

Appendix F: Participant Rights

Appendix F-1: Opportunity to Request a Fair Hearing

The State provides an opportunity to request a Fair Hearing under 42 CFR Part 431, Subpart E to individuals: (a) who are not given the choice of home and community-based services as an alternative to the institutional care specified in Item 1-F of the request; (b) are denied the service(s) of their choice or the provider(s) of their choice; or, (c) whose services are denied, suspended, reduced or terminated. The State provides notice of action as required in 42 CFR §431.210.

Procedures for Offering Opportunity to Request a Fair Hearing. Describe how the individual (or his/her legal representative) is informed of the opportunity to request a fair hearing under 42 CFR Part 431, Subpart E. Specify the notice (s) that are used to offer individuals the opportunity to request a Fair Hearing. State laws, regulations, policies and notices referenced in the description are available to CMS upon request through the operating or Medicaid agency.

The W-5 Freedom of Choice and Consent form is completed annually for all members in the waiver. This form requires the Family Support Specialist, or the Quality Improvement Specialist to explain the right to fair hearing in the event the member or family is denied the provider or service of choice. In addition to the W-5 form, the Explanation of ICF/IID Services and Fair Hearing Rights form provides more detail regarding the fair hearing process and the process used by the Department to commit persons to the State ICF/IID. This form is also used to ensure consistency in the sharing of this information with members and others. ARM 37.34.1921 outlines the choice of services and choice of provider protections afforded to waiver members. ARM 37.34.1919 and 37.34.919 outlines the Fair Hearing process used by the Department. Not all Department decisions can be appealed, as outlined in 37.5.131 with legal clarification as follows:

37.5.131 DEPARTMENT HEARING PROCEDURES, SCOPE, AND SUBORDINATION TO CERTAIN OTHER LAW

- (1) There is no right to a hearing in any matter except as specifically provided by law, including department rule.
- (2) There is no right to a hearing in a contract dispute between the department and any other person or entity except as specifically provided by the terms of the contract or as specifically provided by state law.
- (3) The rules in this chapter are subject to the provisions of any applicable federal statute or regulation, whether now in existence or hereafter adopted.
- (4) The rules in this chapter are subject to any other provision of Montana statute or department rule applicable to the particular program or matter at issue.

Interpretation of 37.5.131- This language is for the purpose of recognizing that mandatory federal provisions for federally authorized programs are to be implemented and will govern over contrary language in the Department's general rule set. This preemption is inclusive of program specific fair hearing rules that are expressly cross-referenced in the general fair hearing rules such as the ARM 37.34.919 referenced in the context of ARM 37.5.115.

37.34.1921 MEDICAID AND COMMUNITY SERVICES CHILDREN'S AUTISM PROGRAM 0667: INFORMING BENEFICIARY OF CHOICE

- (1) The department will give the parent or legal representative of the child the opportunity to make a choice, on behalf of the child, between placement in an ICF/MR or in the Medicaid home and community services program.
 - (2) The parent or legal representative must be informed of the feasible alternatives in the community, if any, available through the Medicaid home and community services program.
- (History: 53-6-402, MCA; IMP, 53-6-402, MCA; NEW, 2012 MAR p. 2085, Eff. 10/12/12.)

37.34.1919 MEDICAID AND COMMUNITY SERVICES CHILDREN'S AUTISM PROGRAM 0667: NOTICES AND FAIR HEARINGS

- (1) The department's notices and fair hearings are provided for in ARM 37.34.919.
- (History: 53-6-402, MCA; IMP, 53-6-402, MCA; NEW, 2012 MAR p. 2085, Eff. 10/12/12.)

37.34.919 0208 MEDICAID HOME AND COMMUNITY-BASED SERVICES PROGRAM: NOTICE AND FAIR HEARING

- (1) A person aggrieved by an adverse determination by the department may request a fair hearing as provided in ARM Title 37, chapter 5, subchapter 3.
- (History: 53-6-113, 53-6-402, MCA; IMP, 53-6-101, 53-6-402, MCA; NEW, 1992 MAR p. 1490, Eff. 7/17/92; AMD, 1995 MAR p. 1136, Eff. 6/30/95; TRANS, from SRS, 1998 MAR p. 3124; AMD, 2000 MAR p. 1653, Eff. 6/30/00; AMD, 2014 MAR p. 220, Eff. 1/31/14.)

37.34.1903 MEDICAID HOME AND COMMUNITY SERVICES CHILDREN'S AUTISM PROGRAM 0667:
GENERALLY

- (1) The Medicaid home and community services program for children with autism is available to serve:
- (a) children who would otherwise require the level of care provided in an intermediate care facility for the mentally retarded (ICF/MR); and
 - (b) for whom services provided will not jeopardize the child's health and safety.
- (2) Eligibility of applicants to be considered for acceptance into the Medicaid home and community services program for children with autism is determined as provided in ARM 37.34.1905.
- (3) Acceptance into the Medicaid home and community services program for children with autism is determined as provided in ARM 37.34.1907.
- (4) Services and acceptance into the Medicaid home and community services program for children with autism are available only to the extent that the federal approval of the state's program permits and that available funding allows.
- (a) In accordance with current federal approval, the program has only fifty placements available.
- (5) The department, in order to comply with federal requirements or to limit expenditures of available funding, may:
- (a) reduce the number of Medicaid children that may be served through this program;
 - (b) postpone or waive implementation of a particular service of the program; or
 - (c) eliminate one or more of the services of the program.
- (History: 53-6-402, MCA; IMP, 53-6-402, MCA; NEW, 2012 MAR p. 2085, Eff. 10/12/12.)

Payment for services during an appeal:

37.34.316 CONTINUATION OF PUBLIC ASSISTANCE BENEFITS

- (1) This rule regarding continuation of benefits applies only to benefits under the following programs:
- (a) TANF cash assistance;
 - (b) food stamps; and
 - (c) Medicaid, subject to (2).
- (2) For purposes of this rule, benefits include services being received under the Medicaid home and community-based services program for persons who are elderly or who have a disability, or developmental disability services funded under the Medicaid program. Applicants for such services who are aggrieved by a department determination are not entitled to Medicaid Home and Community Based Services under this rule.
- (3) If a claimant requests a hearing within the period between the date of the notice and the date of the adverse action and the claimant is receiving benefits at that time, at the request of the claimant benefits shall be continued until the earlier of the expiration of the current eligibility or authorization period or issuance of a hearing decision except as provided in (7) and (8) of this rule.
- (4) If the claimant establishes that his failure to request a hearing within the notice period was for good cause the department shall at the request of the claimant, reinstate the benefits to their prior level until the earlier of the expiration of the current eligibility or authorization period or issuance of a hearing decision, except as provided in (6) and (7) of this rule.
- (5) If an action is taken without timely notice and the claimant requests a hearing within ten days of the mailing of the notice of the action, at the request of the claimant benefits shall be reinstated and continued until the earlier of the expiration of the current eligibility or authorization period or issuance of a hearing decision if the case is one in which the applicant is entitled to a hearing and the hearing is not subject to dismissal under ARM 37.5.313.
- (6) A claimant is not entitled to continued benefits if, after a hearing, the hearing officer makes a determination in writing that the sole issue is one of state or federal law or policy and no valid issue of improper benefit calculation, or misapplication or misinterpretation of state or federal law or policy exists.
- (7) Except as provided in (6), once continued or reinstated, benefits may not be reduced or terminated prior to a hearing decision unless:
- (a) the eligibility, or authorization period expires, although the claimant may reapply and may be determined eligible for benefits;
 - (b) a subsequent change affecting claimant's benefits occurs while the hearing is pending and a subsequent hearing is not requested after notice of adverse action resulting from the subsequent change; or
 - (c) a mass change affecting claimant's eligibility or benefit level occurs while the hearing decision is pending.
- (8) If a claimant requests a hearing on an adverse action concerning food stamp benefits and does not positively indicate whether continued benefits are requested, the department shall assume that continuation of benefits is desired and the benefits shall be issued on the same basis as authorized immediately prior to the notice of adverse action. If a recipient specifically waives continuation of food stamp benefits, the department shall terminate benefits pending a hearing decision in the contested case. This subsection applies only to food stamp benefits, and not to benefits of any other kind.
- (9) Regardless of any other provision of this rule, a claimant is not entitled to continuation of benefits unless the decision at issue is a rescission by the department of a specific eligibility or authorization period previously granted by the department,

such as eligibility for a specified time period or authorization for a particular service or quantity of services. A claimant is not entitled to a continuation of benefits where the department granted the benefit for a particular period of time or in a particular quantity and the contested action is the department's denial of an additional grant of benefits for an additional period of time or quantity of services.

(10) A claimant is not entitled to continuation of benefits when the issue is the lack of a negotiated FIA as specified at ARM 37.78.216(2).

(11) A claimant is not entitled to continuation of benefits for any month that TANF cash assistance benefits have been issued for a required filing unit member in another case or state.

(12) A claimant is not entitled to continuation of benefits if the department demonstrates at the hearing that continuation of benefits would pose a risk of harm to the claimant or another person.

(13) Benefits paid to a claimant pending a hearing decision are subject to recovery by the department if the adverse action is sustained.

(14) This rule shall not be construed to provide continuation of benefits with respect to an action taken by a provider rather than the department.

(15) This rule shall not be construed to prevent or delay a department action against a provider. If an adverse action is taken against a provider, payments may be withheld pending the final hearing decision.

(History: 52-2-111, 53-2-201, 53-2-606, 53-2-803, 53-3-102, 53-4-111, 53-4-212, 53-6-111, 53-6-113, 53-7-102, MCA; IMP, 52-2-112, 53-2-201, 53-2-306, 53-2-606, 53-2-801, 53-3-107, 53-4-112, 53-6-111, MCA; NEW, 1979 MAR p. 489, Eff. 5/25/79; AMD, 1979 MAR p. 812, Eff. 7/27/79; AMD, 1984 MAR p. 1633, Eff. 11/16/84; TRANS & AMD, from SRS, 2000 MAR p. 1653, Eff. 6/30/00; AMD, 2002 MAR p. 2921, Eff. 10/18/02)

The disposition of services pending the resolution of the appeal process and/or fair hearing process follows:

Pre-existing services remain ongoing during the appeal and fair hearing process. Denial of eligibility is subject to the protections of the Administrative Rules of Montana as outlined in 37.34.316, above. Any denial of a requested service based on the plan of care process is subject to DDP administrative review and/or Department fair hearing, as outlined in ARM 37.34.1114. All dispute resolution issues coming to the DDP for initial review are assigned to the DDP field services bureau chief for action and tracking purposes. Records of Department fair hearings, DDP administrative reviews and outcomes are maintained by the DDP community services bureau chief.

Appendix F: Participant-Rights

Appendix F-2: Additional Dispute Resolution Process

- a. **Availability of Additional Dispute Resolution Process.** Indicate whether the State operates another dispute resolution process that offers participants the opportunity to appeal decisions that adversely affect their services while preserving their right to a Fair Hearing. *Select one:*

No. This Appendix does not apply

Yes. The State operates an additional dispute resolution process

- b. **Description of Additional Dispute Resolution Process.** Describe the additional dispute resolution process, including: (a) the State agency that operates the process; (b) the nature of the process (i.e., procedures and timeframes), including the types of disputes addressed through the process; and, (c) how the right to a Medicaid Fair Hearing is preserved when a participant elects to make use of the process: State laws, regulations, and policies referenced in the description are available to CMS upon request through the operating or Medicaid agency.

For persons enrolled in the waiver, the planning process is the general vehicle for settling disputes. Planning meetings may be called for any reason by any team member, in accordance with ARM 37.34.1114. Other disputes may be addressed via provider member grievance procedures. Providers are to maintain internal dispute resolution policies in accordance with ARM 37.34.109. Under no circumstances would a waiver member forfeit the right to a fair hearing. The following IP rule applies to the IFSP process applicable to all family based children's waiver services.

37.34.1114 PLAN OF CARE: PERSONAL SUPPORT PLAN: DECISION MAKING

(1) The personal support plan (PSP) team must base all decisions on a team process which is person-driven and person-centered and ensures the health and safety of the person receiving services. The PSP team members must consider the:

- (a) the person's rights;

- (b) person's needs, visions, and preferences;
 - (c) person's health and safety needs;
 - (d) Montana resources allocation (MONA) for the person; and
 - (e) person's cost plan (ICP).
- (2) All decisions of the PSP team must be made in consensus.
- (3) If consensus cannot be reached, the person(s) who does not consent may submit their disagreement along with the justification for their disagreement within five working days to the regional manager. The regional manager must:
- (a) make a determination within five working days; and
 - (b) provide the determination in writing to the members of the PSP team.
- (4) The person receiving service maintains the right to request an administrative fair hearing.
(History: 53-2-201, 53-20-204, MCA; IMP, 53-20-203, MCA; NEW, 1993 MAR p. 1353, Eff. 6/25/93; AMD, 1996 MAR p. 2188, Eff. 8/9/96; TRANS, from SRS, 1998 MAR p. 3124; AMD, 2013 MAR p. 143, Eff. 2/1/13.)

37.34.109 GRIEVANCE PROCEDURE

- (1) Providers must have a written grievance procedure, approved in writing by the department prior to implementation, for resolution of grievances brought by persons receiving developmental disabilities services.
- (2) The procedure must provide for resolution of a grievance within 45 days of receipt of the grievance. Resolution may be extended beyond 45 days only with written approval by the department.
- (3) The person must exhaust the provider's grievance procedure before appeal of the matter may be made to the department under the provisions of ARM 37.5.304, 37.5.305, 37.5.307, 37.5.311, 37.5.313, 37.5.316, 37.5.318, 37.5.322, 37.5.325, 37.5.328, 37.5.331, 37.5.334, and 37.5.337.
- (4) Upon entry into a program and annually thereafter, the provider must advise the person of their right to present grievances. The provider must assist persons, as may be necessary, in utilizing the grievance procedure.
(History: 53-20-204, MCA; IMP, 53-20-205, MCA; NEW, 1979 MAR p. 1711, Eff. 12/28/79; TRANS, from SRS, 1998 MAR p. 3124; AMD, 2013 MAR p. 165, Eff. 2/1/13.)

Additional clarification related to dispute resolution:

Disputes related to the denial of eligibility for services could result in a request for a DDP administrative review and, depending upon the outcome, a Department fair hearing. Parents of children who do not meet the eligibility requirements for CAW services would learn of their right to appeal and fair hearing rights via the E&D contractor's letter of ineligibility. For families of children enrolled in the waiver, the plan of care serves as the basic forum for dispute resolution. The plan of care is designed to address all facets of a service member's life. Typically, the provider internal grievance policy is enacted when there is failure to achieve IFSP team consensus on an issue affecting the child or family. Adverse actions not resolved by the provider's internal grievance policy would lead to a DDP administrative review and ultimately, a Department fair hearing. The member always retains the right to proceed directly to Department fair hearing, as outlined on the DDP Waiver-5 form.

Appendix F: Participant-Rights

Appendix F-3: State Grievance/Complaint System

a. **Operation of Grievance/Complaint System.** *Select one:*

No. This Appendix does not apply

Yes. The State operates a grievance/complaint system that affords participants the opportunity to register grievances or complaints concerning the provision of services under this waiver

b. **Operational Responsibility.** Specify the State agency that is responsible for the operation of the grievance/complaint system:

c. **Description of System.** Describe the grievance/complaint system, including: (a) the types of grievances/complaints that participants may register; (b) the process and timelines for addressing grievances/complaints; and, (c) the mechanisms that are used to resolve grievances/complaints. State laws, regulations, and policies referenced in the description are available to CMS upon request through the Medicaid agency or the operating agency (if applicable).

