

Child and Family Services Policy Manual: Reference Information Fair Hearing Process

Introduction

This policy section contains a synopsis of the procedures that are applicable to all fair hearings. It is intended to aid CFSD workers involved in fair hearings. There are unique circumstances that arise in the course of fair hearings regarding different services and programs. Therefore, it is not intended to supplement existing laws, rules, and policy, in regard to any particular dispute upon adverse action.

More information can be found in CFSD Policy sections 202-4 (substantiation of child abuse or neglect); 405-11 (foster care support services); 604-1 (subsidized adoptions); 802-10 (foster care licensure); and 803-1 (child placement agency licensure).

Adverse Action

Any action taken by a government agency that is against the recognized constitutional rights of a person is considered an “adverse action.” Those actions include the substantiation of child abuse or neglect; denying, reducing to provisional status, suspending, or revoking a foster care or child placing agency license; and denying, reducing, or terminating foster care benefits or adoption subsidies.

Adverse actions **do not** include the denial of an adoption application, or a home study not related to foster care licensure.

Notice

Notice is a fundamental aspect of the general right of due process that a governmental agency must provide under the United States Constitution. The purpose of a notice is to provide the client with the opportunity to be specifically informed of CFSD’s adverse action and the opportunity to contest the action in a fair hearing.

Form letters are available in CAPS DocGen for notice. More information is available in the CFSD Policy sections mentioned above in the Introduction.

The notice of adverse action should contain the following Information:

- A statement of the adverse action and the reasons for the adverse action.
- A clear and concise listing of each and every reason that the Division relied on to justify the adverse action.

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Include relevant background and any associated issues.

- √ Any reasons that are not specifically outlined in the notice might be excluded at the hearing.
- √ If at a later date the Division becomes aware of additional reasons for the action taken, an amended notice must be sent to the client. When an amended notice is sent, all reasons listed in the initial notice as well as the new reasons must be included.
- The effective date of the adverse action.
- The legal basis for the Division's action. All notices **must** contain proper legal citations. Include all applicable rules and policies.
 - √ The proper citations must include the appropriate sections of the Administrative Rules of Montana ("Mont. Admin. R." or "ARM"). When more than one program is affected or there is more than one issue, be certain **all** applicable legal citations are included.
- An explanation of the client's right to request a fair hearing.
- In the case of a substantiation of child abuse or neglect, the individual against whom child abuse or neglect was substantiated does **not** have the right to a fair hearing if:
 - √ there has been a district court adjudication that the child in the substantiated report is a youth in need of care based on the same facts as the substantiated report, involving the same perpetrator and the same child victim; or
 - √ the perpetrator has been criminally convicted of an offense related to child abuse or neglect which contains the same facts as the substantiated report and involves the same child

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victim.

- An explanation on how the client requests a hearing.
- An explanation of applicable time limitations for requesting a fair hearing.
- A telephone number to call for additional information.
- The client's right to be represented by legal counsel.
- Any special circumstances important in understanding the adverse action's implications.

NOTE: Licensing notices (denying, reducing to provisional status, suspending, or revoking a foster care or child placing agency license) and notices denying, reducing, or terminating foster care benefits or adoption subsidies should be prepared by the Family Resource Specialist Supervisor or Adoption Negotiations Program Manager. Once the letter has been approved by the Regional Administrator, it must be submitted to the DPHHS/CFSD Office of Legal Affairs for approval prior to being mailed. If there are problems or questions encountered when writing notices, the Child Protection Specialist Supervisor or Family Resource Specialist Supervisor should consult with his/her Regional Administrator. The Supervisor may request additional assistance from the DPHHS/CFSD Office of Legal Affairs if necessary.

Timeliness of Notice:
Foster Care Payments or
Adoption Subsidies

Notices of proposed denial, reduction, or termination of foster care payments or adoption subsidies should be sent to the claimant at least **10 days prior to the effective date** of the action. Exceptions may include the death of the claimant or payee, when the claimant has signed in writing a request to terminate payments or when the claimant has payments approved from another source or another jurisdiction.

Fair Hearing Requests

Persons requesting a fair hearing as a result of a substantiation of child abuse or neglect must request a fair hearing **within 30 days** of the date of the substantiation letter. (Policy 202-4).

Persons requesting a fair hearing as a result of a denial,

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reduction to provisional, suspension or revocation of any kind of license (other than day care) must request a fair hearing **within 30 days** of the date of the notice. (Policy 802-10).

Persons requesting a fair hearing as a result of the denial, reduction, or cancellation of foster care payments or adoption subsidies must request a fair hearing **within 30 days** from the date of the mailing of the notice.

Dismissal/Denial of Fair Hearing

The Hearings Officer need not grant or may dismiss a fair hearing or an adverse action when:

- The request for hearing is withdrawn by the claimant or his/her representative
- The claimant, or his/her representative, without good cause, fails to appear at the hearing.
- The request is not received on a timely basis.
- In the case of a substantiation of child abuse, the internal review of the Substantiation Review Panel has resulted in a reversal of the original substantiation determination.
- Either federal or state law requires automatic benefit changes for a class of individuals, unless the issue is incorrect benefit adjustments.
- The Hearings Officer and/or the Division does not have jurisdiction over the subject matter or the appeal procedure.

Administrative Review

Administrative Reviews must be conducted regarding the denial, reduction, or cancellation of foster care payments or adoption subsidies. **Administrative Reviews are not available for substantiated cases of child abuse or neglect (See below).**

An Administrative Review is conducted with the purpose of identifying the issues and resolving the case, or certain issues to the case; thus, avoiding confusion at the hearing or avoiding an unnecessary hearing. This is the time in which all issues should be identified and an amended notice may be

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necessary. Issues can be settled during this review or at any time during the hearing process.

The Hearings Officer will send notice to the Regional Administrator (RA) after receiving the request for a fair hearing. Once the Regional Administrator receives notice from the Hearings Officer that a claimant has requested a fair hearing, an Administrative Review must be scheduled and completed **within 20 days** unless extended upon the agreement of the parties or the Hearing Officer.

An Administrative Review is an informal conference held between the claimant (and/or representative) and an assigned Division employee. It may be conducted in person or by phone.

- In order to assure a neutral and unbiased review, every effort should be made to assure that the person designated to conduct the Administrative Review has not been involved in the decision resulting in the adverse action leading to the request for the fair hearing.
- It is recommended that the specialist handling the case be present to state the facts of the case.

A review of relevant issues, facts, regulations and circumstances involved in the adverse action (an exchange of information, documents, etc.) will occur at the Administrative Review. The specialist handling the case must ensure:

- that all pertinent evidence has been gathered and is available;
- that copies are provided to the opposing party of the regulations the decision was based on; and
- the claimant is provided the opportunity to respond to the material presented and to bring in any other evidence they wish to present in support of his/her position.

The Division employee conducting the Administrative Review

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must complete an Administrative Review report and submit it to the Hearing Officer **within 20 days** of the notice (unless the time limit has been extended).

- The report must contain a written summary of the review.
- If no resolution can be reached, the report must list the matters at issue.
- Upon completion of the report, the claimant or the representative must sign the report and note whether the request for hearing remains in effect or has been withdrawn.

If the claimant does not appear for the Administrative Review, the review may be rescheduled or a request may be sent to the Hearings Officer that a hearing be scheduled. Just cause does not exist to dismiss a fair hearing based on the claimant or the representative not appearing for the Administrative Review.

Substantiation Review Panel

In cases involving the substantiation of child abuse or neglect, the request for a fair hearing will result in an internal review conducted by the Substantiation Review Panel. **Substantiation Review Panels are not available for cases involving the denial, reduction, or cancellation of foster care payments or adoption subsidies. (See above)**

The Review Panel will determine whether or not the evidence and case record supports the substantiation if the case is sent to fair hearing. The Child Protection Specialist or Supervisor will send the relevant case file information to the Office of Legal Affairs for distribution to the Substantiation Review Panel to use in conducting an internal review. (More information on what to send can be found in Policy 202-4). Unlike Administrative Reviews, the alleged perpetrator of child abuse or neglect does not have the right to appear at the Substantiation Review Panel.

If the Substantiation Review Panel determines that the documentation does not support the substantiation, a letter shall be sent to the individual requesting the fair hearing about the internal review's decision to reverse the substantiation. If

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the Substantiation Review Panel upholds the substantiation determination, the case will be referred to the Hearings Office to schedule a fair hearing.

Settlement

Fair hearing matters may be settled by the DPHHS/CFSD Legal Unit without the need for a hearing at any time prior to the scheduled date of the hearing. Settlements may occur even when the case has already been reviewed by Administrative Review or by the Substantiation Review Panel. The DPHHS/CFSD Legal Unit will discuss all settlement agreements with the Regional Administrator prior to finalizing the agreement.

Preparation for the Fair Hearing

To prepare for the hearing, all evidence should be reviewed and organized in consultation with DPHHS/CFSD Legal Unit staff. It is the responsibility of the Specialist in charge of the case to outline the circumstances of the case and the reasons for the decision. Keep in mind that the Hearings Officer will not have any prior knowledge of the case and may not be familiar with the policy used to make the determination or decision.

First, the notice of adverse action letter should be reviewed:

- Review the legal citations to ensure they are correct.
- Ensure that the letter addresses all of the issues under dispute.
- If it is discovered that the notice is not proper, an amended notice **must** be sent.

Second, material evidence should be gathered. Any documents used to make the determination need to be gathered so they can be included as exhibits at the fair hearing. Organize the exhibits in the order in which they should be presented to the Hearings Officer.

Third, CFSD expert and lay witnesses should be identified. Physical evidence to include photographs, videos, audiotapes, etc., should be located and gathered. Evidence requiring an expert witness should be reviewed.

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Once the evidence which must be presented to prove the case is identified, the Specialist and the DPHHS/CFSD Legal Unit staff should determine if witnesses will be necessary. The Division may present witnesses who have **firsthand knowledge** of the events which led to the adverse action or who are experts in a field of knowledge related to the case.

Statements made by a person who is not present to testify at the hearing are often not admissible as evidence. They are considered **hearsay evidence** because the claimant has no opportunity to cross-examine the person making the statements. Thus, the truthfulness and reliability of the statements cannot be determined. Exceptions to hearsay should be discussed with the DPHHS/CFSD attorney. In some cases, the Hearings Officer will allow hearsay statements if there is no objection from the claimant. In substantiation fair hearings, child victim hearsay is admissible; however, child victims, especially older children, tend to be very credible and should be allowed to testify whenever possible.

If witnesses will not attend the hearing voluntarily, they may be subpoenaed to appear along with any materials in their possession. The DPHHS/CFSD attorney will prepare any necessary subpoenas.

If the witness is unavailable for the hearing, the Hearings Officer may allow an affidavit as evidence. Other options may include a deposition or telephonic testimony. The claimant has to agree to witness testimony by affidavit, deposition or telephonically.

The Specialist and DPHHS/CFSD attorney should meet with or call witnesses prior to the hearing. The attorney will describe what will take place at the hearing and prepare witnesses for the types of questions they will be asked. Witnesses may be made aware of what they will be asked at the hearing but should not be coached as to what they should say.

Fair Hearing Procedures

Prior to the Fair Hearing, the Division's position or evidence should not be discussed with the Hearings Officer outside of the presence of the claimant. The Hearings Officer must remain independent and make a decision based only on the facts presented during and subsequent to the hearing.

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Usually the Hearings Officer will explain the procedures, such as which party is to present its case first, immediately prior to the opening of the Fair Hearing. The party who has the burden of proof should be the party who presents its position first, which is usually the Division. However, at the Hearings Officer's discretion, this rule may not always be followed.

It is often helpful to everyone to begin with a very concise statement of the facts that will be proven at the Fair Hearing and why the facts will justify the Division's actions.

CFSD witnesses should then testify. Preparation is important. Witnesses should be certain of the issues and of the facts that are being presented throughout the hearing. Notes may be used; however, the opposing side has the right to review anything used by witnesses while testifying. **Any new or inadvertently omitted information cannot be admitted after the hearing is concluded.**

The Claimant or his/her attorney will be allowed the opportunity to ask questions of any person who testifies for the Division during cross-examination. Cross-examination can be uncomfortable and confusing for witnesses. When being cross-examined, witnesses should keep in mind to:

- keep calm;
- be professional but not cold;
- speak clearly and distinctly;
- always give spoken answers to questions (the recorder does not pick up a nod of the head);
- use ordinary language;
- listen to the question that is asked, then answer only that question; do not elaborate unless directed to do so; look at the person asking the question or at the Hearings Officer;
- be as exact as possible in their testimony;

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- state that they don't know an answer to a question; and
- not answer a question they do not understand; instead, ask for clarification.

It is very possible that during cross-examination, the claimant will attempt to show:

- that the witness is hostile to or biased against the claimant;
- the competency of the witness is questionable;
- there are discrepancies between the case file and the witness' testimony at the hearing or between statements made in direct examination and statements made on cross-examination; or
- the witness made prior statements outside of the hearing (e.g., during the investigation, etc.) which are inconsistent with statements made at the hearing.

The best defense against such tactics is thorough preparation. A carefully documented case record and a thorough knowledge of the case are essential.

The claimant can object to the Division's evidence or witness testimony. Always wait for the Hearing Officer to rule on whether the evidence is admissible; stop what you are saying and wait for the ruling. If you do not remember the question that was asked before the objection, ask for the question to be repeated.

Once the Department has submitted its evidence, the DPHHS/CFSD attorney informs the Hearings Officer that the Division's case is completed.

The Claimant will then present his/her position. The Claimant will have the opportunity to testify and to bring in witnesses. The Division can cross-examine the Claimant and witnesses and may ask further questions at the close of Claimant's

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presentation. The Division is also allowed to object to evidence the opposing party introduces and may bring forth rebuttal evidence or witnesses after the claimant's side of the case is completed.

The Hearings Officer may ask questions of witnesses, the Claimant and Division staff either during or after they testify.

When the Claimant completes his/her case and the Hearings Officer and both parties have no further questions, the Fair Hearing is usually concluded. Both sides are allowed to make a closing statement summarizing their cases.

Witnesses

In general, witnesses can be divided into two categories: lay and expert witnesses. Character witnesses fall into the lay witness category. The basic distinction between the two categories lies in whether or not witnesses can offer opinions, inferences, and conclusions as a part of the testimony. It is quite possible that the same person can be a lay witness in some contexts and an expert witness in others.

Lay Witness: The lay witness is someone who does not have specialized knowledge or skill in a subject. That person is allowed to testify only to what he/she has observed or otherwise perceived with his/her senses. A lay witness may not testify about any inferences or conclusions he/she has drawn from the facts observed, no matter how obvious the inference or conclusion may be.

It is often difficult to distinguish between observed facts and inferences drawn from observations; accordingly, the Hearings Officer is allotted great discretion in determining what is fact and what is opinion. However, the opinion of a lay witness is admissible where:

- the opinion is requested by the Hearings Officer; or
- the opinion is necessary to help the Hearings Officer assess the situation described.

The trend seems to be to allow a witness to state an opinion whenever it will be of assistance to the Hearing Officer. In addition, a provision of the Montana Administrative Procedure

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Act allows Hearings Officers to consider generally recognized technical or scientific facts within the agency's specialized knowledge. Mont. Code Ann. §2-4-612(7).

Character witness: The character and reputation of a person are generally considered irrelevant and unnecessary evidence, except where the character of the person is an issue before the Hearings Officer. Generally, this kind of witness would only be used in Fair Hearings relating to such issues as foster care, etc. Testimony is usually provided about a person's reputation to prove good or bad character. Reputation is the generally accepted view of a person by the community. Rumors are not admissible testimony, nor is the personal opinion of the witness. The witness may generally testify only as to the person's neighborhood, but in some matters this definition has been expanded to allow testimony by relatives, old school friends, co-workers, and others who live in different neighborhoods.

A witness who is called to give character testimony will generally be asked first to testify as to his/her association with the person about whom they are testifying, and the basis of the knowledge about the person's reputation. This is required in order to help the Hearing Officer assess the reliability of the testimony.

Expert witness: An expert witness can be defined as any person who possesses special experience, skill, or learning in a particular field which exceeds that of the ordinary person. In most cases Division personnel such as Family Resource Specialists and Child Protection Specialists are considered expert witnesses.

See Mont. Code Ann. §2-4-612(7), which states that the Agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence.

Such people are called expert witnesses precisely because, in their particular fields of expertise, they can reach conclusions which are beyond the skill and ability of the Hearing Officer. Therefore, within their area of expertise, expert witnesses are allowed to state opinions, inferences, and conclusions in the course of their testimony.

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As with any other evidence, however, the Hearings Officer determines the weight to be given to an expert's testimony, and may choose to disregard it. The expert's opinion can be challenged by the opposing attorney, who may also call experts in an attempt to refute the expert's opinion.

Hearing Officer Decision

The Hearings Officer may order that briefs including proposed findings of fact and conclusions of law be prepared. The Division attorney will write out and submit whatever is requested.

The Hearings Officer will issue a final written decision within 90 days from the date when all requested documentation is received, including briefs. If good cause exists, the 90 days may be extended an additional 30 days.

The Hearings Officer has final decision-making authority for cases involving substantiated child abuse or neglect. The Hearings Officer can only provide a proposal for decision in cases involving licensure, foster care funds or adoption subsidies.

Appeals

In child abuse or neglect substantiation cases, because the Hearing Officer has final decision-making authority, any appeal must be submitted directly to District Court within 30 days of the Hearing Officer's decision.

In cases involving licensure, foster care funds or adoption subsidies, a party has 15 days from the date of the Hearing Officer's written proposal for decision to appeal to the Division's Administrator or designee. At this phase, the Division Administrator or designee will review the hearing record (all exhibits, recorded oral testimony, any motions and briefs) and make a decision whether to uphold the Hearing Officer's findings, modify them, or overturn them. The Division Administrator or designee can review the hearing record but cannot consider any new evidence or information not presented at the hearing.

If still unsatisfied, a party has 30 days from the date of notice of the Division Administrator's or designee's decision to submit an appeal to District Court.

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If, after a District Court's ruling, one of the parties remains unsatisfied with the decision, either party can appeal to the Montana Supreme Court.

Conclusion

Fair Hearings are important and should not be taken lightly. The object for the Division is to provide evidence that will persuade the Hearings Officer to uphold the decision. Therefore, decisions should be well-documented, supported and presented. It should be clear to the Hearings Officer which actions were taken and why. Thorough preparation is essential to effectively present a case at the Fair Hearing.

References

MCA, Title 2, chapter 4, parts 6 and 7
ARM 37.5.117 & 37.5.118
ARM 37.5.304, 305, 307, 310, 311, 313, 316, 318, 322, 325,
328, 331, 334 & 337
ARM 37.5.503 & 505
ARM 37.47.600 through 615
ARM 37.50.306
ARM 37.50.525