

TITLE 8 SOCIAL SERVICES
CHAPTER 354 PREADMISSION SCREENING AND ANNUAL RESIDENT REVIEW (PASRR) AND
PATIENT STATUS POLICIES
PART 2 PASRR AND PATIENT STATUS HEARINGS

8.354.2.1 ISSUING AGENCY: New Mexico Human Services Department.
[2/1/95; 8.354.2.1 NMAC - Rn, 8 NMAC 4.MAD.000.1, 3/1/12]

8.354.2.2 SCOPE: The rule applies to the general public.
[2/1/95; 8.354.2.2 NMAC - Rn, 8 NMAC 4.MAD.000.2, 3/1/12]

8.354.2.3 STATUTORY AUTHORITY: The New Mexico medicaid program is administered pursuant to regulations promulgated by the federal department of health and human services under Title XIX of the Social Security Act, as amended and by the state human services department pursuant to state statute. See Section 27-2-12 et seq. NMSA 1978 (Repl. Pamp. 1991).
[2/1/95; 8.354.2.3 NMAC - Rn, 8 NMAC 4.MAD.000.3, 3/1/12]

8.354.2.4 DURATION: Permanent
[2/1/95; 8.354.2.4 NMAC - Rn, 8 NMAC 4.MAD.000.4, 3/1/12]

8.354.2.5 EFFECTIVE DATE: November 1, 1996
[11/1/96; 8.354.2.5 NMAC - Rn, 8 NMAC 4.MAD.000.5, 3/1/12]

8.354.2.6 OBJECTIVE: The objective of these regulations is to provide policies for the service portion of the New Mexico medicaid program. These policies describe eligible providers, covered services, noncovered services, utilization review, and provider reimbursement.
[2/1/95; 8.354.2.6 NMAC - Rn, 8 NMAC 4.MAD.000.6, 3/1/12]

8.354.2.7 DEFINITIONS: [RESERVED]

8.354.2.8 MISSION STATEMENT: The mission of the New Mexico medical assistance division (MAD) is to maximize the health status of medicaid-eligible individuals by furnishing payment for quality health services at levels comparable to private health plans.
[2/1/95; 8.354.2.8 NMAC - Rn, 8 NMAC 4.MAD.002 3/1/12]

8.354.2.9 PASRR AND PATIENT STATUS HEARINGS: The human services department (HSD) has established a hearing process for medicaid recipients who are adversely affected by the preadmission screening and annual resident review (PASRR) required by Section 1919(e)(7) of the Social Security Act and for individuals whom a nursing facility proposes to transfer or discharge. This part describes the right to a hearing, notice requirements, initiation of a hearing, prehearing procedures, hearing standards, hearing process, hearing decisions and review of hearing decisions.

A. **Definition of terms:** For purposes of this section the following definitions apply:
(1) "claimant" is any individual requesting review; the department of health (DOH) and/or a particular nursing facility (NF) may be parties to the hearing; and
(2) "respondent" is the DOH and/or a NF provider.
B. **Hearing rights:** The right to a hearing includes the right to:
(1) be advised of the nature and availability of a hearing;
(2) be represented by counsel or other person of the claimant's choice. HSD does not provide or pay for the claimant's representation;
(3) have a hearing which safeguards the claimant's opportunity to present a case;
(4) have prompt notice and implementation of the hearing decision; and
(5) be advised that judicial review may be invoked to the extent such review is available under state law; the cost of such proceeding to be at no expense to HSD.

C. **Notice of rights:**
(1) The written notice of a PASRR determination and/or a proposed transfer or discharge from a NF includes information concerning hearing rights. The notice informs the individual of the following:

- (a) his/her right to request a hearing;
 - (b) method by which a hearing may be requested (either orally or in writing); and
 - (c) claimant's presentation may be made by him/herself or a household member or other representative, such as legal counsel, a relative, a friend or other spokesperson.
- (2) In cases involving a PASRR determination, notice of hearing rights is submitted by DOH and HSD.

(3) In cases involving transfer or discharge, notice of hearing rights is submitted by the NF provider. [11/1/96; 8.354.2.9 NMAC - Rn, 8 NMAC 4.MAD.990, 3/1/12]

8.354.2.10 INITIATION OF HEARING PROCESS:

A. **Request for hearing:** The hearing process is initiated by a claimant's request for hearing made in response to a DOH notice concerning PASRR status or a notice by a NF provider concerning transfer or discharge. See 8.200.430.12 NMAC, *right to hearing*, for additional information on hearing rights.

B. **Time limits:** A claimant has ninety (90) calendar days after the date on the notice of action to request a hearing. To be considered timely, the request must be received by the HSD hearing bureau no later than the close of business on the ninetieth (90th) day.

(1) **Decision time limits:** Hearings are conducted and a written decision is issued to the claimant within ninety (90) calendar days from the date the hearing bureau receives the hearing request.

(2) **Continuation of status:** If a hearing concerning transfer or discharge is requested before the date of the proposed action, the individual's status is not changed pending the hearing decision, except when:

- (a) the health or safety of individuals in the NF would be endangered by the claimant's continued presence;
- (b) the claimant's health improves sufficiently to allow a more immediate transfer or discharge;
- (c) an immediate transfer or discharge is required by the claimant's urgent medical needs; or,
- (d) the claimant has not resided in the NF for thirty (30) calendar days.

C. **Eligibility:**

(1) An opportunity for hearing is given to:

- (a) a medicaid recipient who requests it because he/she believes that the respondent has made a mistaken determination with regard to the PASRR requirements of Section 1919(e)(7) of the Social Security Act;
- (b) any NF resident who requests it because he/she believes that a NF provider has mistakenly determined that he/she is to be transferred or discharged.

(2) **Non-interference with request:** The right to file a request for hearing must not be limited or interfered with in any way, as long as the request is made in a timely manner and in accordance with this section.

(3) **Denial and/or dismissal of request for hearing:** HSD may deny and/or dismiss a request for a hearing when:

- (a) the request was not received in a timely manner or within the time period stated in the notice of action;
- (b) the request was withdrawn or canceled in writing by the claimant or the claimant's authorized representative;
- (c) the sole issue presented concerns a federal or state law which requires an adjustment affecting all or certain classes of individuals;
- (d) the claimant fails to appear at a scheduled hearing without good cause; or
- (e) the same issue has already been appealed and a hearing decision made regarding this claimant and fact situation.

(4) **Abandonment:** A request for a hearing may be considered abandoned, and therefore dismissed, if neither the claimant nor his/her representative appears at the time and place of the hearing unless, within ten (10) calendar days after the date of the scheduled hearing, the claimant presents good cause for failing to appear. "Good cause" includes a death in the family, disabling individual illness or other significant emergencies. At the discretion of the hearing officer, other exceptional circumstances may be considered good cause.

D. **Method:** A request for hearing is made by writing or telephoning the HSD hearings bureau. Any definite statement by the claimant or the claimant's authorized representative that he/she wants to appeal a NF provider's transfer and/or discharge determination or a PASRR decision is considered to be a request for hearing.

E. **Acknowledgment of request:** The hearings bureau sends written acknowledgment of the receipt of a hearing request to the claimant, the NF provider and/or DOH.

[11/1/96; 6/1/98; 8.354.2.10 NMAC - Rn, 8 NMAC 4.MAD.991, 3/1/12]

8.354.2.11 PREHEARING PROCEDURE.

A. **Notice of hearing:** Not less than ten (10) calendar days before a hearing, written notice is given to all parties involved, of the time, date, and place of the hearing. With the hearing notice, the parties are also given an explanation of the hearing process and procedures. The claimant is provided with information concerning resources in the community that might provide legal representation or other help at the hearing. Claimants are advised that HSD does not pay for their or the respondent's representation or legal counsel.

B. **Postponement:** A claimant may request and is entitled to receive, one postponement of the scheduled hearing as long as it does not interfere with the decision time frames. Requests for a postponement by the respondent(s), or a request for more than one postponement by the claimant, are considered on a case-by-case basis at the discretion of the hearing officer.

C. **Expedited hearing:** PASRR and patient status hearings are scheduled as priority matters as practicable and consistent with other hearings bureau responsibilities.

D. **Group hearings:** A hearing officer may respond to a series of individual requests for hearing by conducting a single group hearing. Group hearing procedures apply only to cases where individual issues of fact are not disputed, and where related issues of state and/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 his/her own case or to be represented by his/her attorney or other individual. If a group hearing is arranged, any individual claimant has the right to withdraw from the group hearing in favor of an individual hearing.

E. **Prehearing conference:** At the discretion of the hearing officer, a prehearing conference may be scheduled before the hearing to discuss the issues involved in the hearing. Conference participants may include the claimant and/or the claimant's representative, the respondent(s) and/or the respondent's representative, and the hearing officer.

(1) The purpose of the conference is to determine whether some or all issues can be resolved by mutual agreement, to clarify and further define the matters to be decided at the hearing, and/or resolve any procedural disputes concerning availability and exchange of information.

(2) Regardless of the outcome of the conference, a hearing is still held unless the claimant makes a written withdrawal of the request for hearing.

(3) The parties may be asked to submit a prehearing order containing a statement of the issues to be decided at the hearing, summaries of evidence each side will present, and the names of witnesses. The parties may also be asked to submit briefs or memoranda to the hearing officer on any points of law which are at issue.

F. **Summary of evidence:** A written narrative which provides background information concerning the issues must be prepared by the respondent and forwarded to the hearings bureau within seven (7) calendar days of the respondent's receipt of the hearings bureau's acknowledgment of a hearing request.

(1) The narrative must contain the following:

(a) identifying information, including but not limited to the claimant's name, social security number and address;

(b) description of the proposed action or PASRR determination being appealed;

(c) statement of the issues on appeal and/or the question or issue of disagreement to be decided at hearing;

(d) information on which the DOH or NF provider decision is based and the relevant facts and findings that relate to the decision issue;

(e) applicable federal and state regulations or legal authority involved; and

(f) other relevant facts and/or information about the claimant or the procedure which affected the decision being appealed.

(2) Copies of the notice of the action or proposed action must be attached to the narrative along with copies of other documents or records upon which the action or proposed action was based. A copy of the narrative and supporting documentation is provided to the claimant and/or the claimant's representative.

G. **Availability of information:** To ensure that a claimant has the information necessary to proceed to hearing, the respondent(s) must:

(1) provide, on request, in a timely manner without charge, the case documents necessary for a claimant or representative to decide whether to request a hearing or to prepare for a hearing;

(2) provide an interpreter to explain hearing procedures and interpret at the hearing if the claimant speaks a language other than English and the HSD area in which claimant lives is required to provide bilingual staff or interpreters who speak the appropriate language;

(3) upon request, provide claimant help in submitting a hearing request; if a claimant makes an oral request for a hearing to the DOH or NF provider staff, the DOH or NF staff completes the necessary procedures to start the hearing process by reporting and/or forwarding the request to the hearings bureau;

(4) inform claimant, at the time of the hearing request, of any legal services available that can provide representation at the hearing;

(5) allow the claimant or the claimant's representative to examine all documents to be used at the hearing at a reasonable time before the date of the hearing and during the hearing;

(6) if requested by the claimant or representative, the respondent must provide copies of the portions of the case file that are relevant to the hearing; confidential information protected from release, and other documents or records which the claimant would not otherwise have an opportunity to challenge or contest, may not be introduced at the hearing or affect the hearing officer's decision; and

(7) provide the claimant a copy of the summary of evidence.

[11/1/96; 6/1/98; 8.354.2.11 NMAC - Rn, 8 NMAC 4.MAD.992, 3/1/12]

8.354.2.12 HEARING STANDARDS:

A. **Rights at hearing:** The parties to the hearing are given an opportunity to:

(1) present their case or have it presented by a representative; bring witnesses to present information that is relevant to the case; and submit evidence to establish all pertinent facts and circumstances in the case;

(2) advance arguments without undue interference; and

(3) question or contradict any testimony or evidence, including an opportunity to confront and cross-examine opposing witnesses;

B. **Hearing officer:**

(1) Hearings must be conducted by an impartial official who:

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

(b) was not directly involved in the determination or the action which is being contested.

(2) If a hearing officer had any involvement with the action in question, including giving advice or consultation on the points at issue, or is personally related to the parties, he/she must disqualify him/herself as the hearing officer for that case. If either party has issues regarding the impartiality of the hearing officer, it must be raised in a timely manner to the hearings bureau chief for decision.

(3) Authority and duties of the hearing officer: The hearing officer must:

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

(b) administer oaths and affirmations;

(c) ensure that all relevant issues are considered during the hearing;

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

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

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

(g) provide a hearing report and recommendation for review and final decision.

(4) Appointment of hearing officer: The hearing officer is appointed by the hearings bureau chief upon receipt of the request for hearing.

C. **Evidence:** Formal rules of evidence and civil procedure do not apply. A free, orderly exchange of information is necessary for the decision-making process. All relevant evidence is admissible, subject to the hearing officer's authority to limit repetitive or unduly cumulative evidence and conduct an orderly hearing.

(1) Confidentiality: The confidentiality of records is to be maintained. Information not available to the claimant or respondent may not be presented to the hearing officer or used in making the hearing decision.

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

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

(4) Medical issues: In cases where an appeal involves medical care or a medical condition, the parties have the right to examine any documents which may influence the decision. Any medical reports are made available to all parties. If in the possession of the respondent, copies are provided to the claimant, without charge, before or during the hearing.

D. **Burden of proof:** The respondent(s) has the burden of proving the basis to support its proposed action by a preponderance of the evidence. The action or proposed action being appealed is upheld if the evidence supporting the action is more convincing than the evidence offered in opposition to the action.

E. **Record of the hearing:** A hearing is electronically recorded. The recording is placed on file at the hearings bureau and is available for examination by the parties for sixty (60) calendar days after the hearing. In addition to the recorded proceedings, the record of the hearing includes any pleadings, documents or exhibits admitted into the record. If a decision is appealed, a written transcript of the hearing is prepared by HSD and a copy of the transcript is supplied to the parties free of charge.

[11/1/96; 8.354.2.12 NMAC - Rn, 8 NMAC 4.MAD.993, 3/1/12]

8.354.2.13 CONDUCTING THE HEARING: A hearing is conducted in an orderly manner and in an informal atmosphere. The hearing is not open to the public. The hearing may be conducted by telephone or in person, but the hearing officer must attempt to conduct the hearing in individual. The hearing officer has the authority to limit the number of individuals in attendance if space or other considerations dictate.

A. **Opening the hearing:** The hearing is opened by the hearing officer. Before a hearing by telephone, the hearing officer explains the telephone procedures to the parties. The individuals present are asked to identify themselves for the record. The hearing officer explains his/her role in the proceedings and that the final decision on the appeal will be made by the medical assistance division (MAD) director. The order of testimony is described and the oath is administered to all who testify at the hearing.

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

- (1) opening statements of parties or representatives;
- (2) respondent(s) presents witnesses and other evidence; the order of examination of each witness is:
 - (a) direct testimony of the witness;
 - (b) cross-examination by claimant or the claimant's representative;
 - (c) examination or further questions by the hearing officer or, if requested, the respondent's representative;
- (3) claimant presents witnesses and other evidence; the order of examination of each witness is:
 - (a) direct testimony of the witness;
 - (b) cross examination by respondent or the respondent's representative;
 - (c) examination or further questions by the hearing officer or, if requested, by the claimant's representative;
- (4) presentation of rebuttal evidence by the respondent(s) and claimant;
- (5) the hearing officer may direct further questions to the parties, or any witnesses, to clarify inconsistencies or obtain an adequate evidentiary record;
- (6) the hearing officer may ask the parties to summarize and present closing arguments.

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

D. **Continuance:** The hearing officer may continue the hearing upon the request of either party or on his/her own motion, for the admission of additional testimony or other evidence. The granting of a continuance is at the discretion of the hearing officer and is allowed only 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 are 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 continuance.

E. **Additional documentary evidence:** If the hearing officer needs further documentary evidence, he/she may close the hearing but keep the record open and direct the parties to submit such evidence. Each party must receive a copy of the documentary evidence being submitted and is allowed an opportunity to respond to the submission, in writing, within ten (10) calendar days of its receipt.

F. **Re-opening a hearing:** At his/her discretion, the hearing officer 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 time frame. Written notice of the date, time and place of the re-opened hearing is sent to the parties, not less than ten (10) calendar days before the re-opened hearing.

[11/1/96; 6/1/98; 8.354.2.13 NMAC - Rn, 8 NMAC 4.MAD.994, 3/1/12]

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

A. **Decision based on the record:** The hearing decision can be based only on the evidence introduced during the hearing. This includes the record of the testimony and all reports, documents, forms and other material made available at the hearing, provided that the claimant had an opportunity to examine them as part of the hearing process.

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

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

(2) **Recommendation:** The hearing officer recommends:

(a) in favor of the claimant, if the action or proposed action at issue is not supported by a preponderance of the evidence available as a result of the hearing;

(b) in favor of the respondent(s) if the preponderance of the evidence, available as a result of the hearing, supports the conclusion that the action or proposed action at issue is in accordance with regulations, policy and law; or

(c) any other result supported by the record.

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 laws, regulations and policy.

D. **Final decision:** The hearing officer's recommendation may be adopted or rejected in a final written decision by the MAD director on the issues that were the subject of the hearing. The MAD director specifies the reasons for the decision and identifies the evidence supporting the decision. No individual who participated in the original action under appeal may participate in arriving at a final decision.

E. **Notice to parties:** The parties are sent written notice of the decision, its effect upon patient status or PASRR/determination and the right to examine the official record of the hearing. If a party is represented by legal counsel, the legal counsel is provided a copy of the decision. The notice of the decision includes an explanation that the parties have exhausted all administrative remedies and are free to pursue judicial review of the claim. This explanation includes information concerning the place, time and manner for requesting judicial review. [11/1/96; 6/1/98; 8.354.2.14 NMAC - Rn, 8 NMAC 4.MAD.995, 3/1/12]

8.354.2.15 IMPLEMENTATION OF DECISION: HSD's decision is binding on all issues that have been the subject of a hearing as to the specific parties unless stayed by court order. [11/1/96; 8.354.2.15 NMAC - Rn, 8 NMAC 4.MAD.996, 3/1/12]

8.354.2.16 JUDICIAL REVIEW: All parties have the right to pursue judicial review of the decision and is notified of that right at the time of the decision. [11/1/96; 8.354.2.16 NMAC - Rn, 8 NMAC 4.MAD.997, 3/1/12]

HISTORY OF 8.354.2 NMAC: [RESERVED]