



State of New Mexico
Human Services Department
Human Services Register

I. DEPARTMENT

NEW MEXICO HUMAN SERVICES DEPARTMENT
(HSD)

II. SUBJECT

8.308.12 NMAC COMMUNITY BENEFIT; 8.312.2 NURSING FACILITIES; 8.350.2
RECONSIDERATION OF UTILIZATION REVIEW DECISIONS; 8.354.2 PASRR AND PATIENT
STATUS HEARINGS

III. PROGRAM AFFECTED

(TITLE XIX) MEDICAID

IV. ACTION

FINAL RULES

V. BACKGROUND SUMMARY

The Human Services Register Vol. 37 No. 42, dated June 1, 2014, issued the proposed repeal and replacement of: 8.312.2 NMAC, 8.350.2 NMAC and 8.354.2 NMAC and included the Department's intent to amend 8.308.12 NMAC.

A public hearing was held on Monday, July 7, 2014, to receive public testimony on these proposed rules. The Department received one written comment letter which included comments for all four rules; no public testimony or recorded comments were received.

Summary of Comments:

8.308.12 NMAC Community Benefit

8.308.12.7 Definitions

C. Authorized representative

The commenter requested the requirement that a Medical Assistance Division (MAD) Medical Assistance Programs (MAP) eligible recipient who is an enrolled member of a Department contracted

managed care organization (MCO) must designate in writing his or her authorized representative be removed.

Department Response: The Department must have a signed written document from the member when he or she designates an authorized representative to substantiate the authorized representative's scope and duration of access to the member's case information. If the member has a guardianship or a power of attorney in place, those documents substantiate for the Department who is the authorized representative, what information to release and for how long the authorized representative may access and act on behalf of the member. The Department does not require the member to write the designation him or herself; it only requires the member to sign the designation. The Department defers to the State of New Mexico laws or statutes that provide avenues of consent for individuals unable to sign documents. The language stands as proposed.

8.308.12.7.I. Employer of Record

The commenter questioned what an EOR self-assessment instrument entails and why is it being required now.

The commenter requested the statement be removed from the final rule when a member has an authorized representative, he or she cannot act as his or her EOR.

Department Response: During the review of the Community Benefit rule, recommendations were made to the Department to develop an EOR form to ensure consistency among its Centennial Care MCOs and to ensure a member has an established EOR before transitioning from agency-based to self-directed community benefits to support the member not having a break or delay in his or her benefits.

Concerning the second issue, the Department directs the commenter to Section 20 Subsection B of this rule which states if a member has designated an authorized representative to represent and act on the member's behalf on *financial matters*, the member cannot act as his or her EOR. The authorized representative for the member's finances becomes the individual making EOR financial decisions. The language stands as proposed.

8.308.12.8 Mission Statement

The commenter stated the mission statement is condescending, makes assumptions, and is offensive and requested it be amended.

Department Response: The Department may only make changes to sections of the rule that have been amended. Section 8 of this rule did not contain an amendment; therefore, the Department cannot amend Section 8 during this rule's promulgation process. The Department will retain the comment for consideration in the event the Department amends the rule in the future. The language stands as proposed.

8.308.12.15 Self-Directed Community Benefit (SDCB)

The commenter questioned the rationale for restricting a member from participating in both the Agency-Directed Community Benefit approach and the Self-Directed Community Benefit approach concurrently.

Department Response: The Department offers a number of benefit packages to its Medical Assistance Programs (MAP) eligible recipients; some dependent upon a MAP category of eligibility. The Department offers two distinct and unique approaches/packages to the delivery of community benefits. Each member must determine which approach/package offers the best array of community benefits for his or her unique needs. The Department is operating within the bounds of the Code of Federal Register (CFR) in developing and offering distinct benefit approaches/packages for its members. The language stands as proposed.

8.308.12.17 Eligible Members

The commenter questioned why the member's MCO must approve the member for the SDCB approach.

Department Response: The Department directs the commenter to Section 20 of this rule, *"A member who meets a NF LOC and who qualifies for MCO CB must first access services through his or her MCO's ABCB approach. After 120 calendar days, the member may continue his or her CB services provided through the MCO's ABCB or may select the MCO's SDCB approach. The member's MCO shall obtain a signed statement from the member regarding his or her decision to participate in the SDCB approach. The signed statement will include member attestation that he or she understands the responsibilities of self directing his or her CB services, including the management of his or her care plan."*

The requirements to move from Agency-Based Community Benefits to Self-Directed Community Benefits have been in place since the rule was effective 1/1/2014. The additional language in Section 17 of this rule reminds a member of the requirements detailed in Section 20 of this rule. The language stands as proposed.

8.308.12.20 Transition to the Self-Directed Community Benefit

B. Employer of Record (EOR)

The commenter requests the first sentence of this subsection be removed in the final rule as it appears to diminish the intent of the rule and is believed to be illegal.

Department Response: When a member has designated an authorized representative to represent and act on the member's *behalf on financial matters*, the member cannot act as his or her EOR, as the EOR responsibilities include financial decisions. The authorized representative for the member's finances becomes the individual making *EOR financial decisions*. The language stands as proposed.

8.312.2 NMAC Nursing Facilities

8.312.2.7 Definitions

A. Authorized Representative

The commenter requested the requirement that a member must designate in writing his or her authorized representative be removed.

Department Response: The Department must have a signed written document from the member when he or she designates an authorized representative to substantiate the authorized representative's scope and duration of access to the member's case information. If the member has a guardianship or a power of attorney in place, those documents substantiate for the Department who is the authorized representative, what information to release and for how long the authorized representative may access and act on behalf of the member. The Department does not require the member to write the designation him or herself; it only requires the member to sign the designation. The Department defers to the State of New Mexico laws or statutes that provide avenues of consent for individuals unable to sign documents. The language stands as proposed.

8.312.2.8 Mission Statement

The commenter stated the mission statement is condescending, makes assumptions, and is offensive and requested it be amended.

Department Response: The Department may only make changes to sections of the rule that have been amended. Section 8 of this rule did not contain an amendment; therefore, the Department cannot amend Section 8 during this rule's promulgation process. The Department will retain the comment for

consideration in the event the Department amends the rule in the future. The language stands as proposed.

8.312.2.18 Pre-Admission screening and resident Review (PASRR) of Mentally Ill and Intellectually Disabled Individuals

D. Right to an administrative hearing

The commenter asserts this subsection: (1) limits a member's civil rights; and (2) unnecessarily inoculates MAD and its contractors against paying for the member's MCO appeal and HSD administrative hearing process.

Department Response: Concerning the first issue, the Department directs the commenter to the NMAC citation within this subsection, 8.352.2 NMAC. This rule details the responsibilities of the nursing facility, MAD, its utilization review (UR) contractor and the member's MCO for notices and HSD administrative hearing rights and responsibilities that were formerly detailed in 8.312.2 NMAC. 8.352.2 NMAC details claimant hearing instructions. The language stands as proposed.

Concerning the second issue, the Department, MAD, its UR contractors and MCOs have consistently not paid for a member's fees or costs to include attorney fees during the reconsideration of an UR decisions, the MCO appeal process, or a HSD administrative hearing process. The language stands as proposed.

8.350.2 NMAC Reconsideration of Utilization Review Decisions

8.350.2.8 Mission Statement

The commenter stated the mission statement is condescending, makes assumptions, and is offensive and requested it be amended.

Department Response: The Department may only make changes to sections of the rule that have been amended. Section 8 of this rule did not contain an amendment; therefore, the Department cannot amend Section 8 during this rule's promulgation process. The Department will retain the comment for consideration in the event the Department amends the rule in the future. The language stands as proposed.

8.350.2.10 Reconsideration of Utilization Review Decisions

A. Time Constraints and Submission Requirements

The commenter brought a typographical error to the Department's attention: a period (.) before the word "action."

Department Response: The Department is appreciative of bringing this to its attention. The period has been removed.

8.350.2.11 Claimant Hearings

The commenter asserts that every participant is eligible to request a HSD administrative hearing. The commenter requests the Department to follow the HSD Income Support Division (ISD) rule, 8.100.290 NMAC, allowing 90 days to request a HSD administrative hearing. The commenter requests the Department to be flexible in allowing an in-person HSD administrative hearing.

Department Response: Concerning the first issue, the Department reviewed the CFR citations and concludes there is no conflict. The CFR citations discuss who is deemed a claimant and the rights of a claimant to request a HSD administrative hearing. The Department has established a process to determine when an individual has the right to request a HSD administrative hearing. An individual

who does not meet this criteria does not have standing to request a HSD administrative hearing; therefore, the FHB ALJ has the right to dismiss the request if the ALJ can determine prior to the hearing the individual has no standing. The language stands as proposed.

Concerning the second issue, the Department believes the commenter is referring to 8.100.970 Section 9 Subsection B Paragraph (1), as there is not a NMAC rule for 8.100.290. ISD's 8.100.970.9B(1) NMAC rule provides for a HSD administrative hearing specific to MAP eligibility determinations. The Department added clarifying language to 8.352.2 NMAC that a claimant is to follow 8.352.2 NMAC for non-MAP eligibility adverse actions. The language stands as proposed.

Concerning the third issue, the Department directs the commenter to the rule citation within the Section 13 of 8.352.2 NMAC. This rule governs HSD administrative hearings and it affords as necessary a claimant's accommodations during the administrative hearing process. The language stands as proposed.

8.352.2.13 SCHEDULING OF A HSD ADMINISTRATIVE HEARING:

A. Scheduling: The ALJ will assign a date for a HSD administrative hearing that affords the MAD director the opportunity to render his or her HSD administrative hearing final decision within the 90 calendar day time limit. The claimant or the claimant's authorized representative must agree via a recorded message to the assigned ALJ or in writing to the assigned ALJ to extend the 90 calendar day time limit up to an additional 30 calendar days to provide the necessary time for the HSD administrative hearing to be conducted and a final decision rendered. The ALJ has the authority on a case-by-case basis to extend the 90-calendar day time limit to more than 30-calendar days when the claimant or the claimant's authorized representative requests such an extension in writing. If an accommodation is necessary for a disability, the claimant or the claimant's authorized representative must notify FHB at least 10 calendar days prior to the HSD administrative hearing.

8.354.2 PASRR and Patient Status Hearings

8.354.2.7 Definitions

C.

The commenter brought a typographical error to the Department's attention: the section has left out the subsection "C" from the series.

Department Response: The Department is appreciative of bringing this to its attention. The subsection series in this section is renumbered.

D. Authorized Representative

The commenter requested the requirement that a member must designate in writing his or her authorized representative be removed.

Department Response: The Department must have a signed written document from the member when he or she designates an authorized representative to substantiate the authorized representative's scope and duration of access to the member's case information. If the member has a guardianship or a power of attorney in place, those documents substantiate for the Department who is the authorized representative, what information to release and for how long the authorized representative may access and act on behalf of the member. The Department does not require the member to write the designation him or herself; it only requires the member to sign the designation. The Department defers to the State of New Mexico laws or statutes that provide avenues of consent for individuals unable to sign documents. The language stands as proposed.

8.354.2.9 PASRR and Patient Status Hearings

The commenter expressed concerns with the removal in the proposed rule of Subsection B and C that claimants would be denied their rights to a HSD administrative hearing. The commenter requested these two sections be included in the final rule.

Department Response: The Department included in the proposed rule these sections; however, they are located in different sections and subsections of the rule. The proposed language is a mirror of the claimant hearings rule, 8.352.2 NMAC. The Department directs the commenter to review Sections 9-16 of this rule. Embedded in these sections are all the elements of Section 9 of the former rule. The Department has included in this final rule all the safeguards, protections, processes that were in place in the former rule; they have simply been renumbered to align with the flow of 8.352.2 NMAC. This action supports a claimant by having the same language and flow for each type of HSD administrative hearings. The language stands as proposed.

8.354.2.10 Right to a PASRR and Nursing Facility Transfer or Discharge HSD Administrative Hearing

The commenter requests the Department be flexible in allowing an in-person HSD administrative hearing.

Department Response: The Department directs the commenter to the rule citation within the Section 13 of 8.352.2 NMAC. This rule governs HSD administrative hearings and it affords as necessary a claimant's accommodations during the administrative hearing process. The language stands as proposed.

8.352.2.13 SCHEDULING OF A HSD ADMINISTRATIVE HEARING:

A. Scheduling: The ALJ will assign a date for a HSD administrative hearing that affords the MAD director the opportunity to render his or her HSD administrative hearing final decision within the 90 calendar day time limit. The claimant or the claimant's authorized representative must agree via a recorded message to the assigned ALJ or in writing to the assigned ALJ to extend the 90 calendar day time limit up to an additional 30 calendar days to provide the necessary time for the HSD administrative hearing to be conducted and a final decision rendered. The ALJ has the authority on a case-by-case basis to extent the 90-calendar day time limit to more than 30-calendar days when the claimant or the claimant's authorized representative requests such an extension in writing. If an accommodation is necessary for a disability, the claimant or the claimant's authorized representative must notify FHB at least 10 calendar days prior to the HSD administrative hearing.

8.354.2.11 Notice, Time Limits, Postponement, or the Dismissal of a HSD Administrative Hearing

A. Notice and C. Time Limits (2)(a)

The commenter requests the Department to follow the ISD rule, 8.100.290 NMAC, allowing 90 days to request a HSD administrative hearing. The commenter requests the Department to be flexible in allowing an in-person HSD administrative hearing.

Department Response: Concerning the first issue, 8.100.970.9B(1) NMAC provides for a HSD administrative hearing specific to MAP eligibility determinations. The Department added clarifying language to 8.352.2 NMAC that a claimant is to follow 8.352.2 NMAC for non-MAP eligibility adverse actions. The language stands as proposed.

Concerning the second issue, the Department directs the commenter to the rule citation within the Section 13 of 8.352.2 NMAC. This rule governs HSD administrative hearings and it affords as

necessary a claimant's accommodations during the administrative hearing process. The language stands as proposed.

8.352.2.13 SCHEDULING OF A HSD ADMINISTRATIVE HEARING:

A. Scheduling: The ALJ will assign a date for a HSD administrative hearing that affords the MAD director the opportunity to render his or her HSD administrative hearing final decision within the 90 calendar day time limit. The claimant or the claimant's authorized representative must agree via a recorded message to the assigned ALJ or in writing to the assigned ALJ to extend the 90 calendar day time limit up to an additional 30 calendar days to provide the necessary time for the HSD administrative hearing to be conducted and a final decision rendered. The ALJ has the authority on a case-by-case basis to extend the 90-calendar day time limit to more than 30-calendar days when the claimant or the claimant's authorized representative requests such an extension in writing. If an accommodation is necessary for a disability, the claimant or the claimant's authorized representative must notify FHB at least 10 calendar days prior to the HSD administrative hearing.

8.354.2.11 Notice, Time Limits, Postponement, or the Dismissal of a HSD Administrative Hearing

C. Time Limits

(2)(b)(i-iv)

The commenter is requesting clarification of this subparagraph.

Department Response: The Department directs the commenter to the former rule's language in this subparagraph which is word-for-word the same as the language in the proposed rule. The Department has not altered or modified its requirement when promulgating this rule. The language stands as proposed.

D. Dismissal of a hearing request

The commenter contends a HSD administrative hearing is required in order to determine if the adverse action is solely based on a NMAC MAD rule rather than the application of the rule to an individual. The commenter further contends a Fair Hearings Bureau's (FHB) Administrative Law Judge (ALJ) cannot dismiss a claimant's request for a HSD administrative hearing without the MAD Director issuing the final decision.

Department Response: Concerning the first issue raised, the CFR provides the Department a process to dismiss a request for a HSD administrative hearing as found in 42 CFR Section 431.220(b) "agency need not grant a hearing if the sole issue is a federal or state law requiring an automatic change adversely affecting some or all recipients." The language stands as proposed.

Concerning the second issue raised, the Department has the authority to designate an ALJ to render a final decision to dismiss a request for a HSD administrative hearing and asserts that a claimant does have the right to file a judicial appeal in a State district court based on an ALJ's dismissal rather than the MAD director's dismissal of a request for a HSD administrative hearing. The language stands as proposed.

8.354.2.12 Scheduling of a HSD Administrative Hearing

A. Scheduling

The commenter questions why a claimant who has waived the 90-calendar day limit for a final decision with a 30-calendar day extension cannot be granted an additional extension of time.

Department Response: The Department is within its rights under CFR to limit the number of extensions a claimant may request before a HSD administrative hearing must be conducted. Under this final rule, a claimant could be granted up to 120-calendar days before a hearing is conducted. The

Department believes adequate time has been provided for a claimant to prepare his or her case for administrative hearing, especially considering MAD carries the burden of proof, not the claimant. The language stands as proposed.

8.352.2.13 Summary of Evidence

A. Summary of Evidence

(2)

The commenter states the use of ‘claimant’s summary of evidence’ (SOE) is unnecessarily confusing, daunting, and intimidating to claimants. The commenter states a SOE has always referred to the evidence requested from the State or its contractors.

Department Response: Concerning the first issue, the Department’s references to a claimant SOE does provide an avenue for a claimant to submit a written account, documents or other material to support his or her case. The language stands as proposed.

Concerning the second issue, the claimant is not required to submit a SOE; however, if he or she so elects, there is a process by which the information is submitted into evidence during a HSD administrative hearing. The language stands as proposed.

8.352.2.13 Summary of Evidence

A. Summary of Evidence

(3)

The commenter questions how a final decision supports a denial based on a law that is not part of the record.

Department Response: The failure of MAD to not provide in its submitted SOE federal or State statutes, rules or any combination of these in and of itself cannot constitute grounds for an ALJ’s recommendation that MAD failed to meet its burden of proof. As provided in this rule, MAD may amend its SOE prior to the administrative hearing, and if allowed by the ALJ, submit into evidence information that was not included in its final SOE. An ALJ may allow a continuance of the hearing until such time as the parties to the hearing have the opportunity to review and respond to the information. The ALJ must consider the information contained within the record of the hearing in determining his or her summary of facts and recommendation. In preparing his or her summary of facts and recommendations, the ALJ may determine the information accepted into the record does not meet MAD’s burden of proof. The language stands as proposed.

8.352.2.13 Summary of Evidence

D.

The commenter asserts the requirement that any party to the hearing may not present into evidence any document or record that any other party to the hearing has not received at least two working days prior to the HSD administrative hearing is illegal and much more stringent than the formal rules of evidence. The commenter requests the elimination of the 10 working day limit as found in 8.354.2.13B(1)(a).

Department Response: Concerning the first issue, the Department believes this requirement is a safeguard to the claimant so that complex or possibly confusing information for which he or she has not had the opportunity to review, research and prepare a rebuttal are not introduced at the time of the hearing without recourse, such as a continuance. The length of the continuance may be for as little as a few minutes for the parties to determine if they consent to admitting the information into evidence or a matter of days while the parties to the hearing conduct a more in-depth review/research/rebuttal to the proposed evidence. The language stands as proposed.

Concerning the second issue, the Department reminds the commenter that the 10 working day limit is for the submission of MAD's SOE prior to the actual hearing. A claimant has from the date of the adverse action to start preparing for his or her administrative hearing and may submit a SOE up to two working days prior to hearing – while MAD must do so within 10 working days. The language stands as proposed.

“MAD’s SOE shall be delivered to the ALJ and parties to the HSD administrative hearing at least 10 working days prior to the HSD administrative hearing.”

8.354.2.15 Conducting the HSD Administrative Hearing

The commenter requests the inclusion of a re-cross examination of witnesses.

Department Response: The Department directs the commenter to Section 14 Subsection (D) of the final rule which states:

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

The Department believes the HSD administrative hearing process affords the claimant and other parties to the hearing the opportunities to present testimony and evidence into the record. The language stands as proposed.

8.354.2.18 Implementation of the HSD Administrative Final Decision

The commenter states Sections 17 and 18 of the final rule are repetitive.

Department Response: The Department believes the content of Section 17 directly relates to the heading of the section “*Continuation of Benefits Pursuant to a Timely Appeal and a HSD Administrative Hearing Proceedings.*” The content in Section 18 does include language in the main body that directly relates to the implementation of the HSD final decision. The language stands as proposed.

8.354.2.19 Judicial Appeal

C. Jurisdiction and standard of review

The commenter contends this section omits a subparagraph (4) “outside the scope of authority of the agency” as found in Rule 1-704(\$)(3) NMRA.

Department Response: The Department directs the commenter to paragraphs (1-3) which state the reasons a court may set aside a HSD administrative hearing. The Department believes these items do include protections if HSD does act outside the scope of its authority. The language stands as proposed.

The language in all other sections of these rules stand as proposed.

VI. RULES

The rules reference above will be contained in the MAD Program Rule Manual, available on the HSD website at <http://www.hsd.state.nm.us/providers/rules-nm-administrative-code-.aspx>. This register and the final rules will be posted on the HSD website at:

<http://www.hsd.state.nm.us/LookingForInformation/registers.aspx>. If you do not have internet access, a copy of the register and rules may be requested by contacting MAD at 505-827-3118.

VII. EFFECTIVE DATE

The Department will implement these rules effective August 1, 2014.

VIII. PUBLICATION

Publication of these rules approved by:

A handwritten signature in black ink, appearing to read "SIDONIE SQUIER", written over a horizontal line. The signature is stylized and includes a small mark at the end.

SIDONIE SQUIER, SECRETARY
HUMAN SERVICES DEPARTMENT