EXHIBIT D

DEPARTMENT OF HUMAN SERVICES, OFFICE OF CHIEF COUNSEL

SUBJECT: Office of Appeals and Hearings Update to DHS Policy 1098 & REPEALS: Description of Office on Aging and Adult Services; Long Term Care Ombudsman Act

DESCRIPTION:

Statement of Necessity

Act 474 of 2023 amends the Administrative Procedures Act to allow administrative adjudication decisions made by the Department of Human Services be served electronically by e-mail if the party consents. This rule updates DHS Policy 1098 to reflect the amendment. Also, the rule removes from the policy the requirement that certain notices be sent by certified mail, return receipt requested, so that the policy matches Arkansas Code § 25-15-210(c).

Summary

The following are the changes to DHS Policy 1098:

1. Grammatical changes throughout
2. Clarifies that OAH may also send notice of the hearing electronically for parties that have opted to receive electronic communications.
3. Removes that notice of an untimely appeal shall be sent by "certified mail, return receipt requested."
4. Adds that notice of an untimely appeal shall be sent by "regular mail or electronically for parties that have opted to receive electronic communications."
5. Removes that notice of a defective appeal shall be sent by "certified mail, return receipt requested."
6. Adds that notice of a defective appeal shall be sent by "regular mail or electronically for parties that have opted to receive electronic communications."
7. Removes that a copy OAH findings of fact, conclusions of law, and order will be sent by "certified mail, return receipt requested."
8. Adds that that a copy OAH findings of fact, conclusions of law, and order will be sent by "regular mail or electronically for parties that have opted to receive electronic communications."

Repeals pursuant to the Governor's Executive Order 23-02:

1. Long-Term Care Ombudsman Act
2. Description of the Office on Aging and Adult Services

PUBLIC COMMENT: No public hearing was held on this rule. The public comment period expired on September 25, 2023. The agency provided the following summary of the public comments it received and its responses to those comments:

Commenter's Names: Victoria Frazier and Nikki Clark, Attorneys, Legal Aid of Arkansas

1. Legal Aid of Arkansas ("Legal Aid") is a nonprofit law firm representing low-income Arkansans in civil legal matters throughout the state, including in rural areas in the Ozarks and the Delta. Legal Aid's mission is to improve the lives of low-income Arkansans by championing equal access to justice for all, regardless of location and economic or social circumstances. Through many years of advocacy for our clients, we have gained valuable insight into the barriers our clients face due to their location and limited resources. We offer these comments to help the Department of Human Services ("DHS") and the State understand how the proposed revisions can adversely affect our client community.

Sections 1098.9.2, 1098.9.3, 1098.9.4, and 1098.18 of the Appeals and Hearings Procedures, in sum, propose revisions that would authorize the Office of Appeals and Hearing ("OAH") to mail, by regular mail, all notices related to timely appeals and hearing information, untimely appeals and the appellant's rights as a result, as well as defective appeals and their rights as a result. The same sections propose revisions that would allow the OAH to send these same notices electronically for parties that have opted to receive electronic communications.

In short, the shift away from certified mail poses an unjustified risk of harm to beneficiaries' due process rights. Meanwhile, the introduction of electronic notification poses a similar risk, and with details about implementation lacking, requires extreme caution with robust safeguards to ensure due process for all beneficiaries.

RESPONSE: Thank you for your comments regarding updates to DHS Policy 1098. However, DHS respectfully disagrees with the assertions made within the comments. The amendments to Policy 1098 will offer faster mail delivery of notices and expanded options for beneficiaries to receive notices. The amendments will improve the service provided to clients that have initiated actions in the DHS Office of Appeals and Hearings ("DHS OAH").

Your comment letter presents two areas of concern: 1) the proposed amendments "pose an unjustified risk of harm to beneficiaries' due process rights;" and 2) the proposed amendments do not offer the assurances required by Policy 1098.2.7. These arguments and the supporting reasoning have been reviewed and considered by DHS OAH. The arguments do not raise issues or concerns that would support a change to the proposed amendments.

2. 1098.9.3, 1098.9.4, and 1098.18: Regular Mail

The current policy provides each OAH decision be sent via certified mail return receipt requested as well as notice where an untimely appeal was filed and where an appeal was defective. Changing the current to send via regular mail would place Arkansans at a

severe disadvantage because it eliminates the ability to track when decisions are received by claimants.

Certified mail provides the following benefits: proof of when mail was sent, delivery confirmation, and security in that only the intended recipient or authorized representative has to sign to receive the intended mail. Legal Aid has represented several clients in the past where clients did not timely receive an appeal decision. With certified mail tracking, they were able to show that they did not receive the decision. Under the new rule, these clients would have been entirely unable to file for reconsideration or to seek judicial review. Similarly, we have had many clients receive a decision after a significant mailing delay but technically within the timeframes for reconsideration or judicial review. Certified mail tracking ensured they had the full timeframe to consider taking appropriate next steps and secure counsel to do so. With the new rule, they would not have the full time guaranteed by law and could have only a couple of days. If there is no way to track when notices or decisions are received, Arkansans would have no remedy for hearings on untimely appeals.

Furthermore, during the unwinding process, where there has been an increase in appeals, Legal Aid is currently assisting clients where paperwork from DHS is sent to old addresses despite clients providing updated addresses. If sent by regular mail, there would be very little recourse for claimants. They would be unable to demonstrate when decisions are mailed, and the absence of the return receipt would provide no indication that the correct recipient received the notice and/or hearing decision.

Certified mail offers a faster means of delivery than regular mail. This is essential considering appeal timelines. If a claimant wishes to request a reconsideration of the OAH decision, then they must do so within ten days of receipt of the decision. Allowing decisions to be sent via regular mail shrinks due process rights by eliminating the only method that claimants rely on to demonstrate when they receive notices and decisions.

RESPONSE: The comments claim that certified mail is superior to regular mail for several reasons. However, the experience of DHS OAH does not support those claims. Certified mail is routinely slower to be delivered than regular mail. Certified mail is often not correctly delivered; the return receipt may not be signed or may be signed by the wrong recipient. Certified mail is simply not as reliable as the comments suggest. Likewise, DHS OAH keeps track of all notices and correspondence sent out in every administrative proceeding. If the beneficiary has chosen to initiate an action before DHS OAH, they are able to contact the office and find out when a notice or other correspondence was mailed to them and to what address it was sent.

3. 1098.9.2, 1098.9.3, 1098.9.4, and 1098.18: Opting in for Electronic Communications

In addition to what was previously stated, removing the requirement of sending mail "certified" undermines the obligation outlined in Section 1098.2.7, which requires the OAH to have procedures that assure that appellants receive notice of the denial or other action, notice of the administrative adjudication proceedings, and an opportunity to

appear, be represented, be heard, offer evidence, and call and cross examine witnesses. The proposed revisions suggest that individuals may "opt-in" for electronic communications as a method of receiving notice from the OAH.

Although this may serve as a benefit to people with knowledge of and access to appropriate technology, it is imperative that the OAH treats this "opt-in" as a voluntary option and not a mandate. To this end, implementation matters; how will recipients be informed of the ability to opt in? Will it be separate from or part of an existing form that requires other recipient signatures? Will it be clear that opting in is purely optional? Will there be an easy way to opt out if a recipient later decides they do not want electronic notifications?

Additionally, the agency must consider what these communications will look like to recipients. Will these messages be easy to read for those with standard pre-paid mobile devices that may not be smartphones? Will the messages be sent via text message? Will the messages be sent via email? Will the text or email contain the full information in the notice? Or will these messages include hyperlinks that will then send the recipient to a portal requiring a log-in – serving as additional steps in obtaining access to important notices that require prompt action? If DHS uses a portal, will the recipient have to have a separate password? What happens if the recipient forgets the password? In all circumstances, will the recipient be able to access the message later in the future? Will the key information be displayed in a way that is easily printed or shared? Will the messages be accessible to people with disabilities or people with limited English proficiency? What happens if people change email addresses or phone numbers? Will they know to inform DHS? And, will DHS have the capacity to update contact information instantaneously?

It is also important to consider the barriers to internet access that exist in Arkansas. With hundreds of thousands of Arkansans lacking internet access or mobile-phone devices, an "opt-in" for electronic messages may not be a meaningful option for low-income people.[1] Some people lack a home broadband connection because no broadband service is available.

RESPONSE: The option for electronic notifications is a voluntary option that will offer expanded services to clients that have initiated actions before DHS OAH. The clients may continue to receive mailed, paper notifications. The clients may choose to receive only electronic notifications or both electronic and mailed notifications. This is at the discretion and preference of the client. This benefit is particularly helpful when clients change physical addresses; it is common for clients to change their physical address more often than their email address.

For these reasons, the proposed amendments do not pose a risk to beneficiaries' due process rights and do assure that a client appearing before DHS OAH will receive proper notice about the administrative appeal process. DHS appreciates the questions posed in

[1] https://www.digitalinclusion.org/digital-divide-and-systemic-racism/.

the comments about the implementation of proposed amendments. These concerns were considered by the agency when drafting the proposed amendments. The agency also reached out to stakeholders before starting the rulemaking process and the proposed changes were supported by the stakeholders. These arguments do not raise issues or concerns that would support a change to the proposed amendments.

4. Arkansas, like many other states, has communities currently underserved by internet service providers. The Broadband Development Group submitted a report to state officials in April 2022 identifying 251,000 Arkansas households without adequate broadband access.[2] Another problem relates to the spread of residents in some communities. "While workers can more easily install services in flatter terrain, companies may not want to make investments in farming communities -- such as areas located in the delta --" - Philip Powell (Director of the Arkansas Farm Bureau's for Local Affairs and Rural Development). Arkansas statewide coverage maps were published, and, currently, a rather large portion of what is considered the "delta" remains without broadband internet access to date.[3] Furthermore, many people lack home broadband service for reasons other than network availability, like affordability. These are disproportionately people of color.[4] All told, tens of millions of Americans who still lack high-speed internet connections include large numbers of low income, older adult city residents, as well as residents of unserved rural communities.[5] These communities make up more than 60% of those who are receiving Medicaid in Arkansas, and, therefore, many of these beneficiaries have limited, if any internet access.[6]

RESPONSE: The option for electronic notifications is a voluntary option. It is not mandatory so if the beneficiary does not have access to reliable internet, they would not choose the electronic notification option, or they may select both electronic and mailed notifications. This is at the discretion and preference of the client. This benefit is particularly helpful when clients change physical addresses; it is common for clients to change their physical address more often than their email address.

5. Offering electronic-only notification to people with limited, inconsistent, or unreliable internet access endangers their due process rights, particularly absent robust safeguards. Many people are at risk of missing essential information that they only have a set number of days to respond to. It is important that the agency utilizes a system that offers confirmed delivery receipts and notifies them of message delivery failures. Moreover, mechanisms must be considered to take into account lapses in access due to outages, service disruptions, nonpayment of bills, or non-functioning equipment. How will recipients know to notify DHS of such lapses in access? Will hearing officers be explicitly required to consider lapses in access as good cause for hearing absences or untimely requests for appeals or reconsideration? How will DHS transition recipients back to paper-based notifications in such circumstances? These safeguards are important

[2] https://www.nwaonline.com/news/2023/may/28/us-senate-committee-hears-from-broadband-leaders.
[3] https://adfa-gov.maps.arcgis.com/apps/instant/interactivelegend/index.html
[4] Id.
[5] https://www.digitalinclusion.org/digital-divide-and-systemic-racism/.
[6] https://humanservices.arkansas.gov/wp-content/uploads/Annual-Statistical-Report-v7.pdf

in satisfying due process generally and the assurances in Section 1098.2.7, and they will serve to counter the threat of a disparate impact these revisions pose.

Electronic-only notification may assist some low-income Arkansans if robust safeguards are implemented. However, many recipients—perhaps the majority—are likely not to be well-served though electronic-only notification due to lack of internet access, lack of technology to use the internet (e.g., home computers, smartphones), and lack of comfort conducting business electronically. Those people need a dependable way of doing business with DHS and OAH. Thus, the agency should not disinvest in established ways of communication. Rather, the agency should consider doing more to ensure that geography and access to technology do not become additional barriers to accessing DHS's services.

RESPONSE: The option for electronic notifications is a voluntary option. It is not mandatory so if the beneficiary does not have access to reliable internet, they would not choose the electronic notification option, or they may select both electronic and mailed notifications. This is at the discretion and preference of the client. This benefit is particularly helpful when clients change physical addresses; it is common for clients to change their physical address more often than their email address.

6. Conclusion

The revisions in Sections 1098.9.2, 1098.9.3, 1098.9.4, and 1098.18 of the Appeals and Hearings procedures proposed by the Office of Appeals and Hearings, do not appear ripe for the picking or application. Proposing electronic notices as a new optional way of communicating while removing the requirement of certified mail appears to be an attempt to save money by the Office of Appeals and Hearings, with foreseeable discriminatory impacts along racial and economic lines. Removing the mail tracking and delivery assurances of certified mail and introducing an electronic system that lacks a "fail safe" delivery plan, creates a notification system that is without any safeguards. These revisions threaten the due process rights of the people DHS serves and their access to DHS's vital services.

RESPONSE: The comments claim that certified mail is superior to regular mail for several reasons. However, the experience of DHS OAH does not support those claims. Certified mail is routinely slower to be delivered than regular mail. Certified mail is often not correctly delivered; the return receipt may not be signed or may be signed by the wrong recipient. Certified mail is simply not as reliable as the comments suggest. Likewise, DHS OAH keeps track of all notices and correspondence sent out in every administrative proceeding. If the beneficiary has chosen to initiate an action before DHS OAH, they are able to contact the office and find out when a notice or other correspondence was mailed to them and to what address it was sent. This mail tracking by DHS provides due process protection for the clients served by DHS. No completely "fail safe" delivery plan exists, but adding the electronic notification option provides another tool to assist DHS in notifying beneficiaries in a timely manner.

The proposed effective date is January 1, 2024.

FINANCIAL IMPACT: The agency indicated that this rule has a financial impact.

Per the agency, this rule will result in a cost reduction of $36,750 for the current fiscal year ($20,948 in general revenue and $15,803 in federal funds) and $73,500 for the next fiscal year ($41,895 in general revenue and $31,605 in federal funds). The total estimated cost reduction to state, county, and municipal government as a result of this rule is $20,948 for the current fiscal year and $41,895 for the next fiscal year.

LEGAL AUTHORIZATION: "In addition to other rulemaking requirements imposed by law, each agency shall . . . adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available[.]" Ark. Code Ann. § 25-15-203(a). This rule implements Act 474 of 2023. The Act, sponsored by Senator Jim Dotson, amended the Administrative Procedure Act and allowed administrative adjudication decisions to be served electronically.

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
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CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR MEDICAID & CHIP SERVICES

CMCS Informational Bulletin

DATE: August 27, 2021

FROM: Daniel Tsai, Deputy Administrator and Director
Center for Medicaid and CHIP Services (CMCS)

SUBJECT: **Third Party Liability in Medicaid: State Compliance with Changes Required in Bipartisan Budget Act of 2018 and Medicaid Services Investment and Accountability Act of 2019**

The intent of this Center for Medicaid and CHIP Services (CMCS) Informational Bulletin is to advise states of the need to ensure that their Medicaid state plans comply with third party liability (TPL) requirements reflected in current law. The Centers for Medicare & Medicaid Services (CMS) recently completed a review of Medicaid state plans for all fifty states, the District of Columbia, and U.S. territories to ensure compliance with recent changes in statute. CMS found that most states have not yet amended their plans to comply with the TPL requirements authorized under both the Bipartisan Budget Act (BBA) of 2018 (Pub. L. 115- 123) and the Medicaid Services Investment and Accountability Act (MSIAA) of 2019 (Pub. L. 116-16), affecting the BBA of 2013.

The BBA of 2018 includes provisions that modify TPL rules related to special treatment of certain types of care and payment. In addition, the changes made by the MSIAA of 2019 to the BBA of 2013 allow for payment up to 100 days instead of 90 days for claims related to medical support enforcement.[1] CMS issued guidance to states in June of 2018, and again in November of 2019, on these changes in the TPL law (see hyperlinks on the following page). CMS is available to provide technical assistance to states that need to submit Medicaid state plan amendments to comply with the current TPL laws and implement the corresponding operational changes.

Background:

Medicaid is generally the "payer of last resort," meaning that Medicaid only pays for covered care and services if there are no other sources of payment available. Section 1902(a)(25) of the Social Security Act (the Act) requires that states take "all reasonable measures to ascertain the legal liability of third parties." The Act further defines third party payers to include, among others, health insurers, managed care organizations (MCO), group health plans, as well as any other parties that are legally responsible by statute, contract, or agreement to pay for care and services. The regulations mirror this definition of third parties at 42 CFR § 433.136.

Effective February 9, 2018, the BBA of 2018 amended section 1902(a)(25)(E) of the Act to require a state to use standard coordination of benefits cost avoidance instead of "pay and chase" when processing claims for prenatal services, including labor and delivery and postpartum care

[1] Medicaid Services Investment and Accountability Act of 2019 (Pub. L. 116-16), Section 7 (effective April 18, 2019)

claims. Therefore, if the State Medicaid Agency (SMA) has determined that a third party is likely liable for a prenatal claim, it must reject, but not deny, the claim and return it back to the provider noting the third party that Medicaid believes to be legally responsible for payment. If, after the provider bills the liable third party and a balance remains or the claim is denied payment for a substantive reason, the provider can submit a claim to the SMA for payment of the balance, up to the maximum Medicaid payment amount established for the service in the state plan.

Additionally, effective October 1, 2019, the BBA of 2018 amended section 1902(a)(25)(E) of the Act, to require a state to make payments without regard to third party liability for pediatric preventive services unless the state has made a determination related to cost-effectiveness and access to care that warrants cost avoidance for 90 days. In June 2018, CMS released an Informational Bulletin to provide technical assistance on the key TPL provisions related to the BBA of 2018 that impact Medicaid and CHIP. For reference, the hyperlink is provided here: https://www.medicaid.gov/federal-policy-guidance/downloads/cib060118.pdf.

In November 2019, CMS released an additional Information Bulletin to further clarify its guidance and to address changes made by the MSIAA of 2019 to the BBA of 2013, which allow for payment up to 100 days instead of 90 days after a claim is submitted for claims related to medical support enforcement. For reference, the hyperlink to the November 2019 Information Bulletin is provided here: https://www.medicaid.gov/federal-policy-guidance/downloads/cib111419.pdf.

State Compliance with Statutory Third Party Liability Changes:

States should update their Medicaid TPL state plan pages and submit amendments to CMS to reflect the following:

1. The requirement for states to apply cost avoidance procedures to claims for prenatal services, including labor, delivery, and postpartum care services;

2. The requirement for states to make payments without regard to potential TPL for pediatric preventive services, unless the state has made a determination related to cost-effectiveness and access to care that warrants cost avoidance for 90 days; and

3. State flexibility to make payments without regard to potential TPL for up to 100 days for claims related to child support enforcement beneficiaries.

States should review and make the required updates to their current state plan pages identified in Section 4.22 of the state plan (including any other applicable pages), bringing their plan into compliance with current law and regulations. CMS expects states to bring state plans into compliance by December 31, 2021.

If you have further questions regarding state compliance with these identified changes or are in need of technical assistance, please contact Cathy Sturgill, Technical Director for the Coordination of Benefits/Third Party Liability (COB/TPL) team for the Division of Health Homes, PACE and COB/TPL within the Disabled Elderly Health Programs Group at Cathy.Sturgill@cms.hhs.gov.

NOTICE OF RULE MAKING

The Department of Human Services (DHS) announces for a public comment period of thirty (30) calendar days a notice of rulemaking for the following proposed rule under one or more of the following chapters, subchapters, or sections of the Arkansas Code: §§20-76-201, 20-77-107, and 25-10-129. The proposed effective date is January 1, 2024.

The Office of Chief Counsel amends Policy 1098 to comply with Act 474 of the 94th General Assembly, which amends the Administrative Procedures Act to allow administrative adjudication decisions made by the Department of Human Services be served electronically by e-mail if the party consents. Also, Policy 1098 is updated to remove the requirement that certain notices be sent certified mail, return receipt requested. The proposed rule results in cost savings of $36,750 for state fiscal year (SYF) 2024 and $73,500 for SYF 2025.

Pursuant to the Governor's Executive Order 23-02, DHS repeals the following two rules as part of this promulgation: (1) Long-Term Care Ombudsman Act and (2) Description of Office on Aging and Adult Services.

The proposed rule is available for review at the Department of Human Services (DHS) Office of Rules Promulgation, 2nd floor Donaghey Plaza South Building, 7th and Main Streets, P. O. Box 1437, Slot S295, Little Rock, Arkansas 72203-1437. You may also access and download the proposed rule at ar.gov/dhs-proposed-rules. Public comments must be submitted in writing at the above address or at the following email address: ORP@dhs.arkansas.gov. All public comments must be received by DHS no later than September 25, 2023. Please note that public comments submitted in response to this notice are considered public documents. A public comment, including the commenter's name and any personal information contained within the public comment, will be made publicly available and may be seen by various people.

If you need this material in a different format, such as large print, contact the Office of Rules Promulgation at (501) 320-6428.

The Arkansas Department of Human Services is in compliance with Titles VI and VII of the Civil Rights Act and is operated, managed and delivers services without regard to religion, disability, political affiliation, veteran status, age, race, color or national origin. **4502095024**

Mitch Rouse, Chief Counsel
Office of Chief Counsel

1098.0 APPEALS AND HEARINGS PROCEDURES

1098.1 Policy

Department of Human Services (DHS) administrative adjudications are to be conducted impartially, timely, fairly, professionally, and objectively, and are to lead to decisions that are consistent with applicable state and federal laws.

1098.2 Definitions

1098.2.1 Administrative Adjudication: The process for the formulation of an order.

1098.2.2 APA: The Arkansas Administrative Procedure Act, beginning at Ark. Code Ann. §25-15-201.

1098.2.3 Appellant: The party applying for DHS services or appealing DHS adverse action.

1098.2.4 Burden of Proof: The responsibility to establish a proposition by sufficient evidence. An appellant seeking to establish eligibility for DHS benefits or services has the burden of proving his or her eligibility. If the appeal challenges DHS adverse action, DHS has the burden of proving the facts necessary to support the adverse action.

1098.2.5 Conflict of Interest: A situation where, with respect to the claim or controversy before the hearing official, the official:

A. Has been a party or acted as an advocate for a party; or

B. Has a direct or indirect financial interest. A financial interest is indirect if it exists though the hearing official's spouse, child, parent, sibling, or grandparent, or through the hearing official's ownership or management interest in any entity having a financial interest.

1098.2.6 DHS: The Department of Human Services.

1098.2.7 Process Procedures: Procedures assuring that appellants have notice of the denial or other action, notice of the administrative adjudication proceedings, and an opportunity during those proceedings to appear, be represented, be heard, offer evidence and arguments, and call and cross examine witnesses.

1098.2.8 Financial Interest: More than a remote possibility of a gain or loss resulting from the outcome of the claim or controversy.

1098.2.9 Good Cause: Substantial reason, that which a reasonably prudent and intelligent person would find justifiable.

1098.2.10 Hearing Official: An administrative law judge or hearing officer employed by the Office of Administrative Hearings (OAH).

1098.2.11 Impartiality: The absence of bias or prejudice or the appearance of bias or prejudice, in the hearing official's application of the agency's special knowledge and expertise

to the issues under consideration. An appearance of bias or prejudice exists if any party has reasonable cause to question the hearing official's impartiality.

1098.2.12 OAH: Tthe Office of Appeals and Hearings of the Department of Human Services.

1098.2.13 Order: Aa final agency determination that may be appealed to a circuit court under the APA.

1098.2.14 Party: Tthe person asking for the administrative adjudication, and the DHS division or office, acting through its employees, which made the decision or took the action being appealed.

1098.2.15 Reasonable Cause: Ceircumstances sufficiently strong to warrant a cautious person's belief that an allegation is true.

1098.2.16 Recusal: Aan order disqualifying the hearing official from hearing the appeal.

1098.2.17 Relevant Evidence: Eevidence tending to make the existence of any fact that is of consequence to the administrative adjudication more probable or less probable than it would be without the evidence.

1098.2.18 Representative: Aa person selected by a party to present that party's statements, arguments, and evidence during the administrative adjudication process. A corporation or association cannot be a representative.

1098.3 Right to Administrative Adjudication: Unless a different administrative remedy is provided by statute, regulation, or rule, any person denied DHS assistance, and any person entitled by state or federal law or rule to appeal an adverse DHS action, may initiate an administrative adjudication by submitting a written appeal in compliance with the requirements applicable to the assistance denied or adverse action taken.

1098.4 Notice of Representative: Appellants who intend to be represented at any stage of an adjudication must notify OAH of the name, address, and telephone number of the representative as soon as possible, and at least ten (10) business days before any hearing. Appellants who fail to comply with this requirement must choose to: One (1) proceed without representation; or Two (2) request that the hearing be delayed to afford the agency at least ten (10) business days to secure representation, if the request includes a waiver of any timeframe that is inconsistent with the delay.

1098.5 Interpreters: If any party requires an interpreter, due to hearing impairment or an inability to communicate in the English language, the party must notify OAH of the need for an interpreter at least ten (10) business days before a hearing. OAH will immediately direct DHS to secure the services of an interpreter. If the party requiring an interpreter does not furnish timely notice of the need for an interpreter, the hearing will be rescheduled. If the new schedule fails to comply with any applicable timeframe, the party requiring an interpreter will be deemed to have waived that timeframe.

1098.6 Timeframes: Most DHS programs have time limitations for the completion of administrative adjudications. Timeframes are the bases for hearing schedules. Failure to meet a timeframe does not deprive OAH of jurisdiction to administratively adjudicate the appeal, but may be the basis for one or more orders directing parties to take certain actions in a timely manner, and may warrant sanctions against parties that fail to follow OAH orders.

1098.7 Resolution without a Hearing: There are four (4) ways to end an administrative adjudication without a hearing:

1098.7.1 DHS withdraws the adverse action on the record at the hearing or in writing before the hearing;

1098.7.2 The appellant withdraws the appeal request on the record at the hearing or in writing before the hearing;

1098.7.3 The parties reach a mutually agreeable resolution of the appeal and file written notice of settlement explaining the terms of the settlement; or

1098.7.4 OAH dismisses the appeal as defective.

1098.8 Hearings

1098.8.1 Special Types of Hearing

A. Special Nutrition Program: See Family Day Care Home (FDCH)-3.

B. Medical Necessity/ Medical Disability Decisions:

1. The hearing official will notify the appellant in writing that if the appellant has evidence regarding the initial application and asserted disability, the appellant must provide the information to the hearing official or complete a "Consent for Release of Information" form as soon as possible and before the hearing.

2. The hearing will not be delayed for failure to submit additional evidence.

3. Evidence presented to the hearing official will be limited to evidence of eligibility as of the date of denial by DHS. The hearing official will refuse evidence about subsequent medical necessity/disability and advise the applicant to submit a new application to DHS.

4. A physician employed by DHS to review denials will be available by phone for the hearing if requested or subpoenaed by any party.

5. The hearing official will hear medical and non-medical evidence regarding eligibility. The hearing official will make the final decision regarding eligibility.

1098.8.2 Hearing Officials: Each hearing official must act impartially.

A. Hearing officials must not have communication with any party to an administrative adjudication if any other party is excluded from the communication, except that the following communications are acceptable:

1. Communication necessary to schedule hearings and the submission of exhibits and arguments; or

2. Communication necessary to identify, without comment or argument, any exhibits or documents being delivered to OAH.

B. Conflict of Interest:

1. Any hearing official having a conflict of interest must notify the OAH Managing Administrative Law Judge immediately upon discovering a conflict of interest, and must not take any further action regarding the claim or controversy.

2. A hearing official must recuse if the hearing officer has personal knowledge of the facts of the case or has a conflict of interest.

3. A hearing official should recuse if any party has reasonable cause to suspect that the hearing officer may not be impartial.

1098.8.3 Attendance: Administrative adjudications are public ~~proceedings, and~~proceedings and are open to the public subject to state and federal confidentiality laws and rules. An appellant may waive his or her right to ~~confidentiality, but~~confidentiality but may not waive another's right to confidentiality. For example, an appellant may not waive an alleged child victim's right to confidentiality in a child maltreatment case; may not waive a nursing home resident's right to confidentiality in an adult abuse or neglect case; and may not waive a child's right to confidentiality in a Special Nutrition case.

A. The hearing official may determine that a party is physically or mentally unable to attend or participate, or that the party's presence will so disrupt the proceedings that the adjudication cannot continue in an orderly fashion unless the party is excluded. Party representatives may be present at all stages of the proceedings unless the hearing official determines that a representative's presence will so disrupt the proceedings that the adjudication cannot continue in an orderly fashion unless the representative is excluded.

B. Interpreters may be present when necessary to facilitate communication before and during a hearing. Interpreters shall be placed under oath before interpreting testimony. The following oath is suggested: "Do you solemnly affirm that you will truthfully and accurately interpret all questions and answers?"

C. Witnesses may be present unless: (i) any party has asked that the witnesses be excluded except while testifying; or (ii) the evidence is confidential by state or federal law or rule, and disclosing the evidence to a non-testifying witness would violate that confidentiality. If witnesses are excluded from the hearing, the witnesses shall be instructed that until a witness is released, that witness

must not discuss the evidence with another ~~witness, and~~witness and must not discuss any other witness's testimony with anyone.

D. Observers will be excluded if the evidence to be presented is confidential under state or federal law or rule, and disclosing the evidence to the observer would violate that state or federal law or rule.

E. News media: Persons representing the news media will be excluded if the evidence to be presented is confidential under state or federal law or rule, and disclosing the evidence to the observer would violate that state or federal law or rule.

1098.8.4 Opening and Closing Statements: Each party may be given an opportunity to make an opening and closing statement, limited to ten (10) minutes unless the issues are so complex that the hearing official determines that more time is required to adequately explain the parties' contentions.

1098.8.5 Questions Allowed: Questioners may ask only one (1) question at a time. Questions may not take the form of statements or contentions, and must not be asked in such a way as to bully or intimidate a witness.

1098.8.6 Newly acquired evidence:

A. Admissible evidence that was not submitted to the person or persons who made the decision under appeal may be admitted in appeals under Ark. Code Ann. § 12-12-512 or § 5-28-211. Newly acquired evidence may be admitted in other appeals only if the evidence:

1. Ce~~o~~ncerns events or circumstances predating the application, request, or decision under appeal; and

2. Ce~~o~~uld not have been obtained by the party offering the evidence despite that party's due diligence in acquiring evidence.

B. If the hearing official determines that newly acquired evidence is admissible, the hearing official shall return the case to the decision-maker so that the newly acquired evidence may be considered, or shall determine that there is good cause not to return the case. Each good cause finding and the reasons therefore shall be stated in the findings of fact and conclusions of law.

1098.8.7 Allowing additional evidence after the hearing: If a request to receive additional identified and specifically described evidence is made at the hearing, OAH may for good cause hold the hearing record open for a specified period of time to receive additional admissible and relevant evidence that will assist the hearing official in deciding the case.

1098.9 Commencement of Administrative Adjudication

1098.9.1 Each appeal shall begin with the filing of a written notice of appeal in the time and manner specified for the subject matter of the appeal.

1098.9.2 Upon receipt of a sufficient and timely notice of appeal, the OAH shall assign a number to the appeal, schedule the appeal for a hearing within the applicable timeframe, and mail written notice of the time, date, and place of the appeal to the parties by regular mail posted at least thirteen (13) days before the date of the hearing. OAH may also ~~sent~~send notice of the hearing electronically for parties that have opted to receive~~d~~ electronic communications. DHS parties may be notified by interdepartmental mail or by DHS E-mail. Notice is presumptively complete upon mailing or upon transmission by interdepartmental mail or DHS E-mail.

1098.9.3 Upon receipt of an untimely notice of appeal OAH shall notify the appellant that the appeal was not filed in time. The notice shall be sent by ~~certified mail, return receipt requested~~ regular mail or electronically for parties that have opted to receive electronic communications, and shall inform the person that he or she may have a right under the APA to appeal OAH's determination of untimely filing.

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1098.10 Discovery: Discovery is the process whereby one (1) party requests documents from the other party, submits written interrogatories to the other party, or takes witness depositions by phone or in person. If one (1) or more parties want to have discovery, the parties are encouraged to agree informally on discovery procedures. If the parties cannot agree, any party may ask the hearing official to enter a discovery order. All discovery orders will be guided generally by the Arkansas Rules of Civil Procedure regarding discovery, except as necessary to meet timeframes or otherwise fit the administrative adjudication process.

1098.11 Securing the Attendance of Witnesses: Witnesses may appear voluntarily or involuntarily if properly served with a subpoena. Subpoenas direct the witness to appear and give testimony at a specified time and place, and also may direct the witness to bring documents. To obtain a witness subpoena, parties must follow the instructions on the attached subpoena request form. OAH must receive each subpoena request at least ten (10) business days before the hearing. Each party is responsible for serving (delivering) each subpoena in accordance with Rule 45 of the Arkansas Rules of Civil Procedure.

1098.12 Postponements: Any party may request that ~~a hearing~~the hearing be rescheduled to a later date. Requests should be made in writing and delivered to OAH and all other parties. Verbal requests must be followed by a written request mailed or faxed no later than one (1) business day after the verbal request. Except in cases of actual emergency, all postponement requests must be received at least ten (10) days before a hearing. OAH shall deny DHS postponement requests that are incompatible with appeal timeframes. OAH may for good cause grant other postponement requests. Any postponement order that is incompatible with appeal timeframes shall notify the party

requesting the continuance that his or her request is deemed a waiver of any objections, defenses, or both based on timeframes.

1098.13 **Location of Hearings:** Hearings may be held in the OAH office at 7th and Main Streets ~~n~~in Little Rock, Arkansas, in the county office in the county where the appellant resides, by telephone, or by videoconference.

1098.14 **Failure to appear:** Regardless of whether the appellant is represented, the appellant must appear in person for all hearings regarding program eligibility or program ~~services, or~~services or show good cause why he or she cannot be present. If any party fails to appear (either in person or by telephone) within fifteen (15) minutes after the hearing was scheduled to begin, OAH will confirm that the party had proper notice of the hearing and will attempt to contact the absent party. The hearing official may allow an additional fifteen (15) minutes before beginning the hearing. When the hearing begins, the hearing official will identify for the record any party not present in person or by telephone. If the appellant does not appear, the appeal shall be deemed abandoned, subject to reopening on a showing ~~hat~~that the appellant exercised due diligence but was unable to appear due to circumstances beyond the appellant's control. If the agency does not appear, the hearing official may proceed with the hearing and may consider any hearing statements or other documents submitted by the agency.

1098.15 **Burden of Going Forward:** When a hearing begins, the burden of going forward is on the party with the burden of proof. When that party has presented his or her evidence, the burden of going forward shifts to the other party. After that evidence is submitted, the party with the burden of proof may offer rebuttal evidence. For example, if a person named as a perpetrator of child maltreatment appeals the maltreatment finding, DHS has the burden of proof so it presents evidence first. The appellant then presents his or her evidence. After that, DHS may present rebuttal evidence. This process may continue until the party with the burden of proof decides to offer no more evidence.

1098.16 **Order of Witnesses:** The party with the burden of proof goes first. Each party determines the order in which to call its own witnesses. The hearing official may direct, or the parties may agree, to take one or more witnesses out of turn, for example, to accommodate the witness's schedule or expedite the hearing process.

Maltreatment Victim and Child Witnesses: In all maltreatment appeal hearings, the testimony of alleged victims and all child witnesses under the age of eighteen (18) shall be taken outside the presence of the Petitioner. Testimony from child witnesses and alleged victims shall be taken in one of the following manners:

(1) The victim or child may be physically present in the hearing room while the Petitioner listens in from another location by phone;

(2) The victim or child may testify by phone or live camera (FaceTime, audio- visual, etc.) from another location but the child or victim shall not face nor hear from the Petitioner;

(3) The victim or child may testify by other reasonable accommodations agreed upon by both parties as long as the Petitioner is not in the same room with the child or the victim and the child or victim can't see or hear the Petitioner; or,

(4) Previously recorded video or audio interviews also known as "safety assessments" with a victim may be introduced as evidence and shall be given the same weight as if the victim testified in person. The entire interview is subject to scrutiny at the hearing.

If the hearing is taking place in a county office and a child is scheduled to testify at a hearing, the hearing official shall notify the DCFS County Supervisor in that county office to direct that appropriate arrangements are made. At the time and date of the hearing, DHS shall provide:

(1) A separate space for children; and,
(2) A room with a telephone by which the Petitioner can listen to the child's testimony when the child is called into the hearing room to testify.

Child witnesses or victims shall not be questioned by the Petitioner. If the Petitioner doesn't have a representative to ask the victim or child witness questions, the Petitioner shall write them down for the hearing official to ask. The agency is not required to call any child maltreatment victims to testify in appeal hearings if doing so would unnecessarily traumatize the child (See AR DHS v. A.B., 374 Ark. 193 (2008)). Upon the request of the agency or the child's parent or guardian, the hearing official may designate a "comfort person" to remain with the child before, during, and after testifying.

1098.17 Record Made: OAH will tape record each hearing. If the OAH decision is appealed, OAH will prepare a transcript or cause a transcript to be prepared for filing in the circuit court as provided in the APA.

1098.18 Findings of Fact and Conclusions of Law: Each OAH decision will be in writing and will separately set out findings of fact, conclusions of law, and an order. OAH will furnish each party a copy of the findings of fact, conclusions of law, and order by mailing a copy to the party's last known address by regular ~~certified mail, return receipt requested.~~mail or electronically for parties that have opted to receive electronic communications.

1098.19 Reconsideration: Within ten (10) calendar days of a party's receipt of the findings of fact, conclusions of law, and the order, any party may request reconsideration. Simultaneous to a request for reconsideration, the party shall notify the opposing party of the request.

1098.20 Grounds for Reconsideration: Reconsideration is for the limited purposes of correcting material misstatements of the record, clear errors of law, or both. Each request for reconsideration must state in plain terms the grounds upon which the requestor relies. OAH shall summarily deny any reconsideration that asks OAH to

receive additional evidence, exercise its discretion differently, or modify or reverse any finding, conclusion, or order for any reason other than correcting material misstatements of the record, clear errors of law, or both.

1098.21 Reconsideration Process: Any party requesting reconsideration shall ~~provide to~~provide OAH proof of notice to the opposing party. The opposing party shall have ten (10) calendar days from the receipt of the notice to respond to the request. If necessary, OAH may reconvene both parties for argument on the request for reconsideration and shall notify both parties of a reconsideration conference.

1098.22 Reconsideration Decision: If OAH determines that there are good and sufficient grounds for reconsideration, it shall amend the findings of fact, conclusions of law, and decision as necessary to correct any material misstatement of the record, clear error of law, or both. OAH shall issue any amended findings of fact, conclusions of law, and order within thirty (30) calendar days of receiving the reconsideration request, unless the period for the reconsideration decision is waived. The amended findings of fact, conclusions of law, and order shall be the final agency determination as provided in the APA. OAH shall furnish copies of the amended findings of fact, conclusions of law, and order to the parties as provided in 1098.18.

1098.23 Final Agency Determination: If OAH does not receive a written request for reconsideration within ten (10) calendar days of a party's receipt of the initial findings of fact, conclusions of law, and order, the initial findings of fact, conclusions of law, and order shall become the final agency determination as provided in the APA.

1098.0 APPEALS AND HEARINGS PROCEDURES

1098.1 Policy

Department of Human Services (DHS) administrative adjudications are to be conducted impartially, timely, fairly, professionally, and objectively, and are to lead to decisions that are consistent with applicable state and federal laws.

1098.2 Definitions

1098.2.1 Administrative Adjudication: The process for the formulation of an order.

1098.2.2 APA: The Arkansas Administrative Procedure Act, beginning at Ark. Code Ann. §25-15-201.

1098.2.3 Appellant: The party applying for DHS services or appealing DHS adverse action.

1098.2.4 Burden of Proof: The responsibility to establish a proposition by sufficient evidence. An appellant seeking to establish eligibility for DHS benefits or services has the burden of proving his or her eligibility. If the appeal challenges DHS adverse action, DHS has the burden of proving the facts necessary to support the adverse action.

1098.2.5 Conflict of Interest: A situation where, with respect to the claim or controversy before the hearing official, the official:

A. Has been a party or acted as an advocate for a party; or

B. Has a direct or indirect financial interest. A financial interest is indirect if it exists though the hearing official's spouse, child, parent, sibling, or grandparent, or through the hearing official's ownership or management interest in any entity having a financial interest.

1098.2.6 DHS: The Department of Human Services.

1098.2.7 Process Procedures: Procedures assuring that appellants have notice of the denial or other action, notice of the administrative adjudication proceedings, and an opportunity during those proceedings to appear, be represented, be heard, offer evidence and arguments, and call and cross examine witnesses.

1098.2.8 Financial Interest: More than a remote possibility of a gain or loss resulting from the outcome of the claim or controversy.

1098.2.9 Good Cause: Substantial reason, that which a reasonably prudent and intelligent person would find justifiable.

1098.2.10 Hearing Official: An administrative law judge or hearing officer employed by the Office of Administrative Hearings (OAH).

1098.2.11 Impartiality: The absence of bias or prejudice or the appearance of bias or prejudice, in the hearing official's application of the agency's special knowledge and expertise

to the issues under consideration. An appearance of bias or prejudice exists if any party has reasonable cause to question the hearing official's impartiality.

1098.2.12 OAH: The Office of Appeals and Hearings of the Department of Human Services.

1098.2.13 Order: A final agency determination that may be appealed to a circuit court under the APA.

1098.2.14 Party: The person asking for the administrative adjudication, and the DHS division or office, acting through its employees, which made the decision or took the action being appealed.

1098.2.15 Reasonable Cause: Circumstances sufficiently strong to warrant a cautious person's belief that an allegation is true.

1098.2.16 Recusal: An order disqualifying the hearing official from hearing the appeal.

1098.2.17 Relevant Evidence: Evidence tending to make the existence of any fact that is of consequence to the administrative adjudication more probable or less probable than it would be without the evidence.

1098.2.18 Representative: A person selected by a party to present that party's statements, arguments, and evidence during the administrative adjudication process. A corporation or association cannot be a representative.

1098.3 Right to Administrative Adjudication: Unless a different administrative remedy is provided by statute, regulation, or rule, any person denied DHS assistance, and any person entitled by state or federal law or rule to appeal an adverse DHS action, may initiate an administrative adjudication by submitting a written appeal in compliance with the requirements applicable to the assistance denied or adverse action taken.

1098.4 Notice of Representative: Appellants who intend to be represented at any stage of an adjudication must notify OAH of the name, address, and telephone number of the representative as soon as possible, and at least ten (10) business days before any hearing. Appellants who fail to comply with this requirement must choose to: (1) proceed without representation; or (2) request that the hearing be delayed to afford the agency at least ten (10) business days to secure representation, if the request includes a waiver of any timeframe that is inconsistent with the delay.

1098.5 Interpreters: If any party requires an interpreter, due to hearing impairment or an inability to communicate in the English language, the party must notify OAH of the need for an interpreter at least ten (10) business days before a hearing. OAH will immediately direct DHS to secure the services of an interpreter. If the party requiring an interpreter does not furnish timely notice of the need for an interpreter, the hearing will be rescheduled. If the new schedule fails to comply with any applicable timeframe, the party requiring an interpreter will be deemed to have waived that timeframe.

1098.6 Timeframes: Most DHS programs have time limitations for the completion of administrative adjudications. Timeframes are the bases for hearing schedules. Failure to meet a timeframe does not deprive OAH of jurisdiction to administratively adjudicate the appeal, but may be the basis for one or more orders directing parties to take certain actions in a timely manner, and may warrant sanctions against parties that fail to follow OAH orders.

1098.7 Resolution without a Hearing: There are four (4) ways to end an administrative adjudication without a hearing:

1098.7.1 DHS withdraws the adverse action on the record at the hearing or in writing before the hearing;

1098.7.2 The appellant withdraws the appeal request on the record at the hearing or in writing before the hearing;

1098.7.3 The parties reach a mutually agreeable resolution of the appeal and file written notice of settlement explaining the terms of the settlement; or

1098.7.4 OAH dismisses the appeal as defective.

1098.8 Hearings

1098.8.1 Special Types of Hearing

A. Special Nutrition Program: See Family Day Care Home (FDCH)-3.

B. Medical Necessity/ Medical Disability Decisions:

1. The hearing official will notify the appellant in writing that if the appellant has evidence regarding the initial application and asserted disability, the appellant must provide the information to the hearing official or complete a "Consent for Release of Information" form as soon as possible and before the hearing.

2. The hearing will not be delayed for failure to submit additional evidence.

3. Evidence presented to the hearing official will be limited to evidence of eligibility as of the date of denial by DHS. The hearing official will refuse evidence about subsequent medical necessity/disability and advise the applicant to submit a new application to DHS.

4. A physician employed by DHS to review denials will be available by phone for the hearing if requested or subpoenaed by any party.

5. The hearing official will hear medical and non-medical evidence regarding eligibility. The hearing official will make the final decision regarding eligibility.

1098.8.2 Hearing Officials: Each hearing official must act impartially.

A. Hearing officials must not have communication with any party to an administrative adjudication if any other party is excluded from the communication, except that the following communications are acceptable:

1. Communication necessary to schedule hearings and the submission of exhibits and arguments; or

2. Communication necessary to identify, without comment or argument, any exhibits or documents being delivered to OAH.

B. Conflict of Interest:

1. Any hearing official having a conflict of interest must notify the OAH Managing Administrative Law Judge immediately upon discovering a conflict of interest, and must not take any further action regarding the claim or controversy.

2. A hearing official must recuse if the hearing officer has personal knowledge of the facts of the case or has a conflict of interest.

3. A hearing official should recuse if any party has reasonable cause to suspect that the hearing officer may not be impartial.

1098.8.3 Attendance: Administrative adjudications are public proceedings and are open to the public subject to state and federal confidentiality laws and rules. An appellant may waive his or her right to confidentiality but may not waive another's right to confidentiality. For example, an appellant may not waive an alleged child victim's right to confidentiality in a child maltreatment case; may not waive a nursing home resident's right to confidentiality in an adult abuse or neglect case; and may not waive a child's right to confidentiality in a Special Nutrition case.

A. The hearing official may determine that a party is physically or mentally unable to attend or participate, or that the party's presence will so disrupt the proceedings that the adjudication cannot continue in an orderly fashion unless the party is excluded. Party representatives may be present at all stages of the proceedings unless the hearing official determines that a representative's presence will so disrupt the proceedings that the adjudication cannot continue in an orderly fashion unless the representative is excluded.

B. Interpreters may be present when necessary to facilitate communication before and during a hearing. Interpreters shall be placed under oath before interpreting testimony. The following oath is suggested: "Do you solemnly affirm that you will truthfully and accurately interpret all questions and answers?"

C. Witnesses may be present unless: (i) any party has asked that the witnesses be excluded except while testifying; or (ii) the evidence is confidential by state or federal law or rule, and disclosing the evidence to a non-testifying witness would violate that confidentiality. If witnesses are excluded from the hearing, the witnesses shall be instructed that until a witness is released, that witness

must not discuss the evidence with another witness and must not discuss any other witness's testimony with anyone.

D. Observers will be excluded if the evidence to be presented is confidential under state or federal law or rule, and disclosing the evidence to the observer would violate that state or federal law or rule.

E. News media: Persons representing the news media will be excluded if the evidence to be presented is confidential under state or federal law or rule, and disclosing the evidence to the observer would violate that state or federal law or rule.

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(1) A separate space for children; and,
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1098.19 **Reconsideration**: Within ten (10) calendar days of a party's receipt of the findings of fact, conclusions of law, and the order, any party may request reconsideration. Simultaneous to a request for reconsideration, the party shall notify the opposing party of the request.

1098.20 **Grounds for Reconsideration**: Reconsideration is for the limited purposes of correcting material misstatements of the record, clear errors of law, or both. Each request for reconsideration must state in plain terms the grounds upon which the requestor relies. OAH shall summarily deny any reconsideration that asks OAH to

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1098.22 **Reconsideration Decision**: If OAH determines that there are good and sufficient grounds for reconsideration, it shall amend the findings of fact, conclusions of law, and decision as necessary to correct any material misstatement of the record, clear error of law, or both. OAH shall issue any amended findings of fact, conclusions of law, and order within thirty (30) calendar days of receiving the reconsideration request, unless the period for the reconsideration decision is waived. The amended findings of fact, conclusions of law, and order shall be the final agency determination as provided in the APA. OAH shall furnish copies of the amended findings of fact, conclusions of law, and order to the parties as provided in 1098.18.

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State of Arkansas
94th General Assembly
Regular Session, 2023

A Bill

SENATE BILL 397

By: Senator J. Dotson
By: Representative Tosh

For An Act To Be Entitled

AN ACT TO AMEND THE ADMINISTRATIVE PROCEDURE ACT; TO ALLOW ADMINISTRATIVE ADJUDICATION DECISIONS TO BE SERVED ELECTRONICALLY; AND FOR OTHER PURPOSES.

Subtitle

TO AMEND THE ADMINISTRATIVE PROCEDURE ACT; AND TO ALLOW ADMINISTRATIVE ADJUDICATION DECISIONS TO BE SERVED ELECTRONICALLY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code § 25-15-210(c), concerning administrative adjudication decisions under the Arkansas Administrative Procedure Act, is amended to read as follows:

(c)(1) Parties shall be served either personally or by mail with a copy of any decision or order.

(2) In addition to the manner of service provided under subsection (c)(1) of this section, administrative adjudication decisions made by the Department of Human Services may be served electronically by e-mail if the party consents.

SECTION 2. EMERGENCY CLAUSE. It is found and determined by the General Assembly of the State of Arkansas that the Department of Human Services issues numerous administrative adjudication decisions concerning eligibility for health services under Medicaid; that Medicaid provided for

the continuous enrollment in certain programs during the coronavirus 2019 (COVID-19) pandemic; that the revocation of the continuous enrollment procedures under Medicaid will increase the number of administrative adjudication decisions to be transmitted by the Department of Human Services; that beneficiaries under the Medicaid programs require timely notice to ensure continuous care for their health and welfare; and that timely notice to beneficiaries affected by the decisions of the Department of Human Services is immediately necessary because the health and welfare of the citizens affected will be harmed by increased delay in the administrative adjudication process. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on:

(1) The date of its approval by the Governor;

(2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or

(3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.

APPROVED: 4/4/23

RULES SUBMITTED FOR REPEAL

Rule #1: Long-Term Care Ombudsman Act

Rule #2: Description of Office on Aging and Adult Services

FINAL RULE
No Significant Change

LONG-TERM CARE OMBUDSMAN ACT

Purpose

The purpose of this policy is to establish and administer an Ombudsman program in accordance with the federal Older Americans Act, as amended, and all applicable Federal and State laws including the Arkansas Administrative Procedures Act.

Scope

This policy applies to all efforts directed by the State Long-Term Care Ombudsman and all trained and certified sub-state ombudsmen funded wholly or in part with federal and state funds.

General Authority

Repeal

This policy is established in accordance with the provisions of the Older Americans Act as amended and Act 252 of the 1987 Arkansas State Legislature. Section 2 of Act 252 authorizes the Division of Aging and Adult Services to establish and administer the program and to promulgate regulations under the Arkansas Administrative Procedures Act. Section 3 of Act 252 authorizes the Ombudsman access to any patient or resident in a long-term care facility during any period of operation of the facility.

Policy

The Division of Aging and Adult Services shall administer an Ombudsman program in accordance with federal and state law.

Procedures

1. The State Long-Term Care Ombudsman and sub-state ombudsmen shall receive and document complaints concerning treatment and care of residents of long-term care facilities.

2. The State Long-Term Care Ombudsman and sub-state ombudsmen shall conduct complaint verification and investigation.

3. The State Long-Term Care Ombudsman and sub-state ombudsmen shall resolve, to the extent possible, verified complaints via mediating corrective actions involving all pertinent parties.

4. The State Long-Term Care Ombudsman and sub-state ombudsmen shall maintain a basis of confidentiality in order to protect the rights, safety and interests of residents of long-term care facilities.

5. The State Long-Term Care Ombudsman and sub-state ombudsmen shall obtain proper written consent from long-term care facility residents prior to releasing any data concerning a patient or resident of such a facility.

RJ:mmj

The Arkansas State Office on Aging and Adult Services was initially established by a Governor's Proclaimation in 1966. The Arkansas Legislature statutorily established the State Office on Aging in 1971 (Ark. Stat. Ann. 5-912 (1976 Repl.)) in accordance with provisions of the Older Americans Act (42 USC 3001). The Office on Aging is one of seven Divisions of the Department of Human Services, the umbrella agency for most of Arkansas' human services programs. DHS is a cabinet - level agency with the Director appointed by and reporting directly to the Governor. The Directors of each DHS division are immediately under the Director of DHS and are also appointed by the Governor. The Office on Aging was originally part of the DHS Division of Social Services, however, in 1977 the Office was made a separate Division within DHS by the Legislature.

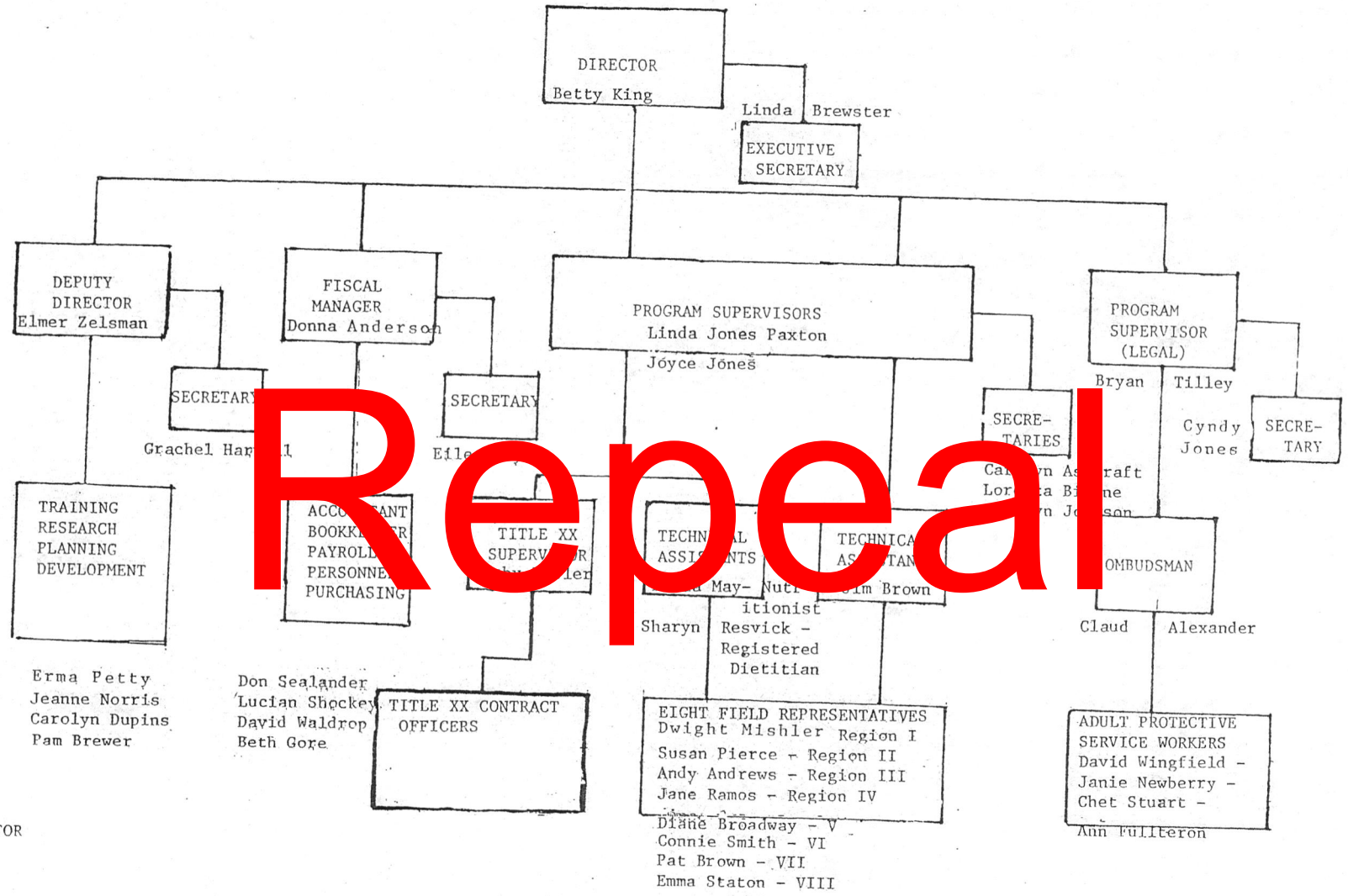
Repeal

The Office on Aging has responsibility for advocating, planning and developing programs for older persons and from time to time the promulgation of rules and regulations to accomplish its objectives. The organizational chart (see attached) indicates there are four main sub-divisions all under the direct supervision of the Director. The four sub-divisions are: fiscal, research and training, programmatic and technical assistance, and advocacy assistance.

The Office on Aging and Adult Services channels monies from multiple funding sources to eight Area Agencies on Aging who are responsible for the provision of services in their multi county districts. The Area Agencies on Aging are private, nonprofit corporations.

If there are any questions, R. Bryan Tilley at 371-2441 is available to answer any questions.

OFFICE ON AGING ORGANIZATIONAL CHART



BETTY KING, DIRECTOR
11/1/79

DHS Responses to Public Comments Regarding – Office of Appeals and Hearings Update to DHS Policy 1098

Victoria Frazier and Nikki Clark, Attorneys

Legal Aid of Arkansas

Comment:

Legal Aid of Arkansas ("Legal Aid") is a nonprofit law firm representing low-income Arkansans in civil legal matters throughout the state, including in rural areas in the Ozarks and the Delta. Legal Aid's mission is to improve the lives of low-income Arkansans by championing equal access to justice for all, regardless of location and economic or social circumstances. Through many years of advocacy for our clients, we have gained valuable insight into the barriers our clients face due to their location and limited resources. We offer these comments to help the Department of Human Services ("DHS") and the State understand how the proposed revisions can adversely affect our client community.

Sections 1098.9.2, 1098.9.3, 1098.9.4, and 1098.18 of the Appeals and Hearings Procedures, in sum, propose revisions that would authorize the Office of Appeals and Hearing ("OAH") to mail, by regular mail, all notices related to timely appeals and hearing information, untimely appeals and the appellant's rights as a result, as well as defective appeals and their rights as a result. The same sections propose revisions that would allow the OAH to send these same notices electronically for parties that have opted to receive electronic communications.

In short, the shift away from certified mail poses an unjustified risk of harm to beneficiaries' due process rights. Meanwhile, the introduction of electronic notification poses a similar risk, and with details about implementation lacking, requires extreme caution with robust safeguards to ensure due process for all beneficiaries.

Response: Thank you for your comments regarding updates to DHS Policy 1098. However, DHS respectfully disagrees with the assertions made within the comments. The amendments to Policy 1098 will offer faster mail delivery of notices and expanded options for beneficiaries to receive notices. The amendments will improve the service provided to clients that have initiated actions in the DHS Office of Appeals and Hearings ("DHS OAH").

Your comment letter presents two areas of concern: 1) the proposed amendments "pose an unjustified risk of harm to beneficiaries' due process rights;" and 2) the proposed amendments do not offer the assurances required by Policy 1098.2.7. These arguments and the supporting reasoning have been reviewed and considered by DHS OAH. The arguments do not raise issues or concerns that would support a change to the proposed amendments.

Comment: 1098.9.3, 1098.9.4, and 1098.18: Regular Mail

The current policy provides each OAH decision be sent via certified mail return receipt requested as well as notice where an untimely appeal was filed and where an appeal was defective. Changing the current to send via regular mail would place Arkansans at a severe disadvantage because it eliminates the ability to track when decisions are received by claimants.

Certified mail provides the following benefits: proof of when mail was sent, delivery confirmation, and security in that only the intended recipient or authorized representative has to sign to receive the intended mail. Legal Aid has represented several clients in the past where clients did not timely receive an appeal decision. With certified mail tracking, they were able to show that they did not receive the decision. Under the new rule, these clients would have been entirely unable to file for reconsideration or to seek judicial review. Similarly, we have had many clients receive a decision after a significant mailing delay but technically within the timeframes for reconsideration or judicial review. Certified mail tracking ensured they had the full timeframe to consider taking appropriate next steps and secure counsel to do so. With the new rule, they would not have the full time guaranteed by law and could have only a couple of days. If there is no way to track when notices or decisions are received, Arkansans would have no remedy for hearings on untimely appeals.

Furthermore, during the unwinding process, where there has been an increase in appeals, Legal Aid is currently assisting clients where paperwork from DHS is sent to old addresses despite clients providing updated addresses. If sent by regular mail, there would be very little recourse for claimants. They would be unable to demonstrate when decisions are mailed, and the absence of the return receipt would provide no indication that the correct recipient received the notice and/or hearing decision.

Certified mail offers a faster means of delivery than regular mail. This is essential considering appeal timelines. If a claimant wishes to request a reconsideration of the OAH decision, then they must do so within ten days of receipt of the decision. Allowing decisions to be sent via regular mail shrinks due process rights by eliminating the only method that claimants rely on to demonstrate when they receive notices and decisions.

Response: The comments claim that certified mail is superior to regular mail for several reasons. However, the experience of DHS OAH does not support those claims. Certified mail is routinely slower to be delivered than regular mail. Certified mail is often not correctly delivered; the return receipt may not be signed or may be signed by the wrong recipient. Certified mail is simply not as reliable as the comments suggest. Likewise, DHS OAH keeps track of all notices and correspondence sent out in every administrative proceeding. If the beneficiary has chosen to initiate an action before DHS OAH, they are able to contact the office and find out when a notice or other correspondence was mailed to them and to what address it was sent.

Comment: 1098.9.2, 1098.9.3, 1098.9.4, and 1098.18: Opting in for Electronic Communications

In addition to what was previously stated, removing the requirement of sending mail “certified” undermines the obligation outlined in Section 1098.2.7, which requires the OAH to have procedures that assure that appellants receive notice of the denial or other action, notice of the administrative adjudication proceedings, and an opportunity to appear, be represented, be heard, offer evidence, and call and cross examine witnesses. The proposed revisions suggest that individuals may “opt-in” for electronic communications as a method of receiving notice from the OAH.

Although this may serve as a benefit to people with knowledge of and access to appropriate technology, it is imperative that the OAH treats this “opt-in” as a voluntary option and not a mandate. To this end, implementation matters; how will recipients be informed of the ability to opt in? Will it be separate from or part of an existing form that requires other recipient signatures? Will it be clear that opting in is

purely optional? Will there be an easy way to opt out if a recipient later decides they do not want electronic notifications?

Additionally, the agency must consider what these communications will look like to recipients. Will these messages be easy to read for those with standard pre-paid mobile devices that may not be smartphones? Will the messages be sent via text message? Will the messages be sent via email? Will the text or email contain the full information in the notice? Or will these messages include hyperlinks that will then send the recipient to a portal requiring a log-in – serving as additional steps in obtaining access to important notices that require prompt action? If DHS uses a portal, will the recipient have to have a separate password? What happens if the recipient forgets the password? In all circumstances, will the recipient be able to access the message later in the future? Will the key information be displayed in a way that is easily printed or shared? Will the messages be accessible to people with disabilities or people with limited English proficiency? What happens if people change email addresses or phone numbers? Will they know to inform DHS? And, will DHS have the capacity to update contact information instantaneously?

It is also important to consider the barriers to internet access that exist in Arkansas. With hundreds of thousands of Arkansans lacking internet access or mobile-phone devices, an "opt-in" for electronic messages may not be a meaningful option for low-income people.1 Some people lack a home broadband connection because no broadband service is available.

1 https://www.digitalinclusion.org/digital-divide-and-systemic-racism/

2 https://www.nwaonline.com/news/2023/may/28/us-senate-committee-hears-from-broadband-leaders

Response: The option for electronic notifications is a voluntary option that will offer expanded services to clients that have initiated actions before DHS OAH. The clients may continue to receive mailed, paper notifications. The clients may choose to receive only electronic notifications or both electronic and mailed notifications. This is at the discretion and preference of the client. This benefit is particularly helpful when clients change physical addresses; it is common for clients to change their physical address more often than their email address.

For these reasons, the proposed amendments do not pose a risk to beneficiaries' due process rights and do assure that a client appearing before DHS OAH will receive proper notice about the administrative appeal process. DHS appreciates the questions posed in the comments about the implementation of proposed amendments. These concerns were considered by the agency when drafting the proposed amendments. The agency also reached out to stakeholders before starting the rulemaking process and the proposed changes were supported by the stakeholders. These arguments do not raise issues or concerns that would support a change to the proposed amendments.

Comment: Arkansas, like many other states, has communities currently underserved by internet service providers. The Broadband Development Group submitted a report to state officials in April 2022 identifying 251,000 Arkansas households without adequate broadband access.2 Another problem relates to the spread of residents in some communities. "While workers can more easily install services

in flatter terrain, companies may not want to make investments in farming communities -- such as areas located in the delta --" - Philip Powell (Director of the Arkansas 5

Farm Bureau's for Local Affairs and Rural Development). Arkansas statewide coverage maps were published, and, currently, a rather large portion of what is considered the "delta" remains without broadband internet access to date.3 Furthermore, many people lack home broadband service for reasons other than network availability, like affordability. These are disproportionately people of color.4 All told, tens of millions of Americans who still lack high-speed internet connections include large numbers of low income, older adult city residents, as well as residents of unserved rural communities.5 These communities make up more than 60% of those who are receiving Medicaid in Arkansas, and, therefore, many of these beneficiaries have limited, if any internet access.6

3 https://adfa-gov.maps.arcgis.com/apps/instant/interactivelegend/index.html

4 Id.

5 https://www.digitalinclusion.org/digital-divide-and-systemic-racism/

6 https://humanservices.arkansas.gov/wp-content/uploads/Annual-Statistical-Report-v7.pdf

Response: The option for electronic notifications is a voluntary option. It is not mandatory so if the beneficiary does not have access to reliable internet, they would not choose the electronic notification option, or they may select both electronic and mailed notifications. This is at the discretion and preference of the client. This benefit is particularly helpful when clients change physical addresses; it is common for clients to change their physical address more often than their email address.

Comment: Offering electronic-only notification to people with limited, inconsistent, or unreliable internet access endangers their due process rights, particularly absent robust safeguards. Many people are at risk of missing essential information that they only have a set number of days to respond to. It is important that the agency utilizes a system that offers confirmed delivery receipts and notifies them of message delivery failures. Moreover, mechanisms must be considered to take into account lapses in access due to outages, service disruptions, nonpayment of bills, or non-functioning equipment. How will recipients know to notify DHS of such lapses in access? Will hearing officers be explicitly required to consider lapses in access as good cause for hearing absences or untimely requests for appeals or reconsideration? How will DHS transition recipients back to paper-based notifications in such circumstances? These safeguards are important in satisfying due process generally and the assurances in Section 1098.2.7, and they will serve to counter the threat of a disparate impact these revisions pose.

Electronic-only notification may assist some low-income Arkansans if robust safeguards are implemented. However, many recipients—perhaps the majority—are likely not to be well-served though

electronic-only notification due to lack of internet access, lack of technology to use the internet (e.g., home computers, smartphones), and lack of comfort conducting business electronically. Those people need a dependable way of doing business with DHS and OAH. Thus, the agency should not disinvest in established ways of communication. Rather, the agency should consider doing more to ensure that geography and access to technology do not become additional barriers to accessing DHS's services.

Response: The option for electronic notifications is a voluntary option. It is not mandatory so if the beneficiary does not have access to reliable internet, they would not choose the electronic notification option, or they may select both electronic and mailed notifications. This is at the discretion and preference of the client. This benefit is particularly helpful when clients change physical addresses; it is common for clients to change their physical address more often than their email address.

Comment: Conclusion

The revisions in Sections 1098.9.2, 1098.9.3, 1098.9.4, and 1098.18 of the Appeals and Hearings procedures proposed by the Office of Appeals and Hearings, do not appear ripe for the picking or application. Proposing electronic notices as a new optional way of communicating while removing the requirement of certified mail appears to be an attempt to save money by the Office of Appeals and Hearings, with foreseeable discriminatory impacts along racial and economic lines. Removing the mail tracking and delivery assurances of certified mail and introducing an electronic system that lacks a "fail safe" delivery plan, creates a notification system that is without any safeguards. These revisions threaten the due process rights of the people DHS serves and their access to DHS's vital services.

Response: The comments claim that certified mail is superior to regular mail for several reasons. However, the experience of DHS OAH does not support those claims. Certified mail is routinely slower to be delivered than regular mail. Certified mail is often not correctly delivered; the return receipt may not be signed or may be signed by the wrong recipient. Certified mail is simply not as reliable as the comments suggest. Likewise, DHS OAH keeps track of all notices and correspondence sent out in every administrative proceeding. If the beneficiary has chosen to initiate an action before DHS OAH, they are able to contact the office and find out when a notice or other correspondence was mailed to them and to what address it was sent. This mail tracking by DHS provides due process protection for the clients served by DHS. No completely "fail safe" delivery plan exists, but adding the electronic notification option provides another tool to assist DHS in notifying beneficiaries in a timely manner.