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HOW TO APPEAL WAIVER SERVICE CUTS

AN OVERVIEW OF THE PROCESS AND YOUR RIGHTS

MINNESOTA DISABILITY LAW CENTER
February 27, 2003

Recent changes to the state's funding of the MR/RC waiver have resulted in county notices of service authorization decreases being sent to waiver recipients in many counties. Because many consumers are seeing their budgets cut by 20% or more, we have prepared this brief outline on the administrative appeal process available to challenge the propriety of those cuts. This outline of the process is intended only as a guide and not a substitute for legal advice regarding any consumer's individual rights.

When can I appeal?

In many instances, recipients of public benefits programs have a constitutional right to challenge adverse benefits determinations. In Minnesota, this right is codified in statute: Minnesota Statute § 256.045.

Under this law, applicants and recipients of various social services, including MR/RC waiver services, may file an "appeal" whenever there has been

- a denial of application for assistance
- a failure to act upon an application with reasonable promptness
- a suspension, reduction, or termination of assistance,
- or an incorrect payment of assistance.

What is an appeal?

An "appeal" is a hearing conducted by "appeals referees" who are employees of the Department of Human Services (DHS). An appeal is:

- An opportunity to challenge the action taken regarding your benefits
  - Submit your own evidence: testimony, documents
  - Confront and "cross examine" (question) the other side about the factual and legal basis for the action it proposes to take.
- An "adversarial" proceeding:
  - You present your case and arguments (facts and legal support) about why the action taken was wrong. The county &/or state presents its case about why they think the action was proper.

- A review and decision from an "impartial" decisionmaker, someone who was not involved in the decision to take the action you are challenging.

How do I appeal?

In waiver cases, you will typically be notified in writing of the county's intended action. This written "notice" is required to tell you the factual basis for the proposed action and the legal grounds for it. It is also required to inform you of your right to appeal the decision.

Whether you receive a written notice or not, you may appeal as soon as you are told of the county's intention to reduce your benefits. Filing an appeal requires only that you submit a written request (by mail or fax) for an appeal to DHS within 30 days of date of the notice, or 90 days if you have a legitimate excuse for filing late. In your letter, you need only indicate that you wish to appeal. Although you may choose to describe the nature of the dispute (that it is a reduction in your waiver services budget, for example), you do not need to argue or prove your case in this request.

Technically, your time to appeal does not begin to run until legally "adequate" notice is provided. If you have questions about late filing, you should seek legal advice. Send your appeal letter to:

Appeals and Regulations Division
Department of Human Services
444 Lafayette Road
St. Paul, MN 55155-1813
Fax number: 651/297-3173.

Can I continue to get my same level of services pending appeal?

Yes. For Medical Assistance programs (including the waiver), if a hearing is requested before the date of the proposed action, the services must continue until a decision is issued after the hearing. The only exception is if the appeals division determines at the hearing that the only issue is one of federal or state law or policy. This is not the case in the present waiver cases, because DHS has told counties to consider consumers' needs – a fact question – before making any cuts in service budgets.

If, within 10 days of the date the notice was mailed to you, you request that your benefits continue as they were (keep the "status quo"), the county *must* continue your benefits until a decision on your appeal is issued.

If the circumstances under which benefits will be continued pending the hearing are not explained in the notice of adverse action, or if the notice of action is otherwise defective, and if the county has reduced assistance in circumstances in which you are otherwise entitled to continue receiving assistance pending appeal, you can ask the appeals referees to issue an order requiring that benefits be reinstated pending the

decision in the appeal.

- **important note regarding repayment by ("recoupment") recipients:** Federal law governing Medical Assistance appeals provides that if the proposed termination or reduction of benefits is upheld by the hearing decision, the agency may institute recovery procedures against the applicant or recipient to recoup the cost of services furnished while the appeal was pending. See 42 C.F.R. § 431.230(b). There is, as yet, no clear practice indicating the circumstances under which the authority to recoup benefits paid pending appeal can or will be exercised. As a matter of past practice, DHS has not sought recoupment in these circumstances.

The "effective date" on my notice has already passed; what does this mean?

In most cases, including the present cases involving reduction in waiver budgets, the county and state are not authorized to predate the effective date of action. Federal law requires that they issue a notice of action at least 10 days *before* the proposed date of action, and that recipients be given the right to request and have a hearing *before* the action becomes effective.

- **Important note:** It is not clear what impact maintaining services during appeal might have on the budget available after appeal should any of the counties' reductions be upheld. Even if the state does not seek recoupment of services paid for during appeal, there will be a question of whether the county will be limited to imposing the budget reduction only prospectively (from the date of the decision forward) or whether it may consider the money spent above the budgeted amount during the appeal, and deduct that from the recipient's future budget. However, other than recoupment, there is no specific authority for the state or counties to reduce your budget even more than the proposed amount by subtracting the money spent during the appeal from your remaining total for the year. Such an attempt would give rise to another appealable issue.

How do I prepare for my appeal?

One of the most important tasks for you is to gather information, including:

- Your own documents (service plans, CDCS budgets, medical records, school records, etc.)
- Info from the county/state
  - Your case file
  - Applicable written guidelines/policies governing the state's "rebasing" of waiver money allocated to counties and the county's own guidelines, if any, for cutting service budgets
  - Everything the county or state intends to use at the hearing

You should ask the county and DHS for this information. If they refuse to provide it, ask the appeals referee for an "interim order" requiring them to produce copies for you (at no charge) *before* the appeal date.

You should also identify witnesses you might need to call to support your argument the need for services and that the cuts proposed would create hardship or threaten health and safety for the waiver recipient.

How will the appeal be conducted?

- Appeals are most often conducted by telephone conference, but you have the right request in writing that it be in person. In-person appeals are generally advisable (easier to review documents, resolve disputes, question the witnesses, etc.).
- Appeals are generally conducted in the county where services are provided.
- The referee will explain that the hearing will be tape-recorded and that witnesses will testify under oath.
- The county usually goes first to explain the action it took and why.
- In service reduction cases, the burden of proving that the action taken is warranted is on the *county (or DHS)*. They want to change the status quo and need to show a legitimate factual and legal basis to do so.
    - In these cases, the counties will likely try to argue that they "had to" reduce budgets because the state is sending them less money. However, the county should be required to show why the specific cut was necessary in your case. It also needs to show that it took steps to assess and ensure that your basic health and safety needs can still be met under your new budget. (In response, if that is not the case, you should be prepared to show in some detail how the cuts will jeopardize health and safety.)

- "Closing the record." At the end of the hearing, you have the right to ask that the record (the evidence – testimony and documents collected in the appeal) be closed and that no more evidence be accepted. You also have the right to ask that the record be kept open if you need to submit other evidence in response to the county's arguments and evidence.

What happens after the appeal hearing? How long does it take to get a decision?

- Post-hearing process: Sometimes the parties to an appeal submit written legal arguments after the hearing. The referee will usually establish a deadline for receiving such materials. Once everything is submitted, the referee reviews the case and then writes a recommended decision for the chief referee to review and, if approved, to sign.
- Appeals decisions are supposed to be issued within 90 days of the date of the request for hearing. For various reasons, appeals can take longer than this, sometimes substantially longer. There is no clear rule or process for ensuring that appeal decisions be issued within a set time frame.
- Once completed, the decision will be mailed to you.

What if I lose?

- Request for Reconsideration: Within 30 days after a decision, you may ask DHS in writing to

reconsider it. You may also appeal the decision within 30 days to state district court or appeal a denial of reconsideration to court within 30 days.