- (6) review of audit findings;
- (7) review of MAD, its UR contractor, or the MCO's adverse action of termination, modification, reduction, or suspension of a covered service or a LOC;
- (8) identification the number of witnesses; and
- (9) facilitation towards a settlement of the case.

B. **Settlements, stipulations and admissions:** No offer of settlement made in a pre-hearing conference is admissible as evidence at a later hearing. Stipulations and admissions are binding and may be used as evidence at the hearing. Any stipulation, settlement or consent order reached between the parties is written and signed by the ALJ and the parties or their authorized representatives or agents.

C. **Written summaries:** The ALJ may request the parties to submit written summaries of all issues resolved at the pre-hearing conference.

D. **Pre-hearing order:** The ALJ may, at his or her sole discretion, prepare or ask the parties to prepare a pre-hearing order after the pre-hearing is completed. The pre-hearing order may contain:

- (1) statements of any contested facts and issues;
- (2) stipulation of matters not in dispute;
- (3) list of witnesses to be called and the subject of their testimony;
- (4) list of exhibits;
- (5) discovery directives; or
- (6) other matters relevant to the issues.

E. **Points of law:** The ALJ may direct the parties to submit memoranda on points of law to inform the final decision, and may dictate the length and scope of these submissions.

F. **Summary of evidence:** A summary of evidence (SOE) is a document submitted by MAD that provides preliminary information concerning the basis of its, its contractor or the HSD MCO's action. The SOE may be amended by MAD at any point prior to the pre-hearing if the ALJ and the claimant or the claimant's authorized representative receives copies of the amended SOE at least two working days of the pre-hearing conference.

- (1) The SOE must be provided at least 10 working days prior to the pre-hearing conference or if the pre-hearing conference is not held, within 10 working days prior to the administrative hearing.
- (2) The failure of MAD to timely provide the SOE may at the ALJ's discretion, result in its exclusion or a continuance of the hearing.
- (3) MAD staff or its designee is responsible for preparation of the SOE and coordination of parties and witnesses. MAD is responsible for the submission of the SOE to all parties.
- (4) The summary of evidence shall contain:

- (a) the claimant's name, telephone number and address and the status of any previous or concurrent appeal through the MAD UR contractor;
- (b) the action, proposed action or inaction being appealed;
- (c) information on which the action or proposed action is based with supporting documentation and correspondence; and
- (d) applicable federal and state statutes, regulations, rules or any combination of these.

G. Availability of claimant evidence:

(1) The claimant or the claimant's authorized representative will provide at least 10 calendar days prior to the hearing to the FHB assigned ALJ any document to be introduced as evidence at the pre-hearing conference. The SOE may be amended by the claimant or the claimant's authorized representative at any point prior to the pre-hearing if the ALJ and HSD receive copies of the amended SOE at least within two working days of the pre-hearing conference. The FHB will forward to the MAD administrative hearings unit copies of such evidence. MAD will then make these available to its MAP UR contractor or the claimant's MCO as appropriate.

(2) Failure of the claimant or the claimant's authorized representative to timely provide the documentary evidence may result in its exclusion or a continuance of the hearing at the discretion of the ALJ.

H. Availability of information to the claimant or the claimant's representative: HSD must:

(1) provide, on request, in a timely manner and without charge, any documents in its possession concerning the underlying action, that are not already in the claimant or the claimant's authorized representative's possession, and that are necessary for him or her to decide whether to request a hearing or to prepare for a hearing;

(2) allow the claimant or the claimant's authorized representative to examine all documents to be used at the pre-hearing and administrative hearing at least 10 working days before the date of the hearing and at the pre-hearing and administrative hearing; HSD documents or records which the claimant or the claimant's authorized representative would not otherwise have an opportunity to challenge or contest may not be introduced at the hearing or be considered by the ALJ.

[8.352.2.16 NMAC - Rp, 8.352.2.13 NMAC, 1-1-14]

8.352.2.17 ADMINISTRATIVE HEARING STANDARDS:

A. Administrative law judge:

(1) Hearings are conducted by an impartial official who:

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

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

(2) **Authority and duties of the hearing officer:** The ALJ must:

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

(b) administer oaths and affirmations;

(c) request, receive, and make part of the record all evidence considered necessary to decide the issues raised;

(d) regulate the conduct and the course of the hearing and any pre-hearing conference to ensure an orderly hearing;

(e) request, if appropriate, an independent medical assessment or professional evaluation from a source mutually satisfactory to the parties; and

(f) produce the hearing report that includes findings of fact and his or her recommendation for resolution of the hearing.

(3) **Appointment of ALJ:** The ALJ is appointed by HSD upon receipt of the request for hearing. All communications are to be addressed to the assigned ALJ.

B. Record of the hearing: The administrative hearing is electronically recorded. The recording is placed on file at the FHB and is available to the parties for 60 calendar days following the final decision. In addition to the recorded proceedings, the record of the administrative hearing includes the SOEs of HSD, the MCO or MAD UR contractor and the claimant, pleadings, documents, or other exhibits admitted into evidence. Any of the parties to the hearing may request one digital copy of the recordings without charge. Subsequent copies will be charged at a rate HSD sets for any other digital request.

C. Rights at administrative hearing: The parties are given an opportunity to:

(1) present his or her case or have it presented by the authorized representative;

(2) bring witnesses to present information relevant to the case;

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

D. **Evidence and procedure:** Formal rules of evidence and civil procedure do not apply to a HSD administrative hearing. A free, orderly exchange of relevant information is necessary for the decision-making process. The ALJ will provide HSD a copy of the claimant's SOE and any amendments to the SOE within one working day of his or her receipt. HSD will provide the MCO or MAD UR contractor a copy of the claimant's SOE within one working day of receipt. The HSD or claimant's SOE may be amended at any point prior to the pre-hearing if the all parties receive a copy of the amended SOE at least within two working days of the pre-hearing conference.

(1) **Admissibility:** All relevant evidence is admissible subject to the ALJ's authority to limit repetitive or unduly cumulative evidence and his or her ability to conduct an orderly hearing. The ALJ must admit evidence that is relevant to the contemplated action or the action taken by HSD, the MAD UR contractor, or the HSD MCO.

(2) **Confidentiality:** The confidentiality of records is to be maintained. Information which is not presented during the hearing in the presence of the claimant or the claimant's authorized representative and HSD representative may not be used by the ALJ in making the hearing recommendation except as allowed by Subsection B of Section 17 of this rule.

(3) **Administrative notice:** The ALJ may take administrative notice of any matter in which courts of this state may take judicial notice.

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

(5) **Medical issues:** In a case involving medical issues, the parties may submit expert testimony, reports, affidavits or medical records into record as necessary. Admission of this evidence is at the discretion of the ALJ. All parties to the hearing have the right to examine any documents which may influence the decision.

E. **Burden of proof:** HSD has the burden of proving the basis to support its proposed action by a preponderance of the evidence.

[8.352.2.17 NMAC - Rp, 8.352.2.14 NMAC, 1-1-14]

8.352.2.18 CONDUCTING THE HEARING: An administrative hearing is conducted in an orderly manner and in an informal atmosphere. The hearing is conducted telephonically and is not open to the public. The ALJ has the authority to limit the number of persons in attendance as necessary for the ALJ to control the hearing.

A. **Opening the hearing:** The hearing is opened by the ALJ. Individuals present must identify themselves for the record. The ALJ explains his or her role in conducting the hearing, that he or she will submit the record of the hearing and a recommendation, and that the final decision on the hearing will be made by the MAD director after review of the proceedings and the ALJ's recommendation. The order of testimony is described, and the oath is administered to all who will testify at the hearing.

B. **Order of testimony:** The order of testimony at the hearing is as follows:

- (1) opening statements of parties or authorized representatives;
- (2) presentation of HSD's case; if witnesses are called, the order of examination of each witness is:
 - (a) examination by HSD authorized representative;
 - (b) cross examination by the claimant or the claimant's authorized representative; and
 - (c) opportunity to redirect the witness;
- (3) presentation of the claimant's case; if witnesses are called, the order of examination of each

witness is:

- (a) examination by claimant or the claimant's authorized representative;
- (b) cross examination by HSD or its authorized representative; and
- (c) opportunity to redirect the witness;
- (4) presentation of rebuttal evidence by HSD and the claimant or the claimant's authorized representative, respectively;
- (5) the ALJ may direct further questions to the HSD authorized representative, claimant or the claim representative, or any witnesses to clarify inconsistencies or obtain an adequate evidentiary record; and
- (6) the ALJ may ask both parties to summarize and present closing arguments.

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

D. **Continuance:** The ALJ may continue the hearing upon the request of either party or on his or her own motion, for admission of additional testimony or evidence. The granting of a continuance is at the discretion of the ALJ and can only be allowed when the timeliness of a decision is not jeopardized by the continuance or the parties have agreed to an extension of the decision time frame. The reasons for the continuance must be stated for the record. Written notice of the date, time, and place of the continued hearing is sent to the parties if these are not set at the time of the approved continuance.

E. **Additional evidence:** If the ALJ needs additional evidence to further clarify documentary evidence presented during the hearing, he or she may close the hearing but keep the record open and direct the parties to submit such clarifying evidence. Each party receives a copy of the direction for further evidence and the documentary evidence being submitted and is allowed an opportunity to respond to the submission, in writing, within 10 calendar days of its receipt. The additional evidence and responses become part of the hearing record.

F. **Re-opening a hearing:** The ALJ, at his or her discretion, may re-open a hearing when the evidentiary record fails to address an issue that is relevant to resolution of a hearing request. The hearing can only be re-opened if the timeliness of the decision is not jeopardized or the parties have agreed to an extension of the decision time frames. Written notice of the date, time and place of the re-opened hearing is sent to the parties not less than 10 calendar days before the re-opened hearing.
[8.352.2.18 NMAC - Rp, 8.352.2.15 NMAC, 1-1-14]

8.352.2.19 HEARING DECISION: The final decision concerning the hearing is made by the MAD director after review of the record and the ALJ's report and recommendation.

A. **Decision based on the record:** The ALJ's recommendation must be based on the record created by the hearing. This includes the record of the testimony, all reports, documents, forms, and other appropriate material made available at the hearing, provided that all parties were given an opportunity to examine them as part of the hearing and the additional evidence allowed; see Section 13 Subsection E of this rule.

B. **ALJ recommendation:** The ALJ reviews the record of the hearing and all appropriate rules, and evaluates the evidence submitted. The ALJ submits the complete record of the hearing, along with his or her written recommendation to the MAD director.

(1) **Content of recommendation:** The ALJ specifies the reasons for his or her conclusions, identifies the supporting evidence, references the pertinent MAD rules, and responds to the arguments of the parties in a written report and recommendation.

(2) The ALJ recommends:

(a) in favor of the eligible recipient if HSD's action or proposed action is not supported by a preponderance of the evidence available as a result of the hearing. The ALJ will provide specific recommendations to each appealed adverse action.

(b) in favor of HSD, if the preponderance of the evidence available supports the adverse action or proposed adverse action; or

(c) any other result supported by the record. The ALJ will provide specific recommendations to each appealed adverse action.

C. **Review of recommendation:** The hearing file and recommendation are reviewed by the MAD director or designee to ensure conformity with applicable federal and state statutes, regulations, and rules.

D. **Final decision:** The ALJ's recommendation may be adopted or rejected in a final written decision by the MAD director on issues that were the subject of the hearing. The MAD director specifies the reasons for the decision and identifies the regulatory authority and the evidence supporting the decision, including the record created by the hearing, applicable federal and state law, rules and policies or any combination of these. No person who participated in the original action under appeal or in the hearing may participate in arriving at a final decision.

E. **Notice to parties:** The parties receive the written decision. When the claimant is represented by legal counsel or another authorized representative, each must receive a copy of the final decision. The decision letter includes an explanation that the parties have exhausted all HSD administrative remedies and may pursue judicial review of the decision. This explanation includes information on time limits, and where and how to pursue judicial review.

[8.352.2.19 NMAC - Rp, 8.353.2.14 NMAC, 1-1-14]

8.352.2.20 CONTINUATION OF BENEFITS PURSUANT TO TIMELY APPEAL OF HEARING DECISION:

A. A continuation of a benefit may be provided to a claimant who requests a hearing within 13 calendar days of issuance of HSD's *advance notice of action* or within 13 calendar days of the claimant's MCO final decision. The notice will include information on the rights to the continued benefit and on the claimant's responsibility for repayment if the hearing decision is not in his or her favor. The continuation of a benefit is only available to a claimant that is currently receiving the appealed service. The continuation of a benefit will be the same as the claimant's current allocation or LOC.

B. Repayment responsibility:

(1) When a claimant or the claimant's authorized representative appeals an issue of medical assistance program eligibility as described in 8.100.970 NMAC, has requested a continued of a benefit pursuant to timely appeal, and the hearing decision upholds HSD, the MCO or the involved contractor's proposed action, the repayment amounts will be calculated as follows:

(a) MAD month: The paid amount (paid claims amount) is owed to HSD.

(b) MCO enrolled month: HSD is owed the capitation amount plus the paid claim amount for any carved-out services.

(2) When a claimant or the claimant's authorized representative appeals a termination, modification, reduction, or suspension of a service as described in this rule, and has requested a benefit continuation pursuant to timely appeal, and the hearing decision upholds HSD, the MCO or the contractor's proposed action, the amount owed by the claimant will be calculated as follows:

(3) HSD will be owed the reimbursable amount for the period of time that the service was continued in the interim period pending the hearing decision. The MCO will be owed and is responsible to collect the reimbursable amount for the period of time that the service was continued in the interim period pending the hearing decision when the service was provided by the MCO. The repayment amount must be used by the MCO to benefit its members.

C. For SCI-enrolled claimant only: If the claimant is granted a continuation of a benefit, the notice will include information about the rights to continued benefits and about the claimant's responsibility for repayment if the hearing decision is not in the claimant's favor. If the SCI enrolled claimant has met his or her claim benefit maximums (dollars or bed days or prescriptions for the month) or has not paid premiums or paid premiums late, he or she will not be granted a continuation of a benefit. Effective January 1, 2014, a SCI enrolled claimant may only be granted a continuation of benefits if:

(1) the *advance notice of action* was issued on or before December 31, 2013 and the claimant or the claimant's authorized representative requests a continuation of benefits within his or her 13 calendar day requirement; or

(2) the claimant or the claimant's authorized representative filed a request for an administrative hearing within 90 calendar days of the notice of action.

[8.352.2.20 NMAC - Rp, 8.352.2.16 NMAC, 1-1-14]

8.352.2.21 IMPLEMENTATION OF DECISION: The MAD director's final decision is binding on all issues that have been the subject of a hearing as to that claimant unless stayed by court order. HSD is responsible for ensuring that the final decision is fulfilled.

A. **Decision favorable to HSD, the MCO, or the involved MAD UR contractor:** If assistance or a benefit has been continued while the hearing decision was pending, and the decision is favorable to HSD, the MCO, or the involved MAD UR contractor, it will take action to file an overpayment claim to the claimant for the service received while the hearing decision was pending. A request for a hearing concerning the overpayment claim is limited to alleged computation errors. The hearing decision serves as the claimant's *advance notice of action* for the resulting benefit termination, modification, reduction, or suspension. If the hearing decision is that the claimant received a benefit to which he or she was not entitled, HSD, the MCO, or the MAD UR contractor will start collection proceedings.

B. **Decision favorable to claimant:** When an administrative hearing decision is favorable to the claimant, HSD, the MCO or the MAD UR contractor will authorize the service and coverage approved in the final decision letter.

[8.352.2.21 NMAC - Rp, 8.352.2.17 NMAC, 1-1-14]

8.352.2.22 JUDICIAL APPEAL: If the final hearing decision upholds the HSD, MCO, or MAD UR contractor's original action or proposed action, the claimant or the claimant's authorized representative has the right to pursue judicial review of the decision and is so notified of that right in the HSD final decision letter. Judicial appeals for the final decision letter are governed by New Mexico statutes and court rules. While the following

subsections highlight applicable procedures, they should not be considered a substitute for examining the statutes and rules themselves.

A. **Jurisdiction:** Administrative appeals for a claimant are governed by the NMSA 1978 Section 39-3-1.1 and by Rule 1-074, Rules of Civil Procedures for the District Courts. The appropriate venue for such appeals is the first judicial district court, or the state district court having jurisdiction over the location the claimant's participated in the hearing in person or telephonically.

B. **Timeliness:** Unless otherwise provided by law, a claimant or the claimant's authorized representative must appeal the final decision letter within 30 calendar days by filing a notice of appeal with the clerk of the appropriate state district court, and sending a copy to the HSD office of general counsel (OGC).

C. **Jurisdiction and standard of review:** All judicial appeals are based on the record made at the administrative hearing, and in accordance with state statute and court rules. The HSD OGC files a copy of the hearing record with the court clerk and furnishes one copy to the claimant within 30 calendar days after receipt of the notice of appeal. The court may set aside the HSD hearing decision if it finds the decision is: (1) arbitrary, capricious, or an abuse of discretion; (2) is not supported by substantial evidence in the record as a whole; or (3) is otherwise not in accordance with the applicable law.

D. **Benefits pending appeal:** The filing of a notice of appeal shall not stay the enforcement of the HSD decision, but the claimant or the claimant's authorized representative may seek a stay upon motion to the court. If the court orders a stay, HSD, the MCO or the MAD UR contractor will maintain the service at issue in accordance with the court's order. If the final decision is in favor of HSD, and a termination, modification, reduction, or suspension of service was pending the decision on appeal, see Section 19 of this rule for the repayment process. [8.352.2.22 NMAC - Rp, 8.352.2.18 NMAC, 1-1-14]

HISTORY OF 8.352.2 NMAC:

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

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

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

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

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

History of Repealed Material:

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