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700 OBJECTIVE

The Board of Review is authorized by State law and functions to provide a fair, impartial, and expeditious hearing process to customers of the Department of Health and Human Resources who feel themselves aggrieved by a Department action. The objective of this chapter is to set forth the regulations and procedures for each of the four categories of hearings as follows:

710 – SUBPART A	Hearings for Applicants and Recipients of Public Assistance Programs
720 – SUBPART B	Hearings Pertaining to Social Services Provided by the Department of Health and Human Resources
730 – SUBPART C	Hearings for Bureau for Child Support Enforcement
740 – SUBPART D	Administrative Disqualification Hearings

In accordance with W.Va. Code § 9-2-6(13), the Board of Review adjudicates additional categories of hearings in which procedures are governed by legislative rule.

710 SUBPART A – FAIR HEARINGS FOR APPLICANTS AND RECIPIENTS OF PUBLIC ASSISTANCE PROGRAMS

710.10 General.

Scope - This procedural rule is intended to set forth the procedures for public assistance administrative hearings held within the Department of Health and Human Resources by the Board of Review. Pursuant to § 29A-1-3(c) of the W.Va. Code, these hearings are exempt from the State Administrative Procedures Act.

710.11 Definitions.

- A. Adverse Action – A change occurring in an applicant’s or recipient’s case that results in a reduction or termination of public assistance.
- B. Appellant – The person(s) challenging a decision or action of the Department pertaining to the receipt of public assistance.

- C. Department – The West Virginia Department of Health and Human Resources.
- D. Federally Facilitated Marketplace – The entity operated by the U.S. Department of Health and Human Services for the purpose of enrollment and eligibility determinations for programs established by the Affordable Care Act, including expanded coverage groups under Medicaid.
- E. Hearing Official – Member of the Department’s Board of Review authorized to conduct hearings and render decisions on behalf of the Board.
- F. Hearing Request – Any written or oral statement by the applicant or recipient, or his or her attorney/authorized representative, requesting an opportunity to appeal to the Board of Review any proposed adverse action or adverse action taken by the Department. The written or oral statement may be made to the Board of Review or the office or bureau within the Department that is taking the adverse action.
- G. Public Assistance – The term public assistance as used within this rule shall have the same meaning as the term “welfare assistance” as defined by W Va. Code § 9-1-2(f) which definition states the term “welfare assistance” means the three classes of assistance administered by the state division of human services, namely: Federal-state assistance, federal assistance, and state assistance. The terms “federal-state assistance,” “federal assistance,” and “state assistance” are defined by W. Va. Code § 9-1-2(c), (d) and (e) respectively.
- H. Recipient – One who receives public assistance through the Department.

710.12 Computing Time.

In computing any period of time prescribed within this rule, the day of the act, event, default, or omission from which the applicable period begins to run is not included. The last day of the period so computed is included, unless it is a Saturday, Sunday, or legal holiday in which case the prescribed period of time runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.

710.13 Hearings Covered by These Rules.

- A. Any public assistance provided by the Department shall be covered by these rules. Public assistance includes, but may not be limited to:
1. Medicaid;
 2. Supplemental Nutrition Assistance Program (SNAP);
 3. Cash Assistance;
 4. Low Income Energy Assistance Program (LIEAP);
 5. Emergency Assistance programs;
 6. Homeless services;
 7. Child Care eligibility;
 8. Electronic Benefit Transfer (EBT) Retailer-initiated claims;
 9. Nursing facility transfer or discharge cases;
 10. Community spouse maintenance and resource allowance disputes;
 11. WIC Appeals; and
 12. Appeals of Federally Facilitated Marketplace (FFM) denials of Medicaid in which the Appellant has opted for the State of West Virginia Board of Review to hear his or her appeal.
- B. Reasons for Hearing.
1. Denial – Any time an applicant or recipient alleges that he or she was excluded incorrectly or wrongfully from public assistance in a program administered by the Department or FFM. Examples of denial may include, but are not limited to:
 - a. Denial of the right to apply;
 - b. Denial of cash assistance, Medicaid or SNAP;

- c. Denial of adequate assistance or SNAP;
 - d. Denial of support services through WV WORKS;
 - e. Denial of Medicaid coverage for procedures, services or durable medical equipment;
 - f. Denial of benefits due to race, color, national origin, age, sex, disability, or religion;
 - g. Denial of expedited services for SNAP; or
 - h. Denial of a request for an extension of the 60-month lifetime limit for WV WORKS.
- 2. Reduction – Any time the amount of public assistance received by a recipient from a program administered by the Department is reduced, or the level of provided services is reduced.
 - 3. Closure – Any time public assistance in a program administered by the Department is discontinued to one or more recipients.
 - 4. Delay – Any inaction or failure by the Department, in an applicant's or recipient's case, to abide by established time frames within the public assistance programs.
 - 5. Error in EBT processing – If a retailer requests an adjustment to a recipient's EBT card, then the recipient may request a hearing on the adjustment.
 - 6. Discharge/Transfer – Any discharge or transfer of a resident by a nursing facility with which the individual/representative disagrees.
 - 7. Disqualification of a recipient or a vendor from the WIC Program.
 - 8. Denial of an application to become a WIC vendor.

710.14 Requirements for Adequate and Timely Notice of Departmental Decisions.

- A. Adequate notice of a Departmental decision affecting benefits, or EBT adjustments, shall be mailed via first class mail, or provided in writing in a face-to-face contact, to the applicant or recipient and must include the following information:

1. The action or proposed action to be taken;
 2. The reason(s) for the action provided in terms readily understandable by the applicant or recipient and specifying all applicable policy manual sections;
 3. The right to a fair hearing;
 4. The time period for requesting a hearing;
 5. The circumstances under which assistance may be continued pending a hearing decision;
 6. Notice that the Appellant may be required to refund any assistance rendered during the hearing process if the Hearing Official upholds the Department's decision;
 7. Notice that a pre-hearing conference will be held for the applicant or recipient if he or she requests one in order to discuss the adverse action taken;
 8. The right to be assisted by a person of the applicant's or recipient's choice, including legal counsel, at any pre-hearing conference and hearing;
 9. The fact that the applicant or recipient may bring witnesses to the hearing at the applicant's or recipient's own expense; and
 10. The names, addresses, and phone numbers of any legal service organizations serving the area in which the applicant or recipient resides.
- B. Timely Notice Requirement – Notice shall be mailed at least 13 days before the effective date of any action or decision which may be adverse to the applicant or recipient.
- C. Exceptions to 13 Day Notice.
1. When the applicant or recipient has waived his or her right to 13-day advance notice.
 2. When a mass change is initiated, e.g., annual update of SNAP allotments or deductions, annual RSDI/SSI updates, change in the

WV WORKS payment levels, or change in Medically Needy income levels.

3. For SNAP cases only – When the benefit is terminated or reduced as a result of redetermination.
4. For Medicaid cases only –If the agency has facts indicating that action should be taken because of probable fraud by the recipient and the facts have been verified, if possible, through secondary sources, then the Department may shorten the period of advance notice to five days.
5. For EBT Retailer-initiated claims only – If the hearing request is received within 15 calendar days of the notice, the hearing request is entered by the EBT Project Office into the Claims Management System and the debit of the cardholder's/recipient's account is stopped until the result of a hearing.
6. In the case of an Emergency Assistance hearing where the hearing process must be completed in a very short timeframe.

710.15 Pre-Hearing Rights.

- A. Pre-hearing Conference – Any applicant or recipient requesting a hearing shall be advised, in writing, of his or her right to have a pre-hearing conference with an employee of the Department who was involved in the decision making process on the applicant's or recipient's case or the supervisor of said employee. Pre-hearing conferences are encouraged in all cases. At no time shall the applicant or recipient be discouraged from pursuing his or her right to a fair hearing.
- B. Transportation – If necessary, in hearings involving Medicaid, travel reimbursement to the applicant or recipient shall be made at the rate currently applied to employees of the Department, subject to availability of funds.
- C. Release of Information to the Applicant – For the purpose of the fair hearing process, the Appellant shall have access to his or her entire case record, including, but not limited to, all documents that pertain to the change in the Appellant's case that is the subject of the fair hearing. With written authorization from the Appellant, the Appellant's attorney or representative may review the record. The review of the record shall take

place during normal business hours at the Departmental location where the record is housed. Additionally, the Appellant, or his or her attorney/representative, may request and receive, free of charge, a copy of the entire case record and a copy of any policy, manual section or other document that may be used in a hearing involving the Appellant.

In SNAP hearings, the contents of the entire case file shall be made available to the Appellant or his or her attorney/representative “provided that confidential information, such as the names of individuals who have disclosed information about the household without its knowledge or the nature or status of pending criminal prosecutions is protected from release. Confidential information that is protected from release and other documents or records which the household will not otherwise have an opportunity to contest or challenge shall not be introduced at the hearing or affect the hearing official’s decision.” 7 C.F.R. § 273.15(p)(1).

710.16 Time Limits for Requesting and Scheduling a Hearing or Pre-Hearing Conference.

A. Pre-Hearing Conference Time Limits

1. The time limit for requesting a pre-hearing conference shall be 90 days from the effective date of the adverse action.
2. If a current Recipient requests a pre-hearing conference prior to the date of the adverse action then the adverse action shall be delayed pending the pre-hearing conference.
3. If both a pre-hearing conference and hearing are timely requested then the pre-hearing conference shall be held at least 10 days prior to the scheduled hearing. The Hearing Official may waive this time requirement.

B. Hearing Request Time Limits

1. The time limit for requesting a hearing shall be 90 days from the effective date of the action.
2. If a current Recipient requests a hearing prior to the effective date of the adverse action then the adverse action shall be delayed pending a hearing decision.
3. In EBT retailer-initiated claims, if the recipient requests a

hearing within 15 days of the date of the notification letter then the adverse action shall be delayed pending a hearing decision.

- C. If a Recipient request is timely submitted but not received until after the initiation of the adverse action then the benefits shall be reinstated pending a pre-hearing conference or hearing decision.
- D. The Department may deny continuance or reinstatement of benefits when expressly authorized by law, rule, or policy.
- E. A request by mail shall be considered timely if postmarked within the provided time limit.

710.17 Procedures for Routing Hearing Requests.

- A. Once a fair hearing request is received by the office or bureau that issued the adverse action, that office or bureau shall, within two business days, send a referral packet to the Board of Review central office. A complete referral packet includes:
 - 1. Form IG-BR-29;
 - 2. The written hearing request if applicable; and
 - 3. A copy of the notification letter that prompted the hearing request.
- B. The preferable method of transmission of the packet is to scan the documents into one PDF document and send it to the Board of Review central email address: DHHROIGBORE@wv.gov. For offices without scanning capability, the packet may be mailed to the Board of Review.
- C. If the hearing referral packet is incomplete when received, the Board of Review will issue an email to the sender specifying what information is missing and requesting the missing or incomplete documentation be provided within five business days.
- D. Once a complete hearing referral is received and the case is deemed ready to hear, it shall be assigned to a Hearing Official.
- E. The Hearing Official shall send a scheduling order to the Appellant specifying the date, time and place for the hearing along with a schedule for

submission of briefs, requests for continuances, and exchange of evidence. The scheduling order includes a cover letter providing the contact information for the Board of Review central office with instructions to contact that office with questions and late requests for rescheduling. An outline of Appellant's rights concerning the hearing process and an outline of the hearing procedures shall be attached to the order. The scheduling order shall be sent to all parties at least 13 days prior to the hearing.

710.18 Notice of Hearing; Service of Documents; and Location of Hearing.

- A. The scheduling order and any document or order shall be served on all parties of record. When a party is represented by an attorney, service shall be made upon the attorney as the proper recipient of all such notices, documents, and orders.
- B. The Department's copy of the scheduling order shall be sent by email to the employee identified on the IG-BR-29 as the Department Worker.
- C. Hearings shall be held at the Department's office in the county in which the Appellant resides with the following exceptions:
 - 1. WIC Vendor hearings shall be held in Charleston.
 - 2. Hearings may be convened via videoconference where available and at the discretion of the Hearing Official. Videoconference hearings shall be conducted as follows:
 - a. The Hearing Official reserves videoconference equipment and space at the necessary locations.
 - b. The Appellant and his or her representative and witnesses will appear in the Appellant's local county office.
 - c. The Department's representative and witnesses will appear with the Appellant at the county office.
 - d. Witnesses and representatives may appear by telephone at the discretion of the Hearing Official.
 - e. The Hearing Official will conduct the hearing from another location – usually his or her primary work location.

- f. The parties shall be required to submit evidence that they wish to have considered to the Hearing Official and to the opposing party at least five days prior to the date of the hearing.
 - g. The Hearing Official shall conduct the hearing as any other hearing before the Board of Review, including placing under oath all individuals who will provide testimony during the hearing.
 3. The hearing may be held by telephone conference at the discretion of the Hearing Official absent an objection from the Appellant. A telephone hearing shall be conducted as follows:
 - a. The scheduling order shall contain the toll-free telephone number and Conference Code/PIN number.
 - b. At the date and time appointed for the hearing, the parties shall dial into the conference call. The Department's representative shall have with him or her all witnesses necessary for the Department's case. The Appellant shall have with him or her all witnesses necessary to prove his or her case.
 - c. The parties shall be required to submit evidence that they wish to have considered to the Hearing Official and to the opposing party at least five days prior to the date of the hearing.
 - d. The Hearing Official shall conduct the hearing as any other hearing before the Board of Review, including placing under oath all individuals who will provide testimony during the hearing.

710.19 Continuation of a Hearing.

A request for continuance shall only be granted for good cause shown, except in the case of hearings involving SNAP wherein the Appellant may request, and is entitled to receive, one continuance of a hearing for any reason. If the request for continuance in a hearing involving SNAP is granted, then the continuance shall not exceed 30 days. Except in the case of an emergency, requests for continuance shall be submitted in writing to the Hearing Official and the opposing party. In all cases involving a request for good cause, the Hearing Official shall determine what constitutes good cause.

710.20 Dismissal; Withdrawal; or Abandonment of a Hearing.

- A. Dismissal – a request for hearing may be dismissed if:
1. The request for hearing was not filed within the allowable time frame specified in the notice of adverse action;
 2. The issue of the appeal has been resolved or becomes moot;
 3. There has been no adverse action taken in relation to the applicant’s or recipient’s benefits; or
 4. In hearings involving Medicaid, other than Medicaid expansion coverage groups under the Affordable Care Act, the sole issue is a federal or state law, including a law or policy requiring an automatic change adversely affecting some or all recipients.
- B. Withdrawal – A request for hearing shall be considered withdrawn when the Appellant withdraws the request in writing or orally. When an Appellant withdraws a hearing request orally, the Department representative shall notify the Board of Review central office of the date and reason for the withdrawal. The Hearing Official or Board of Review central office shall then send a letter confirming the withdrawal and giving the Appellant 13 days from the date of the letter to retract the withdrawal. If the withdrawal is retracted within 13 days, the case will revert to the status that existed at the time of the withdrawal.
- C. Abandonment – A request for hearing shall be considered abandoned when the Appellant fails to appear at a scheduled hearing without good cause. The Hearing Official shall determine what constitutes good cause. If the Appellant fails to appear for the hearing at the scheduled time, the Hearing Official shall send to the Appellant an abandonment letter offering to reschedule the hearing if the Appellant establishes good cause for missing the original hearing. The Appellant must respond in writing within 10 days. Good cause may include death in the family, personal illness or injury, or sudden or unexpected emergency.

In the event that the Appellant does not respond to the abandonment letter or if good cause is not established, the Hearing Official shall issue an Order of Abandonment. If benefits were continued or an action otherwise postponed pending a hearing decision, the action will be taken upon issuance of an Order of Abandonment with no further notice to the Appellant.

710.21 Remand.

A case under appeal may be remanded to the Department for further action if:

- A. The Department, during the pendency of an appeal, opts to reconsider the decision being appealed; or
- B. The Hearing Official determines at the hearing that the Department failed to adequately evaluate the matter at hand.

A case may be reversed and remanded or simply remanded. A decision to remand removes the case from the docket of the Board of Review. Any subsequent action resulting from the remand shall be subject to appeal by the Appellant.

710.22 Attendance; Communication; Witnesses; Evidence; and Decision.

- A. Attendance – The hearing may be attended by the Appellant and his or her representative(s), any employees of the Department who took the action that was allegedly adverse to the Appellant, and a Department representative.
- B. Confidentiality – Due to the confidential nature of the cases, these hearings are not open to the public. The Hearing Official shall have the authority to determine who may attend the hearing, and under this authority shall recognize the requests of the parties concerning persons in attendance.
- C. *Ex Parte* Communication – No person may confer or correspond with the Board of Review or any Hearing Official therein regarding the merits of a hearing unless all parties to the hearing are present.
- D. Witnesses – Either party may have witnesses testify to the issues in controversy. Witnesses may be sequestered upon request by either party or at the discretion of the Hearing Official. At the request of the Appellant, any employee or consultant of the Department who may have relevant evidence or information regarding the appeal must appear at the hearing prepared to give testimony. The Appellant must make this request no later than 14 days from the date of the scheduling order.
- E. Official Record – The Board of Review shall prepare the official record, which shall include the electronic hearing recording and exhibits, as well as all submissions, motions, requests, and rulings filed in the case.
- F. Impartiality – All hearings shall be conducted in an impartial manner.

- G. Presentation of the Case – The Department will present its case, and then the applicant or recipient will present his or her case.
- H. Cross Examination – Both parties shall have the right to cross-examine witnesses who testify.
- I. Admissibility of Evidence – The Hearing Official shall rule on the admissibility of any evidence presented by either party at a hearing. In ruling on the admissibility of evidence, the Hearing Official shall consider the factors of relevancy, reliability, and repetitiveness.
 - 1. Reports resulting from medical examinations shall be admissible without the testimony of the physician or other health care professional who prepared the reports.
 - 2. Routine statistical and public records are admissible without the testimony of the record keeper or other witness, where cross-examination of the witness would not be meaningful.
 - 3. Evidence may be admitted upon agreement of the parties.
- J. Rules of Evidence – The West Virginia Rules of Evidence do not apply in these hearings, but may be considered when determining admissibility of evidence so that the truth may be ascertained and the proceedings justly determined. Both parties shall have the right to submit rebuttal evidence.
- K. Decision – The Hearing Official shall weigh the evidence and testimony presented and render a decision based solely on proper evidence received at the hearing. In rendering a decision, the Hearing Official shall consider all applicable policies of the Department, state and federal statutes, rules or regulations and controlling court orders. The decision shall include reference to all pertinent laws or policies.
- L. Corrective Action – The Hearing Official’s decision must be carried out within 10 working days, and the appropriate bureau shall complete an electronic confirmation form showing actions taken following receipt of the hearing decision and email the form to the Board of Review central email address.

710.23 Retroactive Payments

In instances in which policy was misapplied or other incorrect decision was made, the Appellant may be entitled to retroactive payments of benefits. In such cases, the Hearing Official will order retroactive payments back to the date of incorrect action or other date, as indicated in policy.

710.24 Time Limits for Final Disposition of a Hearing Request

- A. SNAP Hearings – Within 60 days of the request for a hearing, a final decision shall be made and the Appellant and Department shall be notified of the decision. If the hearing is continued at the request of the Appellant, the time limit for a decision shall be extended for as many days as the hearing is continued, but not to exceed 30 days.
- B. Emergency Assistance Hearings – The Department shall notify the Board of Review central office on the same day a request for an Emergency Assistance Hearing is received. A hearing must be scheduled and held within one week after a request is received by the Department. The Hearing Official shall issue a written decision within one business day after the hearing is held. If the decision of the Hearing Official is in the Appellant's favor, the Department must take action immediately. If the hearing is continued at the request of the Appellant, the time limit for a decision shall be extended for as many days as the hearing is continued, but not to exceed 10 days.
- C. Low Income Energy Assistance Program Hearings – Within 30 days from the date of the hearing request, a hearing shall be held, a final decision will be made, and the appropriate action initiated. If the hearing is continued at the request of the Appellant, the time limit for a decision shall be extended for as many days as the hearing is continued, but not to exceed 30 days.
- D. All other public assistance hearings – Within 90 days of the request for hearing, a final decision shall be made and administrative action taken. If the hearing is continued at the request of the Appellant, the time limit for a decision will be extended by as many days as the hearing is continued, but not to exceed 30 days.

710.25 Hearing Decisions Available to the General Public.

All hearing decisions shall be available to the general public. Hearing decisions are posted on the Board of Review Internet site at

<http://www.wvdhhr.org/oig/bor.html>. Decisions may be accessed through this site and can be made available for inspection and copying through the local Department of Health and Human Resources office via access to the Internet site. Copies of specific decisions may be requested and provided by the Board of Review Central Office. Information that is required by law to be kept confidential, including Appellant names and identifying information, shall remain confidential.

710. 26 Appeal of a Hearing Decision.

- A. Pursuant to W.Va. Code § 9-2-13, proceedings for review shall be instituted by filing a petition, in either the circuit court of Kanawha County, West Virginia, or in the circuit court of the county in which the petitioner or any of the petitioners resides or does business, within 30 days after the date upon which the Appellant received notice of the final order or decision of the Board of Review.
- B. In Medicaid fair hearings only, either party, upon receipt of the Hearing Official's decision, may request in writing from the Chairman of the Board of Review, a reconsideration of that decision.
 - 1. The reconsideration must be requested within one year of the Hearing Official's decision.
 - 2. A request for reconsideration will be granted if either party alleges good cause for reopening a previously final determination. Good cause for reconsideration is defined as:
 - a. New and material evidence – Any evidence which was not considered and was not available when the previous determination was made and which shows facts that may result in a conclusion different from the previous decision, even though the previous determination was entirely reasonable when it was made. The evidence may justify or require that further development be undertaken before making a revised determination. The Chairman of the Board of Review shall make this determination.
 - b. Clerical error – Any mechanical, computer or human mistake in mathematical computations. For example, errors in computing resources, income or spenddown requirements for Medicaid eligibility.
 - c. Error on the face of the evidence – Any error in making a

Medicaid determination which causes that determination to be incorrect at the time it is made. For example, evidence is on file to show that an applicant's resources meet the state's standard for eligibility, yet the application is denied.

3. If a request for reconsideration is granted, the Chairman of the Board of Review will determine whether the case will be reconsidered based on written argument or by reconvening the hearing advising the parties of the same.
 4. If the case will be reconsidered by written arguments, the Chairman of the Board of Review will issue a decision on the reconsideration. If the hearing will be reconvened, it will be assigned to a Hearing Official by the Chairman. If the applicant or recipient desires to appeal that decision, he or she may do so under the provisions of 710.26(A) above.
- C. United States Department of Health and Human Services – In all cases except SNAP cases, if the applicant or recipient believes that the Department or the fair hearing process has discriminated against him or her based on race, color, religion, national origin, age, sex or handicap, the applicant or recipient may file a complaint with the Secretary of the United States Department of Health and Human Services in Washington, DC.
- D. United States Department of Agriculture – In a SNAP case, if the applicant or recipient believes that the Department or the fair hearing process has discriminated against him or her based on race, color, religion, national origin, age, sex or handicap, the applicant or recipient may file a complaint with the Secretary of the United States Department of Agriculture in Washington, DC.

710.27 Procedures for Hearings in Special Circumstances.

- A. Community Spouse Maintenance and Resource Allowance Hearings.
1. In Long-term care Medicaid cases, if either the institutionalized spouse or the community spouse is dissatisfied with a determination of:
 - a. The community spouse monthly income allowance;
 - b. The amount of monthly income otherwise available to the community spouse;

- c. The computation of spousal share of resources;
 - d. The attribution of resources; or
 - e. The determination of community spouse resource allowance,

then such spouse is entitled to a fair hearing with respect to such determination if an application for Medicaid benefits has been made on behalf of the institutionalized spouse.
2. The hearing shall be held within 30 days from the date of the request for hearing. The hearing notice, decision and any other communication or writing during the hearing process shall be sent to both spouses.
3. Issues to be Heard.
- a) Revision of Minimum Monthly Maintenance Needs Allowance.
 - i. If it is established that, due to exceptional circumstances resulting in significant financial duress, the community spouse needs income above the levels otherwise provided by the minimum monthly maintenance needs allowance, then an amount adequate to provide such additional income, as necessary, shall be substituted for the original amount.
 - ii. Family members who are living with the community spouse and are dependent upon him or her or the institutionalized spouse will have their needs deducted from the institutionalized individual's monthly income. Family members include minor/dependent children, dependent parents, and/or dependent children of either spouse.
 - b) Revision of Community Spouse's Resource Allowance.
 - i. If it is established that the community spouse resource allowance is inadequate to raise that spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted for the community spouse a resource allowance to meet the minimum monthly allowance.
 - ii. The Hearing Official may grant greater amounts conditioned on the existence of exceptional circumstances determined to be the cause of the extreme financial duress.

B. Nursing Home Transfer/Discharge.

1. Long-term care facilities participating in Medicaid must permit each resident to remain in the facility and not transfer or discharge the resident unless:
 - a. The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;
 - b. The safety of individuals in the facility is endangered;
 - c. The health of individuals in the facility is endangered;
 - d. The resident has failed, after reasonable and appropriate notice, to pay for (or have paid under Medicare or Medicaid) a stay at the facility;
or
 - e. The facility ceases to operate.
2. Prior to any transfer or discharge, a facility must issue written notice to the resident or responsible party. The notice must include the following:
 - a. The reason for transfer or discharge;
 - b. The effective date of transfer or discharge;
 - c. The location to which the resident is transferred or discharged;
 - d. A statement that the resident has the right to appeal the action to the Board of Review;
 - e. The name, address, and telephone number of the State long-term care ombudsman; and
 - f. The mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled and mentally ill individuals.

During the pendency of the hearing, the resident may choose to stay at

the facility. Except in the case of immediate danger to the resident or others, when an immediate transfer is needed by the resident's urgent medical needs, or when a resident has not resided in the facility for 30 or more days, the notice of transfer or discharge must be provided at least 30 days prior to the anticipated move.

3. Upon receipt of notice of transfer or discharge, the resident may request a hearing by contacting the Board of Review central office either in writing or by telephone. The Board of Review shall proceed as follows:
 - a. The request for hearing shall be assigned to a Hearing Official who shall issue a scheduling order to the resident or responsible party and to the administrator of the facility.
 - b. The hearing will typically be held at the facility but may be held by telephone at the request of the resident.
 - c. The hearing shall be conducted as described in this subpart except that the parties will consist of the facility and the resident. The facility will present its case first, followed by the presentation of the resident's case.
 - d. The Hearing Official shall take the matter under advisement and subsequently issue a decision to both parties. The decision shall be based on facts adduced at the hearing and regulations governing transfers and discharges.

C. Appeals of Medicaid Denials by the Federally Facilitated Marketplace (FFM).

1. An applicant seeking assistance with health care may complete an application through the FFM. The FFM will first determine eligibility for Medicaid coverage, and if the applicant is not found eligible for Medicaid, will evaluate eligibility for insurance affordability programs available under the Affordable Care Act. When the FFM finds an applicant ineligible for Medicaid, the applicant may appeal that denial through the federal appeals entity. The applicant has the option of having his or her appeal heard by his or her state appeals entity. In West Virginia, that entity is the Board of Review.
2. When an Appellant opts for a hearing with the Board of Review, the

procedure is as follows:

- a. The federal appeals entity will transfer, by secure electronic means, the Appellant's appeal file including the request for a hearing with the state entity.
- b. Upon receipt of the Appellant's file, the Board of Review shall issue confirmation of receipt of the appeal to the Appellant along with a copy of the file provided by the federal appeals entity.
- c. The appeal shall be assigned to a Hearing Official who shall schedule a hearing to be held by conference call with the Appellant and his or her choice of representation and witnesses. The Appellant shall be provided with a toll-free number and Conference Code/PIN. The FFM will not appear.
- d. The Hearing Official shall consider information contained in the federal file, as well as any additional relevant evidence presented during the course of the appeals process, and shall review the appeal *de novo* to determine whether the FFM acted correctly in denying Medicaid to the Appellant.
- e. The Hearing Official shall issue a written hearing decision to the Appellant, and the Board of Review shall transmit the decision, via secure electronic interface, to the FFM who will promptly implement the decision.

**720 SUBPART B – ADMINISTRATIVE HEARINGS PERTAINING TO
SOCIAL SERVICES PROVIDED BY THE DEPARTMENT OF HEALTH
AND HUMAN RESOURCES**

720.10 General

Social services hearings, including hearings involving child protective services, adult protective services, foster care, adoption subsidy program, licensure or certification of residential child care facilities, child-placing agencies, day care centers, family day care facilities and family day care homes, are subject to the Administrative Procedures Act found at §29A-5-1 et seq. of the W.Va. Code.

730 SUBPART C – FAIR HEARINGS FOR BUREAU FOR CHILD SUPPORT ENFORCEMENT

730.10 General.

Scope - This procedural rule is intended to set forth the procedures for fair hearings concerning the Bureau for Child Support Enforcement held within the Department of Health and Human Resources by the Board of Review. Pursuant to § 29A-1-3(c) of the West Virginia Code, these hearings are exempt from the State Administrative Procedures Act.

730.11 Definitions

- A. Appellant - A person challenging a decision or action of the Department.
- B. Department – The West Virginia Department of Health and Human Resources.
- C. Hearing Official – Member of the Department’s Board of Review authorized to conduct hearings and render decisions on behalf of the Board.
- D. Hearing Request – Any written or oral statement by the Appellant, or his or her attorney/representative, requesting an opportunity to appeal to the Board of Review a proposed adverse action or adverse action taken by the Department. The written or oral statement may be made to the Board of Review or the office or bureau within the Department that is taking the adverse action.
- E. Public Assistance – The term public assistance as used within this rule shall have the same meaning as the term “welfare assistance” as defined by W.Va. Code § 9-1-2(f) which definition states the term “welfare assistance” means the three classes of assistance administered by the state division of human services, namely: Federal-state assistance, federal assistance, and state assistance.
- F. The terms “federal-state assistance,” “federal assistance,” and “state assistance” are defined by W.Va. Code § 9-1-2(c), (d) and (e) respectively.
- G. Recipient – One who receives public assistance through the Department.

730.12 Computing Time.

In computing any period of time prescribed within this rule, the day of the act, event, default, or omission from which the applicable period begins to run is not included. The last day of the period so computed is included, unless it is a Saturday, Sunday, or legal holiday, in which case the prescribed period of time runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.

730.13 Hearings Covered by These Rules.

A. Hearings concerning matters before the Bureau for Child Support Enforcement shall be heard by the Board of Review. Specific reasons for which a hearing may be granted are listed below.

B. Reasons for Hearing:

1. An application for child support services has been acted upon erroneously, or not acted upon with reasonable promptness;
2. Appellant believes that child support payments, including payments owed to the Appellant due to Department error, are not being issued with reasonable promptness;
3. Appellant believes that child support collections have not been distributed or disbursed correctly or questions the accuracy of the arrears owed to the Department at the termination of WV WORKS assistance;
4. Appellant disagrees with the Department's decision to close the child support case; or
5. Appellant believes that the Department has failed to take action against an employer for failure to promptly forward payments withheld from the absent parent's wages.

C. Exceptions for Certain Child Support Actions.

Decisions to act or not to act which fall within the professional legal judgment of a child support attorney for the Department are not subject to administrative review through the fair hearing process. Prior to assertion of the legal judgment exception by a child support attorney, that attorney must notify the applicant/recipient or his or her legal representative and the General Counsel for the Bureau for Child Support Enforcement in

writing of the factual basis for the assertion. The defense of legal judgment should be asserted only after a careful review of the file. The necessity of such defense is most likely to occur when an issue or matter is currently pending in a court of law or when the child support attorney has elected and commenced a means for enforcement of support that will involve a court of law.

730.14 Pre-Hearing Rights.

- A. Right to a Hearing – Any Appellant must be advised, in writing, of his or her right to a fair hearing any time an adverse action occurs in his or her case. The Appellant must be advised, by the Department, of any legal services that may be available to him or her.
- B. Pre-hearing Conference – Any Appellant requesting a hearing shall be advised, in writing, on the “Request for Hearing” form or on the notice of adverse action of his or her right to have a pre-hearing conference with an employee of the Department who was involved in the decision-making process on the applicant’s or recipient’s case.
- C. A pre-hearing conference is required in all hearings under this subpart. However, at no time shall the Appellant be discouraged from pursuing his or her right to a fair hearing.
- D. Release of Information to the Appellant – Except where prohibited by law or regulation as outlined in the BCSE policy manual, for the purpose of the fair hearing process, the Appellant shall have access to his or her case record, including all documents that pertain to the change in the Appellant’s case that is the subject of the fair hearing. With written authorization from the Appellant, the applicant’s or recipient’s attorney or representative may review the record. The review of the record shall take place during normal business hours at the departmental location where the record is housed. Additionally, the Appellant, or his or her attorney/representative, may request and receive, free of fees or costs, a copy of documents from the case record and a copy of any policy, manual section or other document that may be used in a hearing involving the Appellant.

730.15 Time Limits for Requesting and Scheduling a Hearing and Pre-Hearing Conference.

- A. Hearing Request Time Limits

1. The time limit for requesting a hearing shall be 90 days from the effective date of the action.
 2. If a current Recipient requests a hearing prior to the effective date of the adverse action then the adverse action shall be delayed pending a hearing decision.
- B. The mandatory pre-hearing conference shall be held at least 10 days prior to the scheduled hearing. The Hearing Official may waive this time requirement.
 - C. If a Recipient request is timely submitted but not received until after the initiation of the adverse action then the case shall be reinstated pending a pre-hearing conference or hearing decision.
 - D. The Department may deny continuance or reinstatement of benefits when expressly authorized by law, rule, or policy.
 - E. A request by mail shall be considered timely if postmarked within the provided time limit.

730.16 Procedures for Hearing Request Administration and Scheduling.

- A. Once a fair hearing request is received by the office or bureau that issued the adverse action, that office or bureau shall, within two business days, send a referral packet to the Board of Review central office. A complete referral packet includes:
 1. Form IG-BR-29;
 2. The written hearing request if applicable; and
 3. A copy of the adverse action notice, if available.
- B. The preferred method of transmission of the packet is to scan the documents into one PDF file and send it to the Board of Review central email address: DHHROIGBORE@wv.gov. For offices without scanning capability, the packet may be mailed to the Board of Review central office.
- C. If the hearing referral packet is incomplete when received, the Board of Review central office will issue an email to the sender specifying what information is missing and requesting the missing or incomplete documentation within five calendar days.

- D. Once a complete hearing referral is received and is deemed ready to hear, the case shall be assigned to a Hearing Official.
- E. The Hearing Official shall send a scheduling order to the Appellant giving the date, time and place for the hearing, along with time frames for submission of briefs, requests for continuances, and exchange of evidence. The scheduling order includes a cover letter providing the contact information for the Board of Review central office with instructions to contact that office with questions and late requests for rescheduling. An outline of Appellant's rights concerning the hearing process and an outline of the hearing procedures shall be attached to the order.
- F. The scheduling order shall be sent to all parties at least 13 days prior to the hearing.

730.17 Notice of Hearing; Service of Documents; and Location of Hearing.

- A. Notice of hearing and any document or order shall be served on all parties of record. When a party is represented by an attorney, service shall be made on the attorney as the proper recipient of all such notices, documents, and orders.
- B. The Department's copy of the scheduling order shall be sent by email to the employee identified on the IG-BR-29 as the Department Worker.
- C. The hearing shall be held at the Department's office in or adjacent to the county in which the Appellant resides with the following exceptions:
 - 1. Hearings may be convened via videoconference where available and at the discretion of the Hearing Official. Videoconference hearings shall be conducted as follows:
 - a. The Hearing Official reserves videoconference equipment and space at the necessary locations.
 - b. The Appellant and his or her representative and witnesses will appear in the Appellant's local county office.
 - c. The Department's representative and witnesses will appear with the Appellant at the county office.
 - d. Witnesses and representatives may appear by telephone at the discretion of the Hearing Official.

- e. The Hearing Official will conduct the hearing from another location – usually his or her principle office.
 - f. The parties shall be required to submit evidence that they wish to have considered to the Hearing Official and to the opposing party at least five days prior to the date of the hearing.
 - g. The Hearing Official shall conduct the hearing as any other hearing in front of the Board of Review, including, but not limited to, placing under oath all individuals who will provide testimony during the hearing.
2. A hearing may be held by telephone conference at the discretion of the Hearing Official absent an objection from the Appellant. A telephone hearing shall be conducted as follows:
- a. The scheduling order will contain the toll-free telephone number and Conference Code/PIN number.
 - b. At the date and time appointed for the hearing, the parties shall dial into the conference call. The Department’s representative shall have with him or her all witnesses necessary for the Department’s case. The Appellant shall have with him or her all witnesses necessary to prove his or her case.
 - c. The parties shall be required to submit evidence that they wish to have considered to the Hearing Official and to the opposing party at least five days prior to the date of the hearing.
 - d. The Hearing Official shall conduct the hearing as any other hearing in front of the Board of Review, including, but not limited to, placing under oath all individuals who will provide testimony during the hearing.

730.18 Continuation of a Hearing.

A request for continuance shall only be granted for good cause shown. Except in the event of an emergency, requests for continuances shall be submitted in writing to the Board of Review and the opposing party within seven days from the date of the scheduling order. In all cases involving a request for good cause, the Hearing Official shall determine what constitutes good cause.

730.19 Dismissal; Withdrawal; or Abandonment of a Hearing.

- A. Dismissal – A hearing may be dismissed if:
1. The request for hearing was not filed within the allowable time frame specified in the notice of adverse action;
 2. The issue of the appeal has been resolved or becomes moot; or
 3. The reason for the request does not fall within the allowable reasons listed in Section 730.13(B).
- B. Withdrawal – A request for hearing shall be considered withdrawn when the Appellant withdraws the request in writing or orally. If the Appellant withdraws his or her request orally, the Hearing Official or Board of Review central office shall send a letter to all parties confirming the withdrawal and giving the Appellant 13 days from the date of the letter to retract the withdrawal. If the withdrawal is retracted within 13 days, the case will revert to the status that existed at the time of the withdrawal.
- C. Abandonment – A request for hearing shall be considered abandoned if the Appellant fails to appear at a scheduled hearing without good cause. The Hearing Official shall determine what constitutes good cause. The Hearing Official shall send to the Appellant an abandonment letter offering to reschedule the hearing if the Appellant establishes good cause for missing the original hearing in writing within 10 days from the date of the abandonment letter. Good cause may include a death in the family, personal illness or injury, or a sudden or unexpected emergency.

730.20 Attendance; Communication; Witnesses; Evidence; and Decision

- A. Attendance at Hearing – The hearing may be attended by the Appellant and/or the Appellant’s representative(s), any employee(s) of the Department who took the action that was allegedly adverse to the Appellant, and a Department representative. Due to the confidential nature of the cases, these hearings are not open to the public. The Hearing Official shall have the authority to determine who may attend the hearing, and under this authority shall recognize the requests of the parties concerning persons in attendance.
- B. *Ex Parte* Communication – No person may confer or correspond with the Board of Review or any Hearing Official therein regarding the merits of a hearing unless all parties to the hearing are present.

- C. Witnesses – Either party may have witnesses testify to the issues in controversy. Witnesses may be sequestered upon request by either party or at the discretion of the Hearing Official. At the request of the Appellant, any employee or consultant of the Department who may have relevant evidence or information regarding the Appellant’s appeal must appear at the hearing prepared to give testimony in the Appellant’s case. The Appellant must make this request at least seven days prior to the hearing.
- D. Official Record – All hearings shall be recorded electronically. The Board of Review shall prepare the official record, which shall include reported testimony and exhibits in each contested case as well as all papers, motions and requests, and rulings filed in the case.
- E. Impartiality – All hearings shall be conducted in an impartial manner.
- F. Presentation of the Case – The Department will present its case and then the Appellant will present his or her case.
- G. Cross Examination – Each party shall have the right to cross-examine witnesses who testify and shall have the right to submit rebuttal evidence.
- H. Admissibility of Evidence – The Hearing Official shall rule on the admissibility of any evidence presented by either party at a hearing. In ruling on the admissibility of evidence, the Hearing Official shall consider the factors of relevancy, reliability, and repetitiveness. Routine statistical and public records are admissible without the testimony of the record keeper or other witness, where cross-examination of the witness would not be meaningful. Evidence may be admitted upon agreement of the parties.
- I. Rules of evidence – The West Virginia Rules of evidence do not apply in these hearings but may be considered when determining admissibility of evidence.
- J. Decision – The Hearing Official shall weigh the evidence and testimony presented and render a decision based solely on proper evidence received at the hearing. In rendering a decision, the Hearing Official shall consider all applicable policies of the Department, state and federal statutes, rules or regulations, and court orders. The decision shall include reference to all pertinent law or policy.
- K. Modification – In a decision that requires a change or modification, that change or modification must be carried out within 10 days, and the bureau shall complete an electronic confirmation form showing actions taken

following receipt of the hearing decision and email the form to the Board of Review central email address.

730.21 Time Limits for Final Disposition of a Hearing Request.

Final Administrative action shall be taken within 90 days of the request for a hearing. If the hearing is continued at the request of the Appellant, the time limit for a decision shall be extended for as many days as the hearing is continued, but not to exceed 30 days without agreement of the parties.

730.22 Appeal of a Hearing Decision.

- A. Pursuant to W.Va. Code § 9-2-13, proceedings for review shall be instituted by filing a petition, in either the circuit court of Kanawha County, West Virginia, or in the circuit court of the county in which the petitioner or any of the petitioners resides or does business, within 30 days after the date upon which the Appellant received notice of the final order or decision of the Board of Review.
- B. United States Department of Health and Human Services – In all cases except SNAP cases, if the Appellant believes that the Department or the fair hearing process has discriminated against him or her based on race, color, national origin, age, sex or handicap, the Appellant may file a complaint with the Secretary of the United States Department of Health and Human Services in Washington, DC.

740 SUBPART D -ADMINISTRATIVE DISQUALIFICATION HEARINGS

740.10 General.

Scope – This procedure rule is intended to set forth the procedures for Supplemental Nutrition Assistance Program (SNAP) administrative disqualification hearings held within the Department of Health and Human Resources by the Board of Review. Pursuant to § 29A-1-3 of the W.Va. Code, these hearings are exempt from the State Administrative Procedures Act.

740.11 Definitions.

- A. Defendant – A member of a SNAP assistance group who the Department alleges committed an Intentional Program Violation.
- B. Department – The West Virginia Department of Health and Human Resources.
- C. Hearing Official – Member of the Department’s Board of Review authorized to conduct hearings and render decisions on behalf of the Board.
- D. Intentional Program Violation –
 - 1. Intentionally making a false or misleading statement, or misrepresenting, concealing or withholding facts; or
 - 2. Committing any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any state statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization cards or reusable documents used as part of an automated benefit delivery system access device.

740.12 Computing Time.

In computing any period of time prescribed within this rule, the day of the act, event, default, or omission from which the applicable period begins to run is not included. The last day of the period so computed is included, unless it is a Saturday, Sunday, or legal holiday, in which case the prescribed period of time runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.

740.13 Initiating an Administrative Disqualification Hearing.

- A. The Department may initiate an Administrative Disqualification Hearing (ADH) when it has evidence that a SNAP Assistance Group (AG) member has intentionally committed a program violation as defined in 740.11.D and the Department wishes to seek disqualification of the AG member.
- B. An ADH may be initiated irrespective of whether the AG member is a current recipient under the SNAP Program.
- C. The Department will initiate an ADH by sending form IG-BR-29 along with form IG-BR-30 – Request for Administrative Disqualification Hearing – to the Board of Review central office listing the evidence to be presented at the hearing.

740.14 Notice of Hearing; Service of Documents; and Location of Hearing.

- A. The Hearing Official shall issue notice of the ADH by scheduling order at least 30 days prior to the scheduled hearing. The notice shall include:
 - 1. The date, time and place of the hearing;
 - 2. A statement that any request to reschedule must be made at least 10 days prior to the scheduled hearing along with a statement that any such request shall be made through the Board of Review central office. The contact information for that office shall be provided;
 - 3. A warning that the decision will be based solely on information provided by the Department if the Defendant fails to appear at the hearing;
 - 4. A statement that should the Defendant fail to appear at the hearing, he or she will have 10 days from the date of the scheduled hearing to present good cause for failure to appear in order to receive a new hearing;
 - 5. A warning that the determination of an Intentional Program Violation will result in disqualification periods as described in Section 740.19 of this chapter, and a statement of which penalty the Department believes is applicable to the case scheduled for a hearing;
 - 6. A listing of the Defendant's rights as outlined in Section 740.17 of this chapter;

7. A statement that the hearing does not preclude the state or federal government from prosecuting the Defendant for the Intentional Program Violation in a civil or criminal court action, or from collecting any overissuance;
 8. The name and address of organizations providing free legal representation;
 9. A statement that the Defendant has the right to obtain a copy of the Board of Review's published hearing procedures upon request; and
 10. A summary of the evidence and how and where the evidence can be examined.
- B. The scheduling order and IG-BR-30 shall be served on all parties of record. The order shall be mailed via first class mail to the Defendant's last known address.
- C. The hearing shall be held at the Department's office in the county in which the Defendant resides with all parties present with the following exceptions:
1. At the discretion of the Hearing Official, and absent an objection by the Defendant, the hearing may be held by telephone conference. When scheduling a telephone conference hearing, the Hearing Official shall allow the opportunity for the Defendant to request an in-person hearing. A telephone hearing shall be conducted as follows:
 - a. The scheduling order will contain the toll-free telephone number and Conference Code/PIN.
 - b. At the date and time appointed for the hearing, the parties shall dial into the conference call. The Department's representative shall have with him or her all witnesses necessary for the Department's case. The Defendant shall have with him or her all witnesses necessary for his or her case.
 - c. The parties shall be required to submit evidence that they wish to have considered to the Hearing Official and to the opposing party at least five days prior to the date of the hearing.
 - d. The Hearing Official shall conduct the hearing as any other hearing in front of the Board of Review, including placing under

oath all individuals who will provide testimony during the hearing.

2. Hearings may be convened via videoconference where available and at the discretion of the Hearing Official. Videoconference hearings shall be conducted as follows:
 - a. The Hearing Official reserves videoconference equipment and space at the necessary locations.
 - b. The Defendant and his or her representative and witnesses will appear in the Defendant's local county office.
 - c. The Department's representative and witnesses will appear with the Defendant at the county office.
 - d. Witnesses and representatives may appear by telephone at the discretion of the Hearing Official.
 - e. The Hearing Official will conduct the hearing from another location – usually his or her primary work location.
 - f. The parties shall be required to submit evidence that they wish to have considered to the Hearing Official and to the opposing party at least five days prior to the date of the hearing.
 - g. The Hearing Official shall conduct the hearing as any other hearing in front of the Board of Review, including placing under oath all individuals who will provide testimony during the hearing.

740.15 Continuation of the Hearing.

The Defendant or representative is entitled to a postponement of the scheduled hearing, provided that the request for postponement is made at least 10 days in advance of the date of the scheduled hearing. However, the hearing shall not be postponed for more than a total of 30 days. One postponement may be granted without a showing of good cause. Any subsequent postponements may only be granted for good cause. The Hearing Official will determine what constitutes good cause. If the hearing is postponed at the Defendant's request, the time limit for disposition of the hearing decision shall be extended for as many days as the hearing is postponed.

740.16 Dismissal of Hearing.

- A. The Defendant may, at any time prior to the hearing, sign a Waiver of Administrative Disqualification Hearing. The waiver allows for Defendant to either admit or deny the allegation and to waive his or her right to an ADH with the understanding that a disqualification penalty will be applied. If the Defendant signs such a waiver, a hearing will not be held and shall be dismissed. The resulting disqualification cannot be changed or overturned by a subsequent hearing decision.
- B. The Department may withdraw its request for an ADH at any time. The hearing shall be dismissed and no disqualification penalty shall be applied.

740.17 The Defendant's Rights.

- A. The Defendant or his or her representative shall be given adequate opportunity to:
 - 1. Examine all documents and records to be used at the hearing at a reasonable time before the date of the hearing, as well as during the hearing. The contents of the case file including the application form and documents of verification used by the state agency to establish the household's ineligibility or eligibility and allotment shall be made available, provided that confidential information, such as the names of individuals who have disclosed information about the household without its knowledge or the nature or status of pending criminal prosecutions, is protected from release. Confidential information that is protected from release and other documents or records which the household will not otherwise have an opportunity to contest or challenge shall not be introduced at the hearing or affect the Hearing Official's decision. If requested by the household or its representative, the state agency shall provide a free copy of the portions of the case file that are relevant to the hearing. 7 C.F.R. 273.15(p) (1);
 - 2. Present the case or have it presented by a legal counsel or other person;
 - 3. Bring witnesses;
 - 4. Advance arguments without undue interference;
 - 5. Question or refute any testimony or evidence, including an opportunity to confront and cross-examine witnesses; and

6. Submit evidence to establish all pertinent facts and circumstances in the case.

B. The Defendant shall have the right to refuse to answer any questions in the hearing.

740.18 Status of Benefits Pending an Administrative Disqualification Hearing Decision.

A pending disqualification hearing shall not affect the individual's or the household's right to be certified as a participant in SNAP. The benefits will only be reduced or terminated if the certification period expires and the household does not reapply or if found that the recertification decision changes the benefit level or eligibility. Benefits can also be reduced or terminated if the Department has documentation that substantiates that the household is ineligible or eligible for fewer benefits and the household does not request a fair hearing with continuation of benefits. (This is also true even when the documentation or information was the reason for suspicion of Intentional Program Violation and the resulting disqualification hearing.)

740.19 Disqualification Penalties.

Individuals found to have committed an Intentional Program Violation through an Administrative Disqualification Hearing shall be ineligible to participate in SNAP:

A. For a period of 12 months for the first violation;

B. For a period of 24 months for the second violation; and

C. Permanently for the third violation.

D. Except as provided in subsection C of this section, an individual found to have made a fraudulent statement or representation with respect to his or her identity or place of residence in order to receive multiple SNAP benefits simultaneously shall be ineligible to participate in SNAP for 10 years.

740.20 Failure to Appear at the Scheduled Hearing.

A. If the Defendant is given proper and timely notice via first class mail and fails to appear, the hearing shall be held in the Defendant's absence.

- B. The Hearing Official shall base his or her decision on the evidence presented by the Department after careful consideration of all available pertinent information.
- C. If the Defendant fails to appear and the Hearing Official finds the member has committed an Intentional Program Violation, but later determines that the member had good cause for not appearing, the previous decision shall be vacated and a new hearing shall be conducted. The same Hearing Official may conduct both hearings. The Hearing Official must enter the good cause decision into the record. The Defendant has 10 days from the date of the scheduled hearing to present information to the Hearing Official concerning good cause for failure to appear. Good cause shall be determined by the Hearing Official, and good cause may include death in the family, personal illness or injury, and sudden or unexpected emergency.
- D. A claim for good cause may also be based on a showing of non-receipt of the scheduling order. When a claim for good cause is based on a showing of non-receipt of the ADH notice, the Defendant shall have 30 days after the date of the written hearing decision to claim good cause for failure to appear. A showing of non-receipt shall be limited to change of address or temporary absence from the home. In addition, if it is discovered that the address provided to the Board of Review was incorrect, good cause may be found. No other reason for non-receipt of notice shall be considered.

740.21 Consolidation of Administrative Disqualification Hearing with a Fair Hearing Requested by the Household.

An Administrative Disqualification Hearing may be consolidated with a fair hearing requested by the household member if the factual issues arise out of the same or related circumstance. This includes the issue of the amount of overissuance associated with the alleged Intentional Program Violation. If the hearings are consolidated, the household must be notified in advance of this fact, and the time frames for Administrative Disqualification Hearings will be observed. However, the household may waive the 30 day advance notice of the hearing as required in disqualification hearings. If the household member or his or her representative fails to appear at the consolidated hearing, the only issue that may be considered shall be that of an alleged Intentional Program Violation.

740.22 Attendance; Communication; Witnesses; Evidence; and Decision.

- A. *Ex Parte* Communication – No person may confer or correspond with the Board of Review or any Hearing Official therein regarding the merits of a hearing unless all parties to the hearing are present.
- B. Attendance at Hearing – The hearing may be attended by the Defendant and his or her representative(s), any employees of the Department who have relevant testimony and a Department representative.
- C. Confidentiality – Due to the confidential nature of the cases, these hearings are not open to the public. The Hearing Official shall have the authority to determine who may attend the hearing, and under this authority shall recognize the Defendant’s wishes concerning persons in attendance at his or her request.
- D. Witnesses – Each party may have witnesses testify to the issues in controversy. Witnesses may be sequestered upon request by either party or at the discretion of the Hearing Official.
- E. Hearing Record – All hearings shall be recorded electronically.
- F. Impartiality – All hearings shall be conducted in an impartial manner.
- G. Presentation of the Case – The Department will present its case and then the Defendant will present his or her case. The burden of proof is on the Department to prove, by clear and convincing evidence, that the Defendant committed an Intentional Program Violation. The Defendant may present testimony and evidence in support of his or her case or may stand mute if he or she believes that the Department has not proven its case.
- H. Cross Examination – Either party shall have the right to cross-examine witnesses who testify and shall have the right to submit rebuttal evidence.
- I. Admissibility of Evidence – The Hearing Official shall rule on the admissibility of any evidence presented by either party at a hearing. In ruling on the admissibility of evidence, the Hearing Official shall consider the factors of relevancy, reliability, and repetitiveness.
 - 1. Routine statistical and public records are admissible without the testimony of the record keeper or other witness, where cross-examination of the witness would not be meaningful.
 - 2. Evidence may be admitted upon agreement of the parties.

- J. Rules of Evidence – The West Virginia Rules of evidence do not apply in these hearings, but may be considered when determining admissibility of evidence so that the truth may be ascertained and the proceedings justly determined.

- K. Decision – The Hearing Official shall base the determination of Intentional Program Violation on clear and convincing evidence that demonstrates that the Defendant committed, and intended to commit, an Intentional Program Violation as defined in Section 740.11(D) of this Chapter. The Hearing Official shall weigh the evidence and testimony presented and render a decision based solely on proper evidence given at the hearing. In rendering a decision, the Hearing Official shall consider all applicable policies of the Department, state and federal statutes, rules or regulations, and controlling court orders. The decision shall include reference to all pertinent law or policy. If the Hearing Official rules that the Defendant committed an Intentional Program Violation, he or she shall include the length and the beginning date of the disqualification penalty. The Department shall then take action to ensure that the disqualification takes effect within 45 days from the date of the hearing decision.

- L. Within 10 days from receipt of the hearing decision, the Department’s representative shall complete an electronic confirmation reflecting actions taken and email the form to the Board of Review central email address.

- M. Official Record – The Board of Review shall prepare the official record, which shall include the hearing recording and exhibits, as well as all submissions, motions, requests, and rulings filed in the case.

740.23 Time Limits for Final Disposition of Hearing.

Within 90 days from the date the Defendant is notified in writing that an ADH initiated by the Department has been scheduled, the hearing shall be conducted, and a written decision issued. When the hearing has been continued at the request of the Defendant, the time limit will be extended by the number of days the hearing was continued, but not to exceed 30 days.

740.24 Hearing Decisions Available to the General Public

All hearing decisions shall be available to the general public. Hearing decisions are posted on the Board of Review Internet Site at <http://www.wvdhhr.org/oig/bor.html>. Decisions may be accessed through this site and can be made available for inspection and copying through the local Department of Health and Human Resources office via access to the internet site. Copies of specific decisions may be requested and provided by Chairman of the Board of Review. Information that is required by law to be kept confidential, including Defendant names and identifying information, shall remain confidential.

740.25 Appeal of a Hearing Decision

- A. Pursuant to W.Va. Code § 9-2-13, proceedings for review shall be instituted by filing a petition, in either the circuit court of Kanawha County, West Virginia, or in the circuit court of the county in which the petitioner or any of the petitioners resides or does business, within 30 days after the date upon which the Appellant received notice of the final order or decision of the Board of Review.
- B. United States Department of Agriculture – In a SNAP case, if the Defendant believes that the Department or the administrative disqualification hearing process has discriminated against him or her based on race, color, national origin, religion, age, sex or handicap, the claimant may file a complaint with the Secretary of the United States Department of Agriculture in Washington, DC.