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## **Advocates' Guide to Accessibility in Medicaid Managed Care Grievances and Appeals**

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## INTRODUCTION

Medicaid programs are required to maintain a bifurcated system of appeals. Each managed care plan must establish and maintain an internal grievance and appeal system under which enrollees may challenge adverse benefit determinations or any other matter the enrollee is unsatisfied with.<sup>1</sup> Additionally, the State Medicaid Agency is required to maintain a fair hearing system that provides enrollees and potential enrollees with an opportunity to appeal the managed care plan's decision and otherwise challenge eligibility or benefits denials or delays.<sup>2</sup>

In May 2016, the Department of Health and Human Services ("HHS"), Centers for Medicare & Medicaid Services ("CMS") promulgated regulations outlining new procedural requirements for managed care plans' grievance and appeal systems.<sup>3</sup> With a compliance date beginning with the rating period for managed care contracts starting on or after July 1, 2017,<sup>4</sup> States are just beginning to incorporate the new regulations into their Medicaid rules.<sup>5</sup> These changes provide an opportunity to not only shape State regulations to comply with the federal rules, but also to embed language that goes beyond the federal baseline and more fully effectuates the rights of Medicaid beneficiaries.

This document provides guidance on how States can, in the process of implementing the new federal regulations, ensure that people with disabilities have equal access to the grievance and appeal and State fair hearing systems, as mandated by Section 504 of the Rehabilitation Act ("Rehab Act"), the Americans with Disabilities Act ("ADA"), and Section 1557 of the Affordable Care Act ("ACA"). It provides advocates with an outline of potentially problematic areas in the appeals process and provides suggested language for the content of State

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<sup>1</sup> 42 U.S.C. § 1396u-2(b)(4) (2012); 42 C.F.R. § 438.400(a)(3) (2017).

<sup>2</sup> 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.220, 438.408(f)(1). State Fair Hearings are available when an individual's claim for assistance is denied or not acted upon promptly. 42 U.S.C. § 1396a(a)(3). Other grievances, e.g., complaints about quality of care or interpersonal relationships with providers, do not trigger fair hearing rights. *Id.*

<sup>3</sup> Medicaid & CHIP Managed Care Final Rule, 81 Fed. Reg. 27,498 (May 6, 2016) (codified at 42 C.F.R. pts. 431, 433, 438, et al.).

<sup>4</sup> *Id.*

<sup>5</sup> Nationwide compliance has been slowed, in part, by the Trump administration's exercise of enforcement discretion. In a June 2017 Informational Bulletin, CMS asserted that it "intends to use [] enforcement discretion to focus on working with states to achieve compliance with the managed care regulations when states are unable to implement new and potentially burdensome requirements of the final rule by the required compliance dates." CTR. FOR MEDICAID & CHIP SERVS., CTRS. FOR MEDICARE & MEDICAID SERVS., INFORMATIONAL BULLETIN RE: MEDICAID MANAGED CARE REGULATIONS WITH JULY 1, 2017 COMPLIANCE DATES (June 30, 2017), available at <https://www.medicaid.gov/federal-policy-guidance/downloads/cib063017.pdf>.

implementing regulations—to be utilized during commenting periods. Each section begins with a broad overview of the federal accessibility regulations that are binding on managed care plans and/or Agencies. It then proceeds chronologically through the various steps in the grievance and appeal and State fair hearing processes, suggesting regulatory language to improve physical and programmatic accessibility at each step.

Please note that while this guide’s suggested regulatory language is primarily grounded in the binding federal Medicaid regulations, with appropriate citations throughout, this guide also recommends provisions that go beyond these regulations. Language that does *not* find specific authority in the federal Medicaid rules (but may nonetheless be required to effectuate an applicant’s or enrollee’s ADA, Section 504, and/or ACA Section 1557 rights) is denoted with an asterisk (\*).

### Suggestions?

DREDF welcomes feedback from advocates on any alternative regulatory or policy approaches that have proved successful in their State(s), and we will revise this guide periodically as needed. To suggest revisions to this guide, please contact Carly Myers ([cmyers@dredf.org](mailto:cmyers@dredf.org)) or Silvia Yee ([syee@dredf.org](mailto:syee@dredf.org)).

## I. GRIEVANCES AND APPEALS

Each Medicaid Managed Care Organization (“MCO”), Prepaid Inpatient Health Plan (“PIHP”), and Prepaid Ambulatory Health Plan (“PAHP”) must establish and maintain an internal grievance and appeal system for its enrollees to challenge denials of coverage or payment for medical assistance.<sup>6</sup> Enrollees have the right to *appeal* any adverse benefit determination<sup>7</sup> and file a *grievance* if they are unsatisfied about any other matter, including quality of care and complaints about providers or employees.<sup>8</sup>

The grievance and appeals system must be accessible to people with disabilities, consistent with Section 504 of the Rehab Act, the ADA, and Section 1557 of the ACA. Specifically, each MCO, PIHP, and PAHP must give enrollees “any reasonable assistance” in taking procedural steps related to the grievance or appeal.<sup>9</sup> This includes, but is not limited to, providing “auxiliary aids and services,” such as “interpreter services,” “toll-free numbers that have adequate TTY/TTD and interpreter capability,” and alternative-format and/or large font (no smaller than 18-point) written materials, upon request and at no cost.<sup>10</sup> Furthermore, all enrollees must be notified of their right to auxiliary aids and services and how to access them.<sup>11</sup>

This Section provides guidance on how these accessibility requirements can be incorporated into the procedures and practices of each Medicaid managed care plan’s grievance and appeals system.

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<sup>6</sup> 42 U.S.C. § 1396u-2(b)(4); 42 C.F.R. § 438.402(a).

<sup>7</sup> 42 C.F.R. §§ 438.402 (general requirement), 438.400(b) (defining “appeal”). Adverse benefit determination means any of the following: “(1) The denial or limited authorization of a requested service, including determinations based on the type or level of service, requirements for medical necessity, appropriateness, setting, or effectiveness of a covered benefit. (2) The reduction, suspension, or termination of a previously authorized service. (3) The denial, in whole or in part, of payment for a service. (4) The failure to provide services in a timely manner, as defined by the State. (5) The failure of an MCO, PIHP, or PAHP to act within the timeframes . . . regarding the standard resolution of grievances and appeals. (6) For a resident of a rural area with only one MCO, the denial of an enrollee's request to exercise his or her right . . . to obtain services outside the network. (7) The denial of an enrollee's request to dispute a financial liability, including cost sharing, copayments, premiums, deductibles, coinsurance, and other enrollee financial liabilities.” *Id.* § 438.400(b).

<sup>8</sup> *Id.* §§ 438.402 (general requirement), 438.400(b) (defining “grievance”).

<sup>9</sup> *Id.* § 438.406(a).

<sup>10</sup> *Id.* §§ 438.406(a), 438.10(d)(3).

<sup>11</sup> *Id.* § 438.10(d)(5).

## A. Notice of Adverse Benefit Determination or Plan Action

A Medicaid enrollee may first engage with the grievance and appeals system upon receiving notice of an adverse benefit determination or other plan action relating to the claimant's receipt of aid. It is critical that these notices are available in accessible formats, as they inform individuals of actions or inactions that directly impact their receipt of health benefits. We recommend that State regulations incorporate the following language to ensure that all notices are accessible to people with disabilities:

### NOTICE OF ADVERSE BENEFIT DETERMINATION OR PLAN ACTION

1. **General Rule.** Each MCO, PIHP, and PAHP must provide all notices of adverse benefit determinations and other plan actions, as required by federal or state law, in writing and in a manner and format that may be easily understood and is readily accessible to the enrollee. 42 C.F.R. § 438.10(c)(1).
2. **Format of Notice.** All notices must comply with the accessibility requirements detailed at 42 C.F.R. § 438.10. Specifically, such notices shall:
  - A. Use easily understood and readily accessible format and language. 42 C.F.R. § 438.10(c)(1), (d)(6)(i). Readily accessible means the notice complies with modern accessibility standards, such as Section 508 guidelines, Section 504 of the Rehabilitation Act, and W3C's Web Content Accessibility Guidelines ("WCAG") 2.0 AA and successor versions. 42 C.F.R. § 438.10(a).
  - B. Use a font size no smaller than 12 point. 42 C.F.R. § 438.10(d)(6)(ii).
  - C. Be available in alternative formats and through the provision of auxiliary aids and services in an appropriate manner that takes into consideration the special needs of enrollees with disabilities. 42 C.F.R. § 438.10(d)(6)(iii). Such alternative format materials and auxiliary aids and services shall be available upon request and at no cost to the enrollee. 42 C.F.R. § 438.10(d)(3).
    - i. Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices. 45 C.F.R. § 85.3.

ii. Alternative format materials include, but are not limited to, large print, Braille, audio, or digital navigable formats supported by computers or digital talking-book players transmitted through CD, flash drive, or other requested media. Alternative format materials shall be provided in conjunction with and in the same envelopes as their standard-print counterparts.\*

D. Include a large print tagline and information on how to request auxiliary aids and services, including the provision of materials in alternative formats. Large print means printed in a font size no smaller than 18 point. 42 C.F.R. § 438.10(d)(6)(iv).

3. **Record of Accommodation Request.** Each MCO, PIHP, and PAHP shall make a record of each enrollee's request for an alternative format notice and/or auxiliary aid or service, and it shall develop and implement procedures to ensure that all future notices to the enrollee are provided in conformity with the original accommodation request(s). The enrollee retains the right to modify or cancel his or her original accommodation request at any time.\*

#### **PRACTICE TIP: The Intersection of Disability and LEP**

In addition to disability accessibility requirements, the federal regulations also detail the State Agency's and managed care plan's requirements to provide language assistance to individuals who have limited English proficiency ("LEP"). See 42 C.F.R. § 438.10. Keep in mind that these rules are not mutually exclusive—an individual may simultaneously need and request accommodations for their disability and LEP. In such a situation, the Agency, MCO, PIHP, or PAHP must take into account both needs when providing an alternative format and/or auxiliary aid or service. For example, an individual may have a visual impairment and only speak Spanish. In this situation, a Spanish audio recording, a Spanish document formatted for use with a screen reader, or Brailled Spanish material may be appropriate, depending on the individual's needs and preferences.

#### **B. Examination of Case File**

A Medicaid enrollee has a right to examine his or her case file, including medical records, other documents or records, and any evidence considered, relied upon, or generated in connection with the grievance or appeal.<sup>12</sup> It is essential that this case file is accessible for disabled enrollees, as it may assist them in determining whether to file a grievance, appeal, and/or request for a State hearing, and it may help them prepare their underlying legal and

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<sup>12</sup> *Id.* § 438.406(b)(5).

factual arguments. We recommend that State regulations incorporate the following language to ensure that the all records in the case file are accessible to people with disabilities:

#### EXAMINATION OF CASE FILE

1. **General Rule.** A Medicaid enrollee is entitled to examine his or her case file, including medical records, other documents and records, and any evidence considered, relied upon, or generated in connection with the grievance or appeal. This information must be provided free of charge and sufficiently in advance of the resolution timeframe. 42 C.F.R. § 438.406(b)(5).
2. **Reasonable Assistance.** The MCO, PIHP, or PAHP must provide reasonable assistance to an enrollee examining his or her case file. This includes, but is not limited to, providing auxiliary aids and services upon request and at no cost, such as providing alternative formats, interpreter services, and/or toll-free numbers that have adequate TTY/TTD and interpreter capability. See 42 C.F.R. § 438.406(a).<sup>13</sup>

#### C. Filing a Grievance or Appeal

A Medicaid enrollee has the right to file an appeal to challenge any adverse benefit determination.<sup>14</sup> An enrollee also has the right to file a grievance if he or she is unsatisfied about any matter other than an adverse benefit determination, including the quality of care or services provided or aspects of interpersonal relationships (e.g., a provider or employee's rudeness or failure to respect the enrollee's rights).<sup>15</sup> In order to ensure that enrollees with disabilities can effectuate their rights to file a grievance or appeal, it is important that filing methods, timing requirements, and notices are accessible. We recommend that State regulations incorporate the following language:

#### FILING A GRIEVANCE OR APPEAL

1. **General Rule.** An enrollee may file a grievance or appeal either orally or in writing and, as determined by the State, either with the State or with the MCO, PIHP, or PAHP. 42 C.F.R. § 438.402(c)(3).
2. **Reasonable Assistance.** The MCO, PIHP, or PAHP must provide reasonable assistance to the enrollee in filing a grievance or appeal, completing forms, or taking

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<sup>13</sup> Requiring each MCO, PIHP, and PAHP to provide reasonable assistance in *all* "procedural steps related to a grievance or appeal."

<sup>14</sup> 42 C.F.R. §§ 438.402 (general requirement), 438.400(b) (defining "appeal" and "grievance").

<sup>15</sup> *Id.* §§ 438.402, 438.400(b).

other related procedural steps. This includes, but is not limited to, providing auxiliary aids and services upon request and at no cost, such as providing alternative formats, interpreter services, and/or toll-free numbers that have adequate TTY/TTD and interpreter capability. 42 C.F.R. § 438.406(a).

3. **Application and Supplemental Forms.**

- A. Any application or supplemental forms relating to the filing of a grievance or appeal must be accessible to people with disabilities. See 42 C.F.R. § 438.406(a).<sup>16</sup>
- B. If application or supplemental forms accompany a notice from the MCO, PIHP, or PAHP, then the entity shall automatically provide the forms in the same or equally accessible format (as appropriate) as the notice. For example, if the applicant or enrollee requested a large print notice, then any forms accompanying the notice must also have a large print format. Likewise, if the notice is an accessible PDF document, then accompanying forms must be an accessible, electronically fillable, and savable PDF.\*

4. **Timing.**

- A. An enrollee may file a grievance at any time. 42 C.F.R. § 438.402(c)(2)(i).
- B. An enrollee must file an appeal within 60 calendar days of the adverse benefit determination notice. 42 C.F.R. § 438.402(c)(2)(ii). This time limit may be waived if there is good cause for the delay.\* Good cause includes, but is not limited to:
  - i. Illness, injury, or extenuating health circumstances of the enrollee or a member of the enrollee's immediate family;
  - ii. The Agency's failure to provide a required notice or document in a format that is readily accessible to the enrollee, consistent with 42 C.F.R. § 438.10; and
  - iii. The Agency's failure to provide reasonable assistance related to the grievance or appeal, including the provision of auxiliary aids and services upon request, consistent with 42 C.F.R. § 438.406(a).\*

5. **Notice of Acknowledgment.** The MCO, PIHP, or PAHP must acknowledge receipt of each grievance and appeal that is filed. 42 C.F.R. § 438.406(b)(1). This notice shall comply, at a minimum, with the accessibility standards described at 42 C.F.R. §

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<sup>16</sup> Requiring each MCO, PIHP, and PAHP to provide reasonable assistance in *all* "procedural steps related to a grievance or appeal."

## D. Expedited Appeals

A Medicaid enrollee challenging an adverse benefit determination may request an expedited appeal when time is of the essence and a standard appeal could jeopardize the enrollee's life, health, or function.<sup>18</sup> For people with disabilities, many of whom have complex medical needs or rely on health supports for independent functioning, it is critical to ensure the availability of an expedited appeal process that can quickly and effectively remedy erroneous benefit determinations. For these reasons, we recommend that State regulations incorporate the following language:

### EXPEDITED APPEALS

1. **Availability of Expedited Appeal.** Each MCO, PIHP, and PAHP must establish and maintain an expedited review process for appeals when it determines or the provider indicates that taking the time for a standard resolution could seriously jeopardize the enrollee's life, physical or mental health, or ability to attain, maintain, or regain maximum function. 42 C.F.R. § 438.410(a).
  - A. In making this determination, the MCO, PIHP, or PAHP shall consider:
    - i. Whether the claimant is receiving the disputed service pending the hearing; and
    - ii. Whether the claimant is at risk for an out-of-home or nursing facility placement.\*
  - B. The MCO, PIHP, or PAHP must automatically expedite an enrollee's appeal when a request is made or supported by a qualified medical provider and the provider indicates, either orally or in writing, that applying the standard resolution time would seriously jeopardize the enrollee's life, physical or mental health, or ability to attain, maintain, or regain maximum function.\*

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<sup>17</sup> Requiring each MCO, PIHP, and PAHP "to make its written materials that are critical to obtaining services, including, at a minimum . . . appeal and grievance notices . . . available in alternative formats [and consistent with the other accessibility standards detailed in this regulation]."

<sup>18</sup> 42 C.F.R. § 438.410(a).

## E. Enrollee's Opportunity to Present Legal and Factual Arguments

After filing a request for grievance or appeal, the enrollee must be given an opportunity to present legal and factual arguments supporting his or her claim.<sup>19</sup> While the procedural specifics of this requirement are left up to the managed care plan, it must be accessible to people with various disabilities. We recommend that State regulations incorporate the following language:

### ENROLLEE'S OPPORTUNITY TO PRESENT LEGAL AND FACTUAL ARGUMENTS

1. **General Rule.** The MCO, PIHP, or PAHP must provide the enrollee a reasonable opportunity, in person and in writing, to present evidence and testimony and make legal and factual arguments. 42 C.F.R. § 438.406(b)(4).
2. **Accessibility.** The MCO, PIHP, or PAHP must ensure that such opportunity is accessible to people with disabilities, consistent with the enrollee's rights under Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and Section 1557 of the Affordable Care Act. This includes, but is not limited to:
  - A. **Transportation Services.** The enrollee may request appropriate and timely transportation to and from the enrollee's in-person opportunity to present his or her arguments. The MCO, PIHP, or PAHP shall consider and grant such requests, consistent with the enrollee's rights.\*
  - B. **Physical Accessibility.** The MCO, PIHP, or PAHP shall ensure that the location, building, and room used for the enrollee's in-person opportunity to present his or her arguments are structurally accessible for people with physical disabilities, consistent with the enrollee's rights.\*
  - C. **Procedural Modifications.** The enrollee may request procedural modifications to accommodate his or her disability. The MCO, PIHP, or PAHP shall consider and grant such requests, consistent with the enrollee's rights.\*
  - D. **Telephone or Video Conference.** The enrollee may request to appear by telephone or video conference to accommodate his or her disability. The MCO, PIHP, or PAHP shall consider and grant such requests, consistent with the enrollee's rights.\*
  - E. **Reasonable Assistance.** The MCO, PIHP, or PAHP shall provide reasonable assistance to the enrollee in presenting legal and factual arguments, both in person and in writing. This includes providing auxiliary aids and services, such as alternative format materials, interpreter services, and/or toll-free numbers

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<sup>19</sup> *Id.* § 438.406(b)(4).

that have adequate TTY/TTD and interpreter capability, upon request and at no cost. See 42 C.F.R. § 438.406(a).<sup>20</sup>

## F. Resolution of Grievance or Appeal

Once the managed care plan makes a decision regarding the enrollee's grievance or appeal, they must issue a notice of resolution.<sup>21</sup> This notice states the decision, the enrollee's right to request a State fair hearing to challenge it, and how an enrollee may file such a request.<sup>22</sup> We recommend that State regulations incorporate the following language to ensure that such notices are accessible to people with disabilities:

### RESOLUTION OF GRIEVANCE OR APPEAL

1. **Timeline of Resolution.** Each MCO, PIHP, or PAHP must resolve each grievance and appeal, and provide notice, as expeditiously as the enrollee's health condition requires, and may not exceed the timeframes specified at 42 C.F.R. § 438.408(b). 42 C.F.R. § 438.408(a).
2. **Format of Notice of Resolution.** The MCO, PIHP, or PAHP must provide notice of resolution of a grievance or appeal that includes the information and rights listed at 42 C.F.R. § 438.408(e).<sup>23</sup> This notice shall comply, at a minimum, with the accessibility standards described at 42 C.F.R. § 438.10. 42 C.F.R. § 438.408(d); see also 42 C.F.R. § 438.10(d)(3).<sup>24</sup>

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<sup>20</sup> Requiring each MCO, PIHP, and PAHP to provide reasonable assistance in all "procedural steps related to a grievance or appeal."

<sup>21</sup> 42 C.F.R. § 438.408(a), (d), (e).

<sup>22</sup> *Id.* § 438.408(e).

<sup>23</sup> "The written notice of the resolution must include the following: (1) The results of the resolution process and the date it was completed. (2) For appeals not resolved wholly in favor of the enrollees--(i) The right to request a State fair hearing, and how to do so. (ii) The right to request and receive benefits while the hearing is pending, and how to make the request. (iii) That the enrollee may, consistent with state policy, be held liable for the cost of those benefits if the hearing decision upholds the MCO's, PIHP's, or PAHP's adverse benefit determination." *Id.* § 438.408(e).

<sup>24</sup> Requiring each MCO, PIHP, and PAHP "to make its written materials that are critical to obtaining services, including, at a minimum . . . appeal and grievance notices . . . available in alternative formats [and consistent with the other accessibility standards detailed in this regulation]."

## II. STATE FAIR HEARINGS

Each State Medicaid Agency must provide an opportunity for a fair hearing to any person whose claim for medical assistance is denied or not acted upon with reasonable promptness.<sup>25</sup> The Agency must establish and maintain a hearing system that “compl[ies] with the United States Constitution, the Social Security Act, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Age Discrimination Act of 1975, and Section 1557 of the Affordable Care Act and implementing regulations.”<sup>26</sup>

The hearing system must be accessible to people with disabilities.<sup>27</sup> Hearing locations must be physically accessible and program modifications must be considered and granted, consistent with the claimant’s rights under Section 504, the ADA, and Section 1557 of the ACA. Information furnished by the Agency, including the rights and responsibilities of applicants and beneficiaries, must be provided “in plain language and in a manner that is accessible and timely to . . . [i]ndividuals living with disabilities through the provision of auxiliary aids and services at no cost to the individual in accordance with the ADA and Section 504.”<sup>28</sup> Moreover, “[i]ndividuals must be informed of the availability of the accessible information and language services . . . and how to access such information and services.”<sup>29</sup>

This Section provides guidance on how these accessibility requirements can be incorporated into the procedures and practices of each State’s fair hearing system.

### A. Notice of Right to State Hearing

The Agency must notify Medicaid applicants and enrollees of their right to a State hearing at the time an individual applies for Medicaid; whenever it issues an adverse benefit determination; whenever it denies a claim for eligibility, benefits, or services; and whenever a hearing is otherwise required.<sup>30</sup> We recommend that State regulations incorporate the following language to ensure that all such notices are accessible to people with disabilities:

#### NOTICE OF RIGHT TO STATE HEARING

1. **General Rule.** The Agency must, at each time specified at 42 C.F.R. §§ 431.206(c), 431.220(a) inform every applicant or enrollee in writing of his or her right to a fair

<sup>25</sup> 42 U.S.C. § 1396a(a)(3) (2012).

<sup>26</sup> 42 C.F.R. § 431.205(a), (f).

<sup>27</sup> *Id.* § 431.205(e).

<sup>28</sup> *Id.* § 435.905(b)(2).

<sup>29</sup> *Id.* § 435.905(b)(3).

<sup>30</sup> *Id.* § 431.206(b)–(c). For a full list of when the Agency must provide notification of a right to a hearing, see 42 C.F.R. §§ 431.206(c), 431.220(a).

hearing and right to request an expedited fair hearing; of the method by which he may obtain a hearing; that he may represent himself or use legal counsel, a relative, a friend, or other spokesman; and of the time frames in which the Agency must take final administrative action. 42 C.F.R. § 431.206(b).

2. **Format of Notice.** All notices informing applicants or beneficiaries of their rights and responsibilities, including the right to a state hearing, must be provided in plain language and in a manner that is accessible and timely to individuals with disabilities through the provision of auxiliary aids and services at no cost to the individual in accordance with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. 42 C.F.R. §§ 431.206(e), 435.905(b).
3. **Notification of Accommodation Availability.** Individuals must be informed of the availability of the accessible information described in (2) and how to access such information and services, at a minimum through providing taglines indicating their availability. 42 C.F.R. § 435.905(b)(3).

## B. Requesting a State Hearing

The Agency must provide an opportunity for a fair hearing to any person whose claim for assistance is denied or not acted upon with reasonable promptness.<sup>31</sup> This includes when the Agency has denied a claim for eligibility, benefits, or services; when it has not acted upon a claim with reasonable promptness; and when an enrollee’s appeal of an adverse benefit determination is upheld by the managed care plan.<sup>32</sup> In order to ensure that people with disabilities may effectively request a State fair hearing in such circumstances, we recommend that State regulations incorporate the following language:

### REQUESTING A STATE HEARING

1. **“Hearing Request” Defined.** A request for a hearing means a clear expression by the applicant or beneficiary, or his authorized representative, that he wants the opportunity to present his case to a reviewing authority. 42 C.F.R. § 431.201.
2. **Method of Request.** An individual may request a State fair hearing through any of the following modalities—by telephone, via mail, in-person, via internet website, or through other commonly available electronic means.\* Cf. 42 C.F.R. §§

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<sup>31</sup> 42 U.S.C. § 1396a(a)(3) (2012).

<sup>32</sup> 42 C.F.R. §§ 431.220, 438.408(f)(1).

431.221(a)(1)(i),<sup>33</sup> 435.907(a).<sup>34</sup>

3. **Application and Supplemental Forms.** Any application or supplemental forms relating to a State fair hearing must be accessible to people with disabilities, consistent with 42 C.F.R. § 435.905(b). See 42 C.F.R. § 431.205(e)–(f).<sup>35</sup>
  - A. All information must be provided in plain language and in a manner that is accessible and timely to individuals with disabilities through the provision of auxiliary aids and services at no cost to the individual in accordance with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. 42 C.F.R. § 435.905(b).
  - B. Individuals must be informed of the availability of the accessible information described in (2)(A) and how to access such information and services, at a minimum through providing taglines indicating their availability. 42 C.F.R. § 435.905(b)(3).
  - C. If application or supplemental forms accompany a notice from the State, then the State shall automatically provide the forms in the same or equally accessible format (as appropriate) as the notice. For example, if the applicant or enrollee requested a large print notice, then any forms accompanying the notice must also have a large print format. Likewise, if the notice is an accessible PDF document, then accompanying forms must be an accessible, electronically fillable, and savable PDF.\*
4. **Assistance with Application.** The Agency shall assist applicants or enrollees with disabilities in submitting and processing his or her request for a State fair hearing. See 42 C.F.R. § 431.205(e)–(f);<sup>36</sup> cf. 42 C.F.R. § 431.221(c).<sup>37</sup> This includes providing auxiliary aids and services at no cost and informing individuals of the availability and how to access such services, consistent with 42 C.F.R. § 435.905(b). See 42 C.F.R. §

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<sup>33</sup> This regulation states this modality rule, however, it has not been implemented. *Id.* § 435.1200(i) (notice of applicability date). The regulation is not applicable until “6 months from the date of a published Federal Register document alerting States of the requirement to comply with [this section].” *Id.* The current administration has not yet published this notification and is not anticipated to do so.

<sup>34</sup> Requiring the agency to accept Medicaid *applications* in these enumerated modalities.

<sup>35</sup> Requiring the hearing system to be accessible for people with disabilities and comply with disability rights laws, consistent with 42 C.F.R. § 435.905(b).

<sup>36</sup> Requiring the hearing system to be accessible for people with disabilities and comply with disability rights laws, consistent with 42 C.F.R. § 435.905(b).

<sup>37</sup> Providing that the Agency “*may* assist the applicant or beneficiary in submitting and processing his request.”

431.205(e)–(f).<sup>38</sup>

5. **Requests for Accommodations.** While filing a request for a State fair hearing, the claimant may also indicate his or her request for reasonable program modifications during the hearing process.\* The Agency must consider and grant such requests, consistent with the claimant’s rights under Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and Section 1557 of the Affordable Care Act and implementing regulations. See 42 C.F.R. § 431.205(f).<sup>39</sup>
6. **Timing.** An individual must file a request for a State hearing no later than 90 days from the date of the notice of action or, in the case of an adverse benefit determination, 120 days after the date of the MCO’s, PIHP’s, or PAHP’s notice of resolution. 42 C.F.R. §§ 431.221(d), 438.408(f)(2). This time limit may be waived if there is good cause for the delay.\* Good cause includes, but is not limited to:
  - A. Illness, injury, or extenuating health circumstances of the claimant or a member of the claimant’s immediate family;
  - B. The Agency’s failure to provide a required notice or document in a format that is readily accessible to the claimant or the claimant’s authorized representative, consistent with 42 C.F.R. § 438.10;
  - C. The Agency’s failure to provide auxiliary aids and services at no cost to the individual, consistent with 42 C.F.R. §§ 431.205(e), 435.905(b); and
  - D. The Agency’s failure to consider and grant program modifications, consistent with the claimant’s rights.\*
7. **Notice of Acknowledgment.** The Agency must acknowledge receipt of the request for a State fair hearing.\* This notice shall comply, at a minimum, with the accessibility standards described at 42 C.F.R. § 438.10. See 42 C.F.R. § 438.10(d)(6).<sup>40</sup>

### C. Scheduling the Hearing

After a hearing has been requested, it is the Agency’s responsibility to schedule its time, place, and manner. It is important to take into consideration the physical and programmatic needs of the claimant when making these determinations. To that end, we recommend that

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<sup>38</sup> Requiring the hearing system to be accessible for people with disabilities and comply with disability rights laws, consistent with 42 C.F.R. § 435.905(b).

<sup>39</sup> Requiring the hearing system to comply with these disability rights statutes and their implementing regulations.

<sup>40</sup> Requiring the State to provide *all* written materials for enrollees or potential enrollees consistent with these accessibility standards.

State regulations incorporate the following language to ensure that all scheduling practices and procedures accommodate the needs of people with disabilities:

## SCHEDULING THE HEARING

1. **Scheduling Practices and Procedures.** The Agency shall ensure that all hearing scheduling practices and procedures reasonably accommodate the needs of persons with various disabilities, consistent with the claimants' rights under Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and Section 1557 of the Affordable Care Act and implementing regulations. See 42 C.F.R. § 431.205(e)–(f).<sup>41</sup>
  - A. **Hearing Location.** The Agency shall ensure that hearing locations are structurally accessible for people with physical disabilities. The Agency shall provide information about these accessible hearing locations to claimants.\*
  - B. **Alternate Location.** If the claimant is unable to attend the hearing at the hearing location for reasons of poor health, the hearing shall be held in the claimant's home or in another place agreed to by the Agency and the claimant.\*
  - C. **Hearing Time.** A claimant with a disability may request the hearing to fall within a certain time of day when he or she is most functional. The Agency shall consider and grant such requests, consistent with the claimant's rights.\*
2. **Telephone or Video Conference Hearings.** The Agency may schedule hearings to be conducted by telephone or video conference in lieu of an in-person hearing. Such hearings shall be conducted only if the claimant agrees.\*
  - A. If the claimant later rescinds the agreement for a telephone or video conference hearing prior to or during the hearing, an in-person hearing will be scheduled and this shall be considered a postponement for good cause.\*
  - B. The administrative law judge may terminate the telephone hearing or video conference at the request of either party or on his or her own motion and order an in-person hearing when he or she determines that a party's civil rights are being prejudiced by the telephone hearing or video conference procedure.\*
3. **Expedited Scheduling of Hearing.** Upon request, the Agency shall expedite the scheduling of a hearing when its standard resolution could seriously jeopardize the claimant's life, physical or mental health, or ability to attain, maintain, or regain

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<sup>41</sup> Requiring the hearing system to be accessible for people with disabilities and comply with disability rights laws, consistent with 42 C.F.R. § 435.905(b).

maximum function. 42 C.F.R. § 431.224(a)(1).

4. **Notice of Scheduled Hearing.** The Agency must provide adequate written notice of the time, date, and place of the hearing. See 42 C.F.R. § 431.240.<sup>42</sup> This notice shall comply, at a minimum, with the accessibility standards described at 42 C.F.R. § 438.10. See 42 C.F.R. § 438.10(d)(6).<sup>43</sup>

#### D. Agency Responsibilities Prior to Hearing

The Agency has a number of responsibilities prior to the hearing date, including notifying the claimant of his or her rights and responsibilities and providing him or her with relevant documents and evidence. We recommend that State regulations incorporate the following language to ensure that all such information is accessible to people with disabilities:

##### AGENCY RESPONSIBILITIES PRIOR TO HEARING

1. **Case File and Document Examination.** At a reasonable time before the date of the hearing and during the hearing, the claimant or his or her authorized representative must be given an opportunity to examine the content of the claimant's case file and electronic account and all documents and records to be used by the State, local agency, skilled nursing facility, or nursing facility at the hearing. 42 C.F.R. § 431.242. All such files, documentation, and records shall comply, at a minimum, with the accessibility standards described at 42 C.F.R. § 438.10. See 42 C.F.R. § 438.10(d)(6).<sup>44</sup>
2. **Notification of Right to Accommodations.** The Agency shall inform claimants of their right to accommodations during and prior to the hearing and how to access such services. See 42 C.F.R. §§ 431.205(e)–(f),<sup>45</sup> 435.905(b)(3).<sup>46</sup>

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<sup>42</sup> Requiring that the hearing be conducted "only after adequate written notice of the hearing."

<sup>43</sup> Requiring the State to provide *all* written materials for enrollees or potential enrollees consistent with these accessibility standards.

<sup>44</sup> Requiring the State to provide *all* written materials for enrollees or potential enrollees consistent with these accessibility standards.

<sup>45</sup> Requiring the hearing system to be accessible for people with disabilities and comply with disability rights laws, consistent with 42 C.F.R. § 435.905(b).

<sup>46</sup> Requiring the Agency to "inform[] [the individual] of the availability of [] accessible information and language services . . . and how to access such information and services, at a minimum through providing taglines in non-English languages indicating the availability of language services."

## E. Hearing Procedures

At each hearing, the Agency must ensure that its physical location, procedures, and communication methods are accessible for all claimants. We recommend that State regulations incorporate the following language:

### HEARING PROCEDURES

1. **Hearing Practices and Procedures.** The Agency shall ensure that all hearing practices and procedures reasonably accommodate the needs of persons with various disabilities, consistent with the claimants' rights under Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and Section 1557 of the Affordable Care Act and implementing regulations. See 42 C.F.R. § 431.205(f).<sup>47</sup>
  - A. **Transportation Services.** The claimant may request appropriate and timely transportation to and from the hearing. The Agency shall consider and grant such requests, consistent with the claimant's rights.\*
  - B. **Physical Accessibility.** The Agency shall ensure that the hearing location, building, and room are structurally accessible for people with physical disabilities, consistent with the claimant's rights.\*
  - C. **Procedural Modifications.** The claimant may request procedural modifications to the hearing to accommodate his or her disability. The Agency shall consider and grant such requests, consistent with the claimant's rights.\*
  - D. **Non-Witness Support Persons.** The claimant may request non-witness support persons such as case managers, therapists, speech facilitators, or others to attend the hearing. The Agency shall consider and grant such requests, consistent with the claimant's rights.\*
  - E. **Interpretation Services.** The Agency shall make interpretation services available upon request and free of charge to the claimant during the hearing. 42 C.F.R. § 438.10(d)(4). This includes the provision of auxiliary aids and services such as qualified Sign Language interpreters. 42 C.F.R. § 438.10(d)(4). To ensure effective communication, the Agency shall give primary consideration to the claimant's choice of auxiliary aid or service. 28 C.F.R. § 35.160(b)(2).

### PRACTICE TIP: Proving "Disability" and Privacy Considerations

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<sup>47</sup> Requiring the hearing system to comply with these disability rights statutes and their implementing regulations.

In requesting an accommodation, the claimant has the burden of proof to establish disability. That person is going to have to put forth evidence of an impairment that limits or substantially limits a major life activity. However, there is a great deal of misunderstanding about the degree of information that is required. The definition of disability is a *functional* one—you only need to present evidence of functional or endurance limitations. This evidence does not necessarily need to come from a medical witness; in many cases, the client’s, a family member’s, or a friend’s testimony can be sufficient. The preferred method is to use a newly-created letter of declaration that is tightly keyed to the statutory definition (e.g., “I am familiar with [this] person, they have [this] impairment, and [this] is how it affects them.”). You want to avoid introducing underlying medical records, if possible. As soon as you introduce medical records, you are not only exposing those records, but also creating an opportunity for the opposing side to rifle in more detail through your client’s private health information.

Keep in mind that there are potential privacy consequences to revealing your client’s disability when they are seeking accommodations. Recently, a California Appeals Court held that an opposing party may examine underlying medical documentation for a disability accommodation request. See *Vesco v. Superior Court*, 221 Cal. App. 4th 275 (2d Dist. 2013). While less of an issue in the context of the Medicaid appeals process, because the State Agency or managed care plan may already have access to the individual’s medical record, advocates should still be mindful of exposing clients’ private health information, particularly when the disability, e.g., a mental health condition, is not necessarily documented in Medicaid records. You want to analyze any potential privacy issues in advance of disclosure and make sure that your client is prepared for the potential consequences.

## F. Expedited Hearings

A claimant may request an expedited appeal when the time otherwise permitted for a hearing could jeopardize the claimant’s life, health, or function.<sup>48</sup> For people with disabilities, many of whom have complex medical needs or rely on health supports for independent functioning, it is critical to ensure the availability of an expedited appeal process that can quickly and effectively remedy erroneous benefits decisions. For this reason, we recommend that State regulations incorporate the following language:

### EXPEDITED HEARINGS

1. **Availability.** The Agency must establish and maintain a process for individuals to request an expedited fair hearing when the time otherwise permitted for a hearing

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<sup>48</sup> 42 C.F.R. § 431.224(a) (2017).

could jeopardize the individual's life, health, or ability to attain, maintain, or regain maximum function. 42 C.F.R. § 431.224(a).

- A. In making this determination, the Agency shall consider:
    - i. Whether the claimant is receiving the disputed service pending the hearing; and
    - ii. Whether the claimant is at risk for an out-of-home or nursing facility placement.\*
  - B. A statement from a qualified medical provider attesting that the time for standard resolution would seriously jeopardize the claimant's life, health or ability to attain, maintain, or regain maximum function, is controlling. The administrative law judge shall designate the hearing as expedited upon receiving such statement.\*
2. **Notices and Documents.** The Agency shall ensure that all required notices and documents relating to the expedited hearing, including the written notice of decision granting or denying the request for an expedited hearing, the scheduling notice, the case file and evidentiary documentation, and the hearing decision, comply, at a minimum, with the accessibility standards described at 42 C.F.R. § 438.10. See 42 C.F.R. § 438.10(d)(6).<sup>49</sup>
3. **Hearing Procedures.** The Agency shall ensure that all expedited hearing procedures reasonably accommodate the needs of persons with various disabilities, consistent with the claimants' rights under Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and Section 1557 of the Affordable Care Act and implementing regulations. See 42 C.F.R. § 431.205(f).<sup>50</sup>

## G. Hearing Postponements

A claimant should have the right to request a postponement to a hearing if he or she has good cause, such as extenuating health circumstances or when the Agency precipitates the delay through a violation of the claimant's civil rights. We recommend that State regulations incorporate the following language related to postponements:

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<sup>49</sup> Requiring the State to provide *all* written materials for enrollees or potential enrollees consistent with these accessibility standards.

<sup>50</sup> Requiring the hearing system to comply with these disability rights statutes and their implementing regulations.

## HEARING POSTPONEMENTS

1. **Claimant Requests for Postponement.** A hearing shall be postponed upon the request of a claimant if such request has good cause.\* Good cause includes, but is not limited to:
  - A. Illness, injury, or extenuating health circumstances of the claimant or a member of the claimant's immediate family;
  - B. The Agency's failure to provide a required notice or document in a format that is readily accessible to the claimant or the claimant's authorized representative, consistent with 42 C.F.R. § 438.10;
  - C. The Agency's failure to consider and/or provide in an appropriate and timely manner the claimant's transportation to and from the hearing, consistent with the claimant's rights;
  - D. The Agency's failure to schedule the hearing in a structurally accessible location, building, and room, consistent with the claimant's rights;
  - E. The Agency's failure to make interpretation services, including auxiliary aids and services, available upon request and free of charge to the claimant, consistent with 42 C.F.R. § 438.10(d)(4); and
  - F. The Agency's failure to consider and grant program modifications, consistent with the claimant's rights.\*

## H. Hearing Dismissals

A claimant's request for a hearing may be dismissed for reason of withdrawal or abandonment. In order to ensure that all claimants have equal access to the withdrawal process and to prevent wrongful determinations of abandonment, we recommend that State regulations incorporate the following language:

## HEARING DISMISSALS

1. **Withdrawal.** The Agency must accept the claimant's withdrawal of a fair hearing request through any of the following modalities—by telephone, via mail, in-person, via internet website, or through other commonly available electronic means. 42 C.F.R. § 431.223(a).
2. **Abandonment.** The Agency may dismiss a claim if the claimant fails to appear personally or by authorized representative at the scheduled hearing and the claimant did not have good cause for his or her absence. 42 C.F.R. § 431.223(b). Good cause

includes, but is not limited to:

- A. Illness, injury, or extenuating health circumstances of the claimant or a member of the claimant's immediate family;
  - B. The Agency's failure to provide a required notice or document in a format that is readily accessible to the claimant or the claimant's authorized representative, consistent with 42 C.F.R. § 438.10;
  - C. The Agency's failure to consider and/or provide in an appropriate and timely manner the claimant's transportation to and from the hearing, consistent with the claimant's rights;
  - D. The Agency's failure to schedule the hearing in a structurally accessible location, building, and room, consistent with the claimant's rights;
  - E. The Agency's failure to make interpretation services, including auxiliary aids and services, available upon request and free of charge to the claimant, consistent with 42 C.F.R. § 438.10(d)(4); and
  - F. The Agency's failure to consider and grant program modifications, consistent with the claimant's rights.\*
3. **Dismissal Notice.** The Agency shall issue a dismissal notice and warning notices, as appropriate, in writing.\* Such notices shall comply, at a minimum, with the accessibility standards described at 42 C.F.R. § 438.10. See 42 C.F.R. § 438.10(d)(6).<sup>51</sup>

## I. Hearing Decision and Case Referral

Once the Agency makes a decision regarding the claimant's hearing, it must issue a notice of decision.<sup>52</sup> This notice should state the decision and, as applicable, the claimant's right to request a State hearing or judicial review<sup>53</sup> and to file a discrimination complaint with relevant State and federal agencies. We recommend that State regulations incorporate the following language to ensure that such notices are accessible to people with disabilities and provide them with information on how to enforce their civil rights:

### HEARING DECISION AND CASE REFERRAL

1. **Notice of Decision.** The Agency must notify the claimant in writing of the decision

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<sup>51</sup> Requiring the State to provide *all* written materials for enrollees or potential enrollees consistent with these accessibility standards.

<sup>52</sup> 42 C.F.R. § 431.245.

<sup>53</sup> See *id.* §§ 431.244(d)–(e), 431.245.

and his or her right to request a State hearing or seek judicial review, to the extent that either is available. 42 C.F.R. § 431.245. Such notices shall comply, at a minimum, with the accessibility standards described at 42 C.F.R. § 438.10. See 42 C.F.R. § 438.10(d)(6).<sup>54</sup>

2. **Discrimination Case Referral.** In cases involving allegations of discrimination by the Agency, MCO, PIHP, PAHP, or PCCM, the allegations shall be reported to the U.S. Department of Health and Human Services (“HHS”) Office for Civil Rights (“OCR”) and any applicable State Agencies.\* Notices of decision of such cases shall include the following language:

If you believe you have been subjected to discrimination in a CMS program or activity, there are several ways to file a complaint with the U.S. Department of Health and Human Services, Office for Civil Rights:

**By phone:** Call 1-800-368-1019. TDD users should call 1-800-537-7697.

**In writing by mail:**

Centralized Case Management Operations  
U.S. Department of Health and Human Services  
200 Independence Avenue, S.W.  
Room 509F, HHH Building  
Washington, D.C. 20201

**By email:** [OCRComplaint@hhs.gov](mailto:OCRComplaint@hhs.gov)

**By online portal:** <https://ocrportal.hhs.gov/>

For additional information, visit <https://www.hhs.gov/civil-rights/filing-a-complaint/complaint-process/index.html> \*

### **PRACTICE TIP: State Complaint Mechanisms**

In addition to HHS OCR, also consider filing a disability discrimination complaint with relevant State agencies. For example, in California, the Department of Fair Employment and Housing (“DFEH”) is charged with enforcing the State’s nondiscrimination law (CAL. GOV’T CODE § 11135), which prohibits discrimination in any program or activity that receives State funding, including Medicaid. An individual or authorized representative may file a claim with DFEH alleging the State Medicaid Agency’s or managed care plan’s failure to provide

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<sup>54</sup> Requiring the State to provide *all* written materials for enrollees or potential enrollees consistent with these accessibility standards.

reasonable accommodations during the grievance, appeal, or State hearing process. For more information on filing a DFEH complaint, visit: <https://www.dfeh.ca.gov/complaint-process/file-a-complaint/>.

## J. Examination of Hearing Records

A claimant has the right to examine his or her hearing record, including a recording, transcript, or report of the hearing; all papers and requests filed in the proceedings; and the decision.<sup>55</sup> It is important that this record is available in accessible formats, as it may assist individuals in understanding the hearing decision, its impact on their health benefits, and whether they should request a rehearing. We recommend that State regulations incorporate the following language to ensure that hearing records are accessible to people with disabilities:

### EXAMINATION OF HEARING RECORDS

1. **General Rule.** The Agency shall ensure that the claimant has access to his or her hearing record at a convenient place and time. 42 C.F.R. § 431.244(c). The record must contain the transcript, recording, or an official report of the substance of the hearing; all papers and requests filed in the proceeding; and the recommendation or decision of the hearing officer. 42 C.F.R. § 431.244(b).
2. **Accessibility.** All written materials in the hearing record must be provided in a manner that complies, at a minimum, with the accessibility standards described at 42 C.F.R. § 438.10. See 42 C.F.R. § 438.10(d)(6).<sup>56</sup>

## K. Rehearing Procedures

A claimant should be permitted to request a rehearing if they are unsatisfied with the hearing decision.<sup>57</sup> Like the original request, this filing process must be equally accessible to all claimants, including those with disabilities. To that end, we recommend that State regulations incorporate the following language:

### REHEARING PROCEDURES

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<sup>55</sup> 42 C.F.R. § 431.244(b)–(c).

<sup>56</sup> Requiring the State to provide *all* written materials for enrollees or potential enrollees consistent with these accessibility standards.

<sup>57</sup> The federal rules do *not* require a rehearing.

1. **Method of Request.** An individual may request a rehearing through any of the following modalities—by telephone, via mail, in-person, via internet website, or through other commonly available electronic means.\* Cf. 42 C.F.R. § 431.221(a)(1)(i).<sup>58</sup>
2. **Application and Supplemental Forms.** Any application or supplemental forms for a State fair hearing must be accessible to persons who have disabilities, consistent with 42 C.F.R. § 435.905(b). See 42 C.F.R. § 431.205(e)–(f).<sup>59</sup>
3. **Assistance with Application.** The Agency shall assist the applicant or enrollee in submitting and processing his or her request for a rehearing. This includes providing auxiliary aids and services at no cost and informing individuals of the availability and how to access such services, consistent with 42 C.F.R. § 435.905(b). See 42 C.F.R. § 431.205(e)–(f).<sup>60</sup>
4. **Timing.** An individual must file a request for a rehearing no later than 30 days from the date of the notice of decision of the original hearing. This time limit may be waived if there is good cause for the delay.\* Good cause includes, but is not limited to:
  - A. Illness, injury, or extenuating health circumstances of the claimant or a member of the claimant’s immediate family;
  - B. The Agency’s failure to provide a required notice or document in a format that is readily accessible to the claimant or the claimant’s authorized representative, consistent with 42 C.F.R. § 438.10;
  - C. The Agency’s failure to provide auxiliary aids and services at no cost to the individual, consistent with 42 C.F.R. §§ 431.205(e), 435.905(b); and
  - D. The Agency’s failure to consider and grant program modifications, consistent with the claimant’s rights.\*
5. **Notice of Decision.** The Agency shall ensure that all required notices and documents relating to the rehearing, including the notice of decision granting or denying the request for an rehearing, the scheduling notice, the agency position statement and its

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<sup>58</sup> This regulation states this modality rule, however, it has not been implemented. 42 C.F.R. § 435.1200(i) (notice of applicability date). The regulation is not applicable until “6 months from the date of a published Federal Register document alerting States of the requirement to comply with [this section].” *Id.* The current administration has not yet published this notification and is not anticipated to do so.

<sup>59</sup> Requiring the hearing system to be accessible for people with disabilities and comply with disability rights laws, consistent with 42 C.F.R. § 435.905(b).

<sup>60</sup> Requiring the hearing system to be accessible for people with disabilities and comply with disability rights laws, consistent with 42 C.F.R. § 435.905(b).

attachments, and the hearing decision, comply, at a minimum, with the accessibility standards described at 42 C.F.R. § 438.10. See 42 C.F.R. § 438.10(d)(6).<sup>61</sup>

## L. Authorized Representatives

The Agency must permit a claimant to designate an individual or organization to assist or represent him or her during the hearing process.<sup>62</sup> Provided the representation is voluntary and in the best interests of the claimant, an individual can benefit from the representative's assistance and, in many cases, expertise. However, the appointment of a representative also has the potential for abuse and infringement on self-determination, if proper safeguards are not in place. We recommend that State regulations incorporate the following language to ensure the appropriate and beneficial use of authorized representatives:

### AUTHORIZED REPRESENTATIVES

1. **Permissibility.** The Agency shall permit claimants to designate an individual or organization to act responsibly on their behalf in assisting with or representing the claimant during all aspects of the hearing process and/or other communications with the Agency. See 42 C.F.R. § 435.923(a)(1).<sup>63</sup>
2. **Authorization.** The claimant may designate an authorized representative at any time by signing and dating a written statement to that effect or by stating at the hearing that the person is so authorized. See 42 C.F.R. § 435.923(f).<sup>64</sup>
  - A. **Scope and Duration.** The claimant may limit the scope and/or duration of the authorization. If the authorization is not expressly limited or revoked, then the duration of the authorization shall extend to the final disposition of the issue involved in the hearing.\*
  - B. **Revocation and Modification.** The claimant may revoke, modify the scope, or shorten the duration of the authorization at any time. See 42 C.F.R. §

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<sup>61</sup> Requiring the State to provide *all* written materials for enrollees or potential enrollees consistent with these accessibility standards.

<sup>62</sup> See 42 C.F.R. §§ 431.221(a)(1), 431.222, 435.923.

<sup>63</sup> Providing that the Agency must permit claimants to designate an authorized representative for any "ongoing communications with the agency."

<sup>64</sup> Providing that an authorized representative designation can be made through these modalities, among others.

3. **Legal Guardianship, Conservatorship, or Power of Attorney.**

- A. Authority for an individual or entity to act on behalf of the claimant accorded under State law, including but not limited to, a court order establishing legal guardianship, conservatorship, or a power of attorney, must be treated as a written designation by the claimant of authorized representation. 42 C.F.R. § 435.923(a)(2).
- B. The individual or entity treated as an authorized representative in (A) has the authority to designate an alternative individual or entity to act as an authorized representative on the claimant's behalf during the hearing process and/or other communications with the Agency.\*
- C. If there is a change in the legal authority upon which an individual or entity's authorized representation was based, then the authorized representation is deemed revoked. 42 C.F.R. § 435.923(c). A "change" for purposes of this provision means a reduction or termination of legal authority, so as to deem the representation inappropriate.\*

4. **Authorization Without Claimant's Written Statement or Presence at Hearing.** If the claimant has not authorized the representative in writing and is not present at the hearing, the person may be recognized as the authorized representative only as follows:

- A. If the person is an attorney and he or she states on the hearing record that the claimant is mentally competent and has authorized him or her to act as authorized representative regarding the issue(s) to be addressed at the hearing, the attorney shall be recognized as an authorized representative without being required to submit an authorized representative form.\*
- B. If the person is not an attorney and he or she swears, affirms, or states under penalty of perjury that the claimant is mentally competent and has authorized him or her to act as the claimant's authorized representative, and the administrative law judge determines the person is so authorized, the non-attorney may represent the claimant at the hearing, provided a written authorization is submitted by the non-attorney within ten days of the hearing.\*
- C. If the claimant is not competent, the hearing may proceed at the administrative

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<sup>65</sup> Providing that the authorized representation "is valid until the [claimant] modifies the authorization or notifies the agency that the representative is no longer authorized to act on his or her behalf," among other events.

law judge's discretion if the person is the claimant's relative, the claimant's attorney or advocate working under the supervision of an attorney, or a person who has knowledge of the claimant's circumstances and who completed and signed the Statement of Facts on the claimant's behalf. If there is no one who qualifies to represent the claimant at the hearing, the administrative law judge may allow an individual with knowledge about the claimant's circumstances to represent the claimant at the hearing if the administrative law judge determines that the representation is in the claimant's best interests.\*

D. For the purposes of this section, "competent" means being able to provide properly for his or her personal needs for physical health, food, clothing, or shelter.\*

5. **Requirements of Authorized Representative.** The authorized representative shall:

A. Fulfill all responsibilities encompassed within the scope of the authorized representation (42 C.F.R. § 435.923(d)(1));

B. Maintain confidentiality of information regarding the claimant, as required by relevant State and Federal laws (42 C.F.R. § 435.923(d)(2), (e)); and

C. Adhere to all relevant State and Federal laws concerning conflicts of interest (42 C.F.R. § 435.923(e)).

6. **Accessibility for Authorized Representatives.**

A. **Hearing System Accessibility.** The hearing system must be accessible to authorized representatives who have disabilities, consistent with 42 C.F.R. § 435.905(b). See 42 C.F.R. § 431.205(e).<sup>66</sup> Hearing locations must be physically accessible and program modifications must be considered and granted, consistent with the authorized representative's rights under Section 504 of the Rehab Act, the ADA, and Section 1557 of the ACA. See 42 C.F.R. § 431.205(f).<sup>67</sup>

B. **Copies of Notices.** The Agency shall provide the authorized representative with copies of all past notices, decisions, and other correspondence that relate to the hearing and were provided to the claimant. The Agency shall send all subsequent notices, decisions, and other correspondence that relate to the hearing to both the claimant and the authorized representative simultaneously. Such correspondence must be readily accessible to both the claimant and

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<sup>66</sup> Requiring the hearing system to be accessible for *people* with disabilities (not just *claimants* with disabilities), consistent with 42 C.F.R. 435.905(b).

<sup>67</sup> Requiring the hearing system to comply with these disability rights statutes and their implementing regulations.

### **PRACTICE TIP: Deeming An Individual “Not Competent”**

Incompetency determinations, for purposes of appointing an authorized representative pursuant to Section 4(c) above, should be carefully considered and used sparingly. Such determinations can infringe on an individual’s rights to decisionmaking and autonomy. They are appropriate only when absolutely necessary to ensure that the best interests of the claimant are represented at the hearing. Less intrusive alternatives, such as the provision of auxiliary aids or services, programmatic modifications, or other disability accommodations, should first be considered and explicitly offered to the individual.

If an incompetency determination is necessary, it should be based on unbiased, objective evidence regarding the individual’s capacities. Stereotypes or assumptions about the individual’s capabilities because of their disability must be avoided. Moreover, considerations of efficiency, cost of the hearing, or convenience to the administrative law judge or other interested parties are inappropriate. If an individual is deemed incompetent and an authorized representative must be appointed pursuant to Section 4(c) above, then the administrative law judge should closely consider *who* is the best representative for the individual. In particular, potential conflicts of interest should be carefully scrutinized.