

Chapter DWD 75

APPEAL PROCEDURES FOR PERSONS APPLYING FOR OR RECEIVING VOCATIONAL REHABILITATION SERVICES

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Note: Corrections made under s. 13.93 (2m) (b) 1., 6. and 7., Stats. Register, December, 1996, No. 492.

DWD 75.01 Authority and purpose. This chapter is promulgated under the authority of ss. 47.02 (5) and 103.005 (1), Stats., and in conformity with requirements under 29 USC 722 (c), and 34 CFR 361.57, to develop and implement procedures for an applicant or eligible individual appealing the determination of ineligibility for services or the decision of the furnishing or denial of services issued by the department's division of vocational rehabilitation under the rehabilitation act of 1973, as amended.

History: Cr. Register, December, 1996, No. 492, eff. 1–1–97; CR 15–055: am. Register May 2016 No. 725, eff. 6–1–16.

DWD 75.02 Applicability. This chapter applies to the department, applicants eligible individuals, and the representative of the applicant or eligible individual. An applicant or eligible individual who is dissatisfied with any determination issued by the department's division of vocational rehabilitation concerning eligibility for or the furnishing or denial of services under the act, or a decision issued by a hearing officer that affects the provisions of vocational rehabilitation services, may request a timely review of that determination or decision.

History: Cr. Register, December, 1996, No. 492, eff. 1–1–97; CR 15–055: am. Register May 2016 No. 725, eff. 6–1–16.

DWD 75.03 Definitions. In this chapter:

(1) "Act" means the federal rehabilitation act of 1973, as amended, 29 USC 701 et seq.

(2) "Administrator" means the administrator of the division.

(2m) "Administrator's representative" means an employee of the department designated by the administrator to represent the department at each hearing.

(3) "Appeal" means a request for relief filed with the division by the applicant or eligible individual based on the determination of ineligibility of services or the decision of the furnishing or denial of services issued by the division.

(3m) "Contract administrator" means an employee of the department responsible for administering the contracts with the hearing officer.

(5) "Department" means the Wisconsin department of workforce development.

(5r) "Determination of ineligibility" means a determination issued by the department to an individual who applies for vocational rehabilitation services and is determined not to be eligible for the services; or a decision issued by the department to an eligible individual receiving services under an IPE and is determined to no longer be eligible for services.

(6) "Division" means the department's division of vocational rehabilitation.

(7) "File" or "filed" means the physical receipt of a document by the person designated in this chapter.

(8) "Hearing" means a formal review by an impartial hearing officer of the determination of ineligibility for services or the decision of the furnishing or denial of services issued by the division.

(9) "Hearing coordinator" means an employee of the department within the division who maintains the records of hearings, contacts hearing officers to schedule hearings and ensures that time requirements for the completion and reporting of hearings are observed.

(10) "Hearing request" means a written request for a hearing signed by an applicant or eligible individual to appeal a determination of ineligibility of services or the decision of the furnishing or denial of services.

(11) "Intent to review" means the department will review the decision of a hearing officer to determine if the decision will stand or be modified.

(12) "IPE" means individualized plan for employment.

(13) "Order of selection" means the order of priority for service, by category, required by 29 USC 721 (a) (5) (A) to ensure that clients with the most severe functional limitations who need multiple services over an extended period of time are served before clients who have less severe functional limitations or do not require multiple services over an extended period of time.

(14) "Party" means an applicant or eligible individual, or the representative of the applicant or eligible individual, or the administrator's representative.

(15) "Prehearing conference" means a joint face-to-face meeting, a telephone conference, separate meetings or separate telephone calls by the hearing officer with the parties prior to the hearing to formulate a statement of the issues presented by an appeal, identify potential witnesses, establish a schedule for discovery and deadlines for exchange of witness lists and exhibits, receive motions and clarify any remaining issues to be considered or excluded from a hearing.

(16) "Representative" means a parent, guardian, other family member or advocate designated in writing by the applicant or eligible individual, or a representative of the applicant or eligible individual appointed by a court.

(16m) "Secretary" means the secretary of the department.

(17) "Wisconsin client assistance program" means a service program established by the governor under 34 CFR 370.2 (a) (d).

History: Cr. Register, December, 1996, No. 492, eff. 1–1–97; CR 15–055: cr. (2m), am. (3), cr. (3m), r. (4), cr. (5r), am. (8) to (16), cr. (16m), am. (17), Register May 2016 No. 725, eff. 6–1–16.

DWD 75.04 Right to a hearing. An applicant or eligible individual may appeal a determination of ineligibility for services or the decision of the furnishing or denial of services including a

decision relating to an order of selection for services, whenever vocational rehabilitation services for an individual are denied, reduced, suspended, or terminated.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97; CR 15-055: am. Register May 2016 No. 725, eff. 6-1-16.

DWD 75.05 Filing a hearing request. (1) TIME LIMITS.

The time limit for filing a hearing request shall be within 12 months after a determination of ineligibility for services or the decision of the furnishing or denial of services was mailed to the applicant or eligible individual, or the representative of the applicant or eligible individual. Failure to file a hearing request within the 12 month limit shall be cause for the hearing request to be dismissed.

(2) HOW TO FILE. An applicant or eligible individual shall file a written hearing request and state the issues involved in the appeal and the desired outcome on a form provided by the department with the hearing coordinator.

Note: To obtain a hearing request form, or for questions relating to filing a hearing request, contact the Hearing Coordinator, Division of Vocational Rehabilitation, P.O. Box 7852, Madison, Wisconsin 53707, telephone (800) 442-3477 or access the form online at <http://dwd.wisconsin.gov/dvr/>.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97; CR 15-055: am. Register May 2016 No. 725, eff. 6-1-16.

DWD 75.06 Acknowledgment of a hearing request.

The hearing coordinator shall acknowledge receipt of a hearing request in writing and notify the parties within 5 working days after receiving the request. If a representative has been designated, the hearing coordinator shall notify the applicant's or eligible individual's representative in writing. The acknowledgment of a hearing request shall include a copy of this chapter, and information on appeal rights and the Wisconsin client assistance program.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97; CR 15-055: am. Register May 2016 No. 725, eff. 6-1-16.

DWD 75.07 Time limit for hearing.

A hearing shall be held within 60 calendar days of the receipt of the hearing request by the hearing coordinator unless the parties agree to a specific extension of time.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97; CR 15-055: am. Register May 2016 No. 725, eff. 6-1-16.

DWD 75.08 Motions relative to a hearing.

Motions shall be filed in writing within 5 working days prior to a scheduled hearing. A motion shall state the grounds of the motion and the relief or order requested. Briefs, affidavits, documentary evidence and other papers in support of a motion shall be filed with the motion and the hearing officer. Motions relative to a hearing may include any of the following:

(1) MOTION TO EXTEND TIME LIMITS. A motion to extend any time limit, including the 60-day time limit for holding a hearing.

(2) MOTION TO DISMISS A HEARING REQUEST FOR LACK OF SUBJECT MATTER JURISDICTION. A motion to dismiss a hearing request on the grounds that the department does not have subject matter jurisdiction may be filed at any time.

(3) MOTION TO AMEND A HEARING REQUEST. A motion to expand or restrict the nature or scope of the hearing.

(4) MOTION TO WITHDRAW A HEARING REQUEST. An applicant or eligible individual, or the representative of the applicant or eligible individual, may withdraw from the appeal process at any time.

(5) MOTION FOR A SUBSTITUTE HEARING OFFICER. Either party may file a motion for a substitute hearing officer for reasons of conflict of interest, bias, or qualifications.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97; CR 15-055: am. Register May 2016 No. 725, eff. 6-1-16.

DWD 75.09 Identification of a representative.

(1) ADMINISTRATOR'S REPRESENTATIVE. An administrator's representative shall be designated for each hearing.

(2) REPRESENTATIVE OF APPLICANT OR ELIGIBLE INDIVIDUAL. An applicant or eligible individual may designate a representative for a hearing. As provided under 34 CFR 370.4, upon the request of an applicant or eligible individual, the Wisconsin client assistance program may provide assistance and advocacy services for the applicant or eligible individual and may be the designated representative of an applicant or eligible individual.

(3) NOTICE OF REPRESENTATION. Notice of representation shall be filed with the hearing officer as part of the prehearing conference under s. DWD 75.14, or within 5 working days in advance of the scheduled hearing. If the representative of the applicant or eligible individual has been properly designated in writing prior to a hearing request, that designation shall be valid for a hearing unless revoked by the applicant or eligible individual. If the applicant or eligible individual is not present at a hearing to introduce a representative, the hearing officer may require the representative to present identification before the hearing may proceed.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97; CR 15-055: am. Register May 2016 No. 725, eff. 6-1-16.

DWD 75.10 Filing documents. (1) DOCUMENTS FILED WITH REPRESENTATIVE.

If the applicant or eligible individual has designated a representative in writing, all correspondence and other documents related to the hearing shall be mailed to the representative of the applicant or eligible individual. For documents sent by mail, the date the document is received by the applicant or eligible individual, or representative of the applicant or eligible individual, determines the date of filing.

(2) FILING IN PERSON. For papers filed in person, the date the applicant or eligible individual, or the representative of the applicant or eligible individual, receives the document determines the filing date.

(3) DOCUMENT EXCHANGE. Filing of any document with the hearing officer or the hearing coordinator constitutes a certification that a copy of the document has been served on the other parties.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97; CR 15-055: am. (1), (2) Register May 2016 No. 725, eff. 6-1-16.

DWD 75.11 Services while a hearing officer's decision is pending.

Pending the decision of a hearing officer, the department may not suspend, reduce, or terminate vocational rehabilitation services including evaluation and assessment services and IPE development unless any of the following apply:

(1) The services were obtained through misrepresentation, fraud, collusion, or criminal conduct.

(2) The applicant eligible individual, or, in appropriate cases, the applicant or eligible individuals representative requests a suspension, reduction, or termination of services.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97; CR 15-055: renum. 75.11 to 75.11 (intro.) and (1) and am., cr. (2) Register May 2016 No. 725, eff. 6-1-16.

DWD 75.12 Hearing officer qualifications.

A hearing officer shall be impartial and have knowledge of the delivery of vocational rehabilitation services, the requirements of the state plan for services under the act, federal regulations and state regulations and policy governing the provision of the services and the procedures for conducting an impartial hearing. The hearing officer shall not:

(1) Be an employee of the department or other public agency except as an administrative law judge, a hearing examiner or an employee of an institution of higher education. An individual is not considered an employee of the department solely because the individual is paid by the department to serve as a hearing officer.

(2) Be a member of the state rehabilitation planning advisory council.

(3) Have been previously involved in the vocational rehabilitation of the applicant or eligible individual.

(4) Have any personal or financial interest that may conflict with the hearing officer's obligation to be objective.

History: Cr. Register, December, 1996, No. 492, eff. 1–1–97; CR 15–055: am. (intro.), (1), (3) Register May 2016 No. 725, eff. 6–1–16.

DWD 75.13 Authority of the hearing officer. (1) The hearing officer shall conduct a prehearing conference with the parties as specified under s. DWD 75.14. The hearing officer may receive and act on motions under s. DWD 75.08, use the power of subpoena under s. 885.01, Stats., and contact any party prior to a scheduled hearing to obtain needed information or suggest mediation if the parties agree that agreement is possible prior to the hearing. The parties retain all rights under this chapter regardless of their participation or nonparticipation in mediation.

(2) The hearing officer shall control the course and conduct of the hearing to ensure that all required procedures are followed, that the parties are fairly represented and that the issues are presented clearly and briefly.

(3) Except as provided under s. DWD 75.19, the decision of the hearing officer is final.

History: Cr. Register, December, 1996, No. 492, eff. 1–1–97; CR 15–055: am. (1), (3) Register May 2016 No. 725, eff. 6–1–16.

DWD 75.14 Prehearing conference. (1) **PURPOSE.** The hearing officer shall ask the parties to participate in a prehearing conference to do one or more of the following:

(a) Formulate a statement of the issue or issues presented by an appeal.

(b) Identify potential witnesses and receive motions.

(c) Confirm the scheduled hearing.

(d) Clarify any other issues to be considered or excluded from a hearing.

(2) **PARTICIPATION.** The administrator's representative shall participate in the prehearing conference. If the applicant or eligible individual, or the representative of the applicant or eligible individual, fails to participate in a prehearing conference without prior notice, the hearing officer shall continue the prehearing conference period for 5 working days. During this period the applicant or eligible individual, or the representative of the applicant or eligible individual, may file a good cause explanation, including the need for reasonable and specific disability accommodations, and request that the prehearing conference be rescheduled. If a motion is not filed within 5 working days, the hearing officer shall schedule the hearing within the 60–day limit and notify the parties and the hearing coordinator of this decision. The department may review this decision as provided in s. DWD 75.19.

(3) **HEARING NOT DELAYED BY PARTICIPATION IN A PREHEARING CONFERENCE.** Participation in a prehearing conference shall not delay a hearing and does not affect time limits under this chapter. The parties shall not forfeit any rights under this chapter by participating in a prehearing conference or meeting to reach agreement prior to a hearing.

History: Cr. Register, December, 1996, No. 492, eff. 1–1–97; CR 15–055: am. (title), (1) (intro.), (2), (3) Register May 2016 No. 725, eff. 6–1–16.

DWD 75.15 Agreement prior to a hearing. (1) **NOTICE OF AGREEMENT.** If the parties reach agreement prior to a hearing, the hearing officer shall notify the parties by certified mail that the issue has been resolved by mutual agreement and is dismissed without prejudice. The dismissal notice shall include a brief summary of the agreement between the parties and advise the parties that failure to meet the conditions of the agreement shall be grounds for a new hearing request.

(2) **IF PROPOSED SETTLEMENT REJECTED.** If either party rejects a proposal prior to a scheduled hearing, the scheduled hearing shall be held without additional notice.

History: Cr. Register, December, 1996, No. 492, eff. 1–1–97.

DWD 75.16 Hearing procedures. (1) **HEARING IS CLOSED.** A hearing shall be closed to the public as a confidential

matter unless the applicant or eligible individual, or the representative of the applicant or eligible individual files a motion to open the hearing within 5 working days in advance of the scheduled hearing.

(2) **HEARING NOT A COURT.** The hearing officer is not bound by the rules of evidence and customary procedures of a court of law. However, the hearing officer shall adhere to the hearing procedures in this section unless there is good cause and shall document, on the record of the hearing, the reasons for deviation from any procedure required under this chapter.

(3) **ATTENDANCE AT A HEARING.** Parties and witnesses shall attend a scheduled hearing unless a motion has been filed with the hearing officer within 5 working days prior to a scheduled hearing stating reasonable cause for an individual to participate in the hearing, including the need for reasonable and specific disability accommodations, by a live, real time electronic means as an alternative to appearing in person. The hearing officer may grant the request if the other party has no objection.

(4) **TESTIMONY BY WITNESSES.** Witnesses may testify in person by answering questions posed to them, in narrative form, or by deposition provided that the witness agrees in advance, as part of the deposition, to permit the recording of the testimony and any subsequent cross–examination and the witness understands a subpoena to appear may be issued by the hearing officer based on the information in the deposition. For reasonable and specific disability accommodations or to provide testimony by deposition or electronic means, witnesses shall file a request with the hearing officer within 5 working days prior to a scheduled hearing. The hearing officer may grant the request if the other party does not object provided that the witness agrees in advance and on the record to permit the recording of the witness's telephone testimony and any subsequent cross–examination.

(5) **IDENTIFICATION OF WITNESSES AND EXHIBITS.** Each party shall file a list of witnesses and submit a copy of exhibits not previously identified in the prehearing conference with the hearing officer and the other party within 5 working days prior to a scheduled hearing.

(6) **RECORD OF THE HEARING.** (a) *Recording.* The hearing officer shall record each hearing. The applicant or eligible individual, or the representative of the applicant or eligible individual, may obtain one free copy of the recording by contacting the hearing coordinator. No other recording of the hearing is permitted.

Note: To obtain a copy of the recorded hearing, contact the Hearing Coordinator, Division of Vocational Rehabilitation, P.O. Box 7852, Madison, Wisconsin 53707 or telephone (800) 442–3477.

(b) *Transcript.* Transcripts of the hearing record may be provided at the expense of the requestor. However, a party who cannot, due to a disability, use the free copy of the recording provided in par. (a) may file a written request with the hearing coordinator for a copy of the record in an alternate format as a reasonable accommodation.

Note: To file a written request for a transcript of the hearing record, contact the Hearing Coordinator, Division of Vocational Rehabilitation, P.O. Box 7852, Madison, Wisconsin 53707 or telephone (800) 442–3477.

(7) **OPENING STATEMENT BY HEARING OFFICER.** The hearing officer shall open the hearing with a brief statement of the date, the location of the hearing, the issues, the parties directly involved in the hearing and the standard procedures, and shall remind all parties and witnesses present that all personally identifiable information made available for the hearing is confidential.

(8) **ROLL CALL.** (a) The hearing officer shall determine if the parties and announced witnesses are present. The hearing officer may admit other individuals to the hearing for good cause at the request of either party.

(b) If either party fails to appear at a hearing without prior notice, the hearing officer shall immediately reschedule the hearing to a date within 5 working days after the current date to allow the absent party to explain the absence. The hearing officer shall notify the parties and the hearing coordinator by certified mail of

the new hearing date and the reason for rescheduling the hearing. If the applicant or eligible individual, or the representative of the applicant or eligible individual, fails to appear at the rescheduled hearing, the hearing officer shall dismiss the appeal. This dismissal shall not be construed as violation of the 60-day limit for holding a hearing since the hearing was scheduled and held but the applicant or eligible individual, or the representative of the applicant or eligible individual, did not appear to present testimony or evidence. The department may review this decision as provided in s. DWD 75.19.

(9) ADMISSIBILITY OF EVIDENCE OR TESTIMONY. At the request of either party, the hearing officer may exclude testimony or evidence. The hearing officer may also exclude immaterial, irrelevant or unduly repetitious testimony. A decision to exclude evidence or testimony shall be made on the record and shall include the rationale and arguments used by the hearing officer to exclude the material. The hearing officer may issue reserved rulings on evidence and determine, before the close of the hearing, if the material will be considered in the decision.

(10) ADMINISTERING OATH. The hearing officer shall swear in the parties and all witnesses. After the roll call, witnesses shall be present in the hearing room only while giving testimony.

(11) CROSS-EXAMINATION. Cross-examination is not limited to matters to which a party or witness testified on direct examination.

(12) PRELIMINARY STATEMENTS BY THE PARTIES. The hearing officer shall ask the parties to state their names for the record.

(13) REQUEST FOR DIRECT TESTIMONY, EVIDENCE AND ARGUMENTS. (a) The hearing officer shall ask the parties to present written and oral statements regarding the facts, issues and desired outcome of the hearing. This includes new information which may not have been available when the original request for a hearing was filed.

(b) Witnesses may testify either by answering questions posed to them or in narrative form. Written or electronic depositions may also be used with the understanding that a witness may be asked or subpoenaed to appear by the hearing officer based on the information in the deposition.

(c) Cross-examination is not limited to matters to which a party or witness testified on direct examination.

(d) The hearing officer shall ensure that the parties have an opportunity to review and comment on all evidence.

(e) At the request of either party, the hearing officer may exclude the testimony of a witness.

(14) DIRECT TESTIMONY. (a) The hearing officer shall ask the applicant or eligible individual, or the representative of the applicant or eligible individual, to make the first presentation and to question the administrator's representative and witnesses.

(b) The hearing officer shall ask the administrator's representative to make the second presentation and to question the applicant or eligible individual, or the representative of the applicant or eligible individual, and witnesses.

(15) REBUTTAL AND QUESTIONS. The hearing officer shall give the applicant or eligible individual or the representative of the applicant or eligible individual, the opportunity to make a rebuttal of evidence presented at the hearing and to question the administrator's representative and witnesses and then give the same opportunity to the administrator's representative.

(16) CLOSING ARGUMENTS. The hearing officer shall ask the administrator's representative to present closing arguments and then ask the applicant or eligible individual, or the representative of the applicant or eligible individual, to present closing arguments. Closing arguments may be submitted both as verbal arguments and as written briefs.

(17) ENDING THE HEARING. The hearing officer shall inform the parties that a written decision will be sent to them by certified

mail within 30 calendar days after the date of the hearing and state the date and time in which the hearing was closed.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97; CR 15-055: am. (1), (3) to (5), (6) (a), (b), (7), (8) (b), (9), (14) (a), (b), (15) to (17) Register May 2016 No. 725, eff. 6-1-16.

DWD 75.17 Decision of the hearing officer. The hearing officer shall issue a written decision within 10 calendar days of a written motion under s. DWD 75.08 and within 30 calendar days of a hearing. The hearing officer shall provide a report of the hearing including the findings and the grounds for the decision. The decision shall state that the decision is final unless the administrator's representative, applicant or eligible individual, or the representative of the applicant or eligible individual, requests a review of the decision of the hearing officer within 20 calendar days after the decision is issued, under s. DWD 75.19, or the applicant or eligible individual, or the representative of the applicant or eligible individual, chooses to petition the circuit court under s. 227.53, Stats. The notice shall specify the procedures for filing a claim in circuit court. The hearing officer shall send the original to the applicant or eligible individual, or the representative of the applicant or eligible individual, and send a copy of the notice to the administrator's representative and to the hearing coordinator for placement in the applicant's or eligible individual's case record.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97; CR 15-055: am. Register May 2016 No. 725, eff. 6-1-16.

DWD 75.18 Hearing officer's report. The hearing officer shall forward the recording of the hearing, a written summary of the hearing and any other items specified by contract to the hearing coordinator. The hearing coordinator shall ensure that all required materials have been received and shall forward the materials to the department for a decision as to whether a formal review of the hearing officer's decision is needed.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97; CR 15-055: am. Register May 2016 No. 725, eff. 6-1-16.

DWD 75.19 Review of hearing officer's decision.

(1) NOTICE OF INTENT TO REVIEW. The department, or the applicant or eligible individual, may initiate a review of the hearing officer's decision issued under s. DWD 75.17. If the department decides to initiate a review of the hearing officer's decision, written notice of this decision shall be filed with the parties by certified mail within 20 calendar days of the date that the decision of the hearing officer was mailed. The intent to review notice shall advise the parties that additional evidence and information relevant to the final decision may be filed with the department within 30 calendar days following the date of the intent to review notice and that the department may also collect new evidence from other sources during that period.

(2) REVIEW PROCEDURE. (a) Authority for modifying the decision of a hearing officer under this chapter is reserved to the department secretary or the secretary's authorized designee and may not be otherwise delegated.

(b) The administrator shall conduct an initial review of the hearing officer's decision and shall submit a proposed review decision to the secretary or the secretary's authorized designee.

(c) The secretary or the secretary's authorized designee shall conduct a review of the decision of the hearing officer, the administrator's proposed decision under par. (b) and issue a final review decision.

(3) BASIS FOR CHANGING HEARING OFFICER DECISION. The department may not modify a decision of a hearing officer which supports the position of the applicant or eligible individual unless, based on clear and convincing evidence, the decision is clearly contrary to law or federal policy issuances.

(4) CONSULTATION WITH HEARING OFFICER. The department may consult with the hearing officer regarding the decision.

(5) NOTICE OF OUTCOME OF THE DEPARTMENT'S REVIEW. The department shall notify the parties in writing by certified mail of the outcome of the review within 30 calendar days after the date of the intent to review notice. The notice shall state the findings, the grounds for the final decision, that it is the final decision unless modified by a court and information on how to file a request for circuit court review. The department shall send copies of the letter and any attachments to the hearing coordinator for placement in the applicant's or eligible individual's case record, to the hearing officer and to the contract administrator.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97; **CR 15-055: am. (title), (1), (2) (title), renum. (2) to (2) (a) and am., cr. (2) (b), (c), am. (3) to (5) Register May 2016 No. 725, eff. 6-1-16.**