

A CONSUMER'S GUIDE

**CIVIL RIGHTS/
MEDICAID FAIR HEARINGS**

**Disability Rights Center, Inc.
1100 North University, Suite 201
Little Rock, AR 72207**

“To protect the human, civil, and legal rights of individuals with disabilities”

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MEMORANDUM

TO: Consumers Requesting Information
SUBJECT: Medicaid Fair Hearings

The following publication was prepared by legal staff of Disability Rights Center (DRC) to assist callers requesting information about Medicaid Fair Hearings. The document provides strategies and suggestions to individuals representing themselves or others at Fair Hearings, and is not intended to provide legal advice.

After the initial October, 1997 printing of this guide, the Office of Appeals and Hearings began conducting Fair Hearings by telephone. **A new section at the end of this guide addresses telephone hearings.**

WHAT IS A MEDICAID FAIR HEARING?

A Medicaid Fair Hearing is an administrative process which allows an individual to appeal an adverse decision ("Notice of Action") made by the Medicaid agency. All states participating in the Medicaid program are required by federal regulation to have such a process available.

Although the Fair Hearing is **not** a court proceeding, it is a formal proceeding in which you may present and refute evidence, examine and cross-examine witnesses, and show why the decision Medicaid made was incorrect. A Hearing Officer presides over the hearing, and issues a written decision based upon evidence presented during the hearing, as well as upon federal regulation and state policy governing the Medicaid program.

WHEN TO REQUEST A FAIR HEARING

Medicaid must grant an opportunity for a hearing to: 1) any person who has applied for Medicaid eligibility and requests a hearing because his claim for Medicaid eligibility has been denied or was not acted upon with reasonable promptness; 2) any Medicaid recipient who requests a hearing because his claim for services has been erroneously denied; 3) a nursing home resident who has been erroneously discharged or transferred; and 4) a Medicaid recipient who believes that Medicaid has made an erroneous decision related to nursing home preadmission and annual review requirements.

Most requests to DRC for assistance in Fair Hearings fall under item #2 above - the recipient who has received a "Notice of Action" from Medicaid stating that Medicaid will not pay for a particular service or approve an extension of benefits. This document deals with Fair Hearings for those individuals.

HOW TO REQUEST A FAIR HEARING

The "Notice of Action" contains a sentence which tells you where to send your request for a hearing. Requests must be made in writing within 30 days of the date of the notice. Requests should be sent to: Appeals and Hearings Section, P.O. Box 1437, Little Rock, Arkansas, 72203-1437. The request should note the date of the "Notice of Action," as well as the recipient's Medicaid number. If you are requesting a hearing for another person, make it clear that you are representing that person, so Appeals and Hearings will send copies of all future correspondence to you. **Keep a copy of everything you send.**

PREPARING FOR THE HEARING

The "Notice of Action" lists four reasons why a claim for services has been denied. The first states that the requested service is not a "medical necessity." The second states that Medicaid requested information about your claim that has not been received. The third states that Medicaid's computer shows that the person is not an eligible Medicaid recipient. The fourth reason is "other." If "other" is checked, there should be an explanation beside it.

Reasons 2 and 3 are relatively easy to resolve. Have the service provider supply the missing information, or provide proof that the person was eligible for Medicaid on the date the service was requested.

Often, "other" will be explained as, "Not a covered service." Medicaid regulations specify which services are mandatory and must be provided, and which are optional. If you are sure that the requested service is a mandatory service, then you will have to prove this at the Fair Hearing.

"Medical necessity" must be proven as well. Such requests and claims have been reviewed by Medicaid's Utilization Review Section (UR), and generally speaking, a physician working for Medicaid has determined that there is no medical necessity for the service. In order to win on this issue at a hearing, you will have to provide evidence, through documents and testimony, that your personal physician is right, and Medicaid's physician is wrong.

I. Witnesses

You will receive a letter from Appeals and Hearings which acknowledges your request for a Fair Hearing. The letter will advise you of some of your rights, such as: the right to examine the Hearing File at your county office before the hearing takes place; the right to represent yourself, or have someone else represent you; the right to question your witnesses at the hearing; the right to present arguments in your case without undue interference; the right to cross-examine Medicaid's witnesses; and the right to present other evidence (such as documents) to establish facts in your case.

Attached to the letter will be a witness list, which you will be instructed to return to Appeals and Hearing within five (5) days. The list is divided into two parts, one part for the list of people you wish to have subpoenaed (compelled to attend) for the hearing, and others who will appear willingly. If you are unsure of the number of witnesses you will need, you must notify Appeals and Hearings **in writing** that you need additional time to complete the witness list, and state the date that you will provide the list to the office. Failure to return the list means that you have lost the right to have witnesses subpoenaed. You will be notified later of the date, time and location of the hearing.

For hearings involving a question of medical necessity, one of your witnesses should be the physician who prescribed the service you have been denied. In some cases, it may be appropriate to have other medical professionals such as physical, occupational or speech therapists as witnesses. Many medical professionals object to having to be away from their other patients to attend a hearing. An acceptable alternative to having medical professionals physically present at the hearing is to make a written request to Appeals and Hearings to take the testimony of medical professionals by speaker telephone at a specific time during the hearing. Medical professionals are important to your success at the hearing, so subpoenas should be requested for them.

The UR physician who made the determination that your requested service was not medically necessary should also be subpoenaed. If you do not know the identity of this person or persons, you may wish to list "Unknown Medicaid UR Physician(s)" on your subpoena list.

You may wish to use witnesses in addition to medical professionals to make your

case. These individuals should have **first-hand knowledge** of the reason for the hearing, and in cases of medical necessity, must offer testimony which supports the medical need for the service. Such witnesses could be a public school teacher or aide who assists a child needing a Medicaid service, a personal care or home health aide who assists an adult, etc. It is not advisable to bring in witnesses just for moral support. Nor is it a good idea to bring a number of witnesses who all say the same thing. If the witness cannot add something new and relevant to the hearing, s/he should not be called as a witness.

The Hearing Officer and/or the Medicaid representative at the hearing may also have questions for your witnesses.

a. Qualifications of your medical professional witness

As with all your witnesses, you should prepare the testimony of the medical professional(s) who testify for you before you get to the hearing. You may wish to write out all the questions you will ask each witness on a separate sheet of paper for each. You should go over the questions in advance with each witness. All witnesses should be asked to identify themselves for the record.

Medical professionals should be asked questions such as: the name of the educational facility where the witness received his/her professional training and date graduated; how long the witness has been licensed to practice in his/her field; any other medical training related to the case at hand; how long the Medicaid recipient has been a patient in his/her care and patient's diagnosis which makes the requested service

medically necessary, and date of last examination of the patient. You may also ask this witness what type of outcome would result if the patient does not receive the requested service.

You will also ask some of these same questions of the Medicaid UR physician who made the decision to deny services. Your goal will be to show that the patient's physician/medical professional is more qualified to prescribe medically necessary appropriate treatment for the Medicaid recipient than the Medicaid UR physician. As you question this witness, it will be clear that s/he has never met the patient, much less examined him/her, and s/he may not have qualifications and training specific to the patient's diagnosis.

All other witnesses should be asked questions which make clear the relationship between the witness and the Medicaid recipient, as well as demonstrating first-hand knowledge of the need for the service requested.

II. Documents as evidence

You should make a written request to review the Hearing File. Your letter should state that you wish to review the file as soon as it is complete and available at the DHS county office. During your review, you should ask for a copy of all documents in the file, as well as a signed and dated statement from a DHS county employee stating that you have received a copy of the **complete** Hearing File. This is important, because you should review the file again, no later than the day before the hearing takes place. Documents in the Hearing File are automatically part of the official record. If you

discover that additional documents have been added to the file since your first review, you may 1) object to the supplement to the record, because you have not had time to review these documents and prepare a response, and 2) ask that the hearing be continued to allow you time to prepare a response to the information contained in the new documents.

Documents in your possession which support your case may be offered into evidence at the hearing. In order to have them admitted, you should provide a witness to testify as to the document's authenticity, well as to answer any questions the Hearing Officer or Medicaid representative may have about the document. Documents you may consider using could include independent medical evaluations which support your position. In cases where Medicaid has denied a claim for services, e.g. personal care, because Medicaid believes there is an already existing source of care, such as a spouse or parent, you may choose to offer documents such as employment time records which show that there is a specific period of time in which the "existing source of care" is not available.

You should bring four (4) copies of documents you intend to offer - one each for you, your witness, the Hearing Officer, and the Medicaid representative. As a courtesy, you may offer, in writing, to provide these documents to Appeals and Hearings in advance of the hearing.

III. Other things to consider

If you are representing yourself, or a person with a disability who will be present at the hearing, you should consider any auxiliary aids or services or modifications needed during the hearing such as sign language or other interpreters, a raised table for

a person who uses a wheelchair, etc. You should request these modifications in advance, by writing Appeals and Hearings. It is the responsibility of Appeals and Hearings to provide modifications which are reasonable. Often, the hearing takes place at the DHS county office. If the hearing location is physically inaccessible to any of the participants in the hearing, you should request, in writing, that an alternate accessible location be used instead.

DURING THE FAIR HEARING

Federal regulations governing the Medicaid program require that hearings must be conducted at a reasonable time, date and place. Generally, the hearing is held in the county where the Medicaid recipient lives. The hearing is audiotaped to provide a record, and the Hearing Officer usually takes notes during the hearing. Appeals and Hearings does not provide a written transcript of the hearing, unless the decision was an adverse one, and you have notified Appeals and Hearing that you intend to appeal.

The Hearing Officer presides over the hearing, and opens the hearing by identifying all persons present, as well as stating the reason for the hearing. Generally, all persons present who will testify are "sworn," just as in a court of law. Individuals who testify by telephone are sworn just prior to giving testimony.

You may choose to give an opening statement and closing argument, but this is not required. If you do so, keep the statements brief, and in the opening statement, simply explain what you **will show** (don't use the word "prove") during the hearing. Likewise, for your closing argument, summarize what you **have shown** to be true.

At the conclusion of the hearing, the Hearing Officer will gather all the documents admitted into the record for review before issuing his/her written decision. In cases of medical necessity, s/he may state that the record will be reviewed by a physician for a medical necessity determination. If this happens, make sure you request that the record be reviewed by a physician who has not had any previous involvement in your case. Ask that your request be noted for the record.

THE DECISION

You will receive a copy of the written decision. As stated earlier, Appeals and Hearings only provides transcripts of hearings in the event of an adverse decision which will be appealed. The Hearing Officer will inform you at the hearing that adverse decisions may be appealed to Circuit Court. In some cases, such appeals may also be filed in U.S. District Court.

TELEPHONE HEARINGS

After the October, 1997 printing of this guide, the Office of Appeals and Hearings began conducting Fair Hearings by telephone. One reason for the telephone hearings is to be able to get to a hearing more quickly. The Office of Appeals and Hearings will *automatically* schedule a telephone hearing for you, unless you advise the office you want a face-to-face hearing. There are reasons for a face-to-face hearing, and this issue should be considered by the representative for each individual hearing.

TIME AND PLACE:

You will be given the time, date and place of the hearing on your "Notice of

Hearing." Generally speaking, you will report to your county office, and so will your witnesses. The Hearing Officer, and if called as a witness(es), UR physician and/or staff, will be in Little Rock. The Hearing will be conducted by speaker telephone.

DOCUMENTS AS EVIDENCE:

Documents which you wish to have considered as evidence should be submitted by *certified mail, return receipt requested* to the Hearing Officer listed on your "Notice of Hearing." If you discover that you have late documents you wish to have considered, bring them to the hearing and tell the hearing officer over the phone that you want the documents considered. The County Office staff may be able to fax them to the Hearing Officer.

WHEN YOU GET TO THE COUNTY OFFICE:

Identify yourself to the receptionist and show her your "Notice of Hearing." You and your witnesses will be taken to a private office with telephone equipment. County office staff will show you how to use the telephone equipment and will perform necessary steps to begin the hearing.

The hearing will follow the same steps as a face-to-face hearing. Since you will be talking on the phone, be sure to speak slowly and clearly. Do not interrupt when another person is speaking, and identify yourself (or your witness) before you begin speaking. If you have difficulty hearing anyone speaking, let the Hearing Officer know immediately.