

PASRR Technical Assistance Center

www.pasrrassist.org



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ADMINISTRATIVE APPEALS

September 10, 2013
PTAC Webinar

What is an Appeal?

- ▶ Any party that is adversely affected by an agency decision is entitled to a review (42CFR 431.200 and 483.204). This includes non-Medicaid individuals adversely affected by PASRR.
- ▶ Medicaid adverse actions can be appealed through the state fair hearing process. Hearings can be either informal or formal.
- ▶ A Medicaid appeal is typically initiated in the form of a complaint issued often to a local eligibility office or to the designated state entity responsible for conducting administrative hearings. (Example: Inspector General's office of administrative hearings).
- ▶ "Hearings are conducted by an independent neutral officer who writes decision based on program rules and regulations, the facts or evidence produced during the hearing." Source: Fl. Dept. of C&F Inspector Generals Office.
- ▶ States are required to have statutes, rules, and administrative procedures in place to outline hearings process.
- ▶ Medicaid appeals can also be filed judicially in civil court.

Examples of Appeals

- ▶ NF applicant/resident does not meet level of care criteria required to qualify for the Medicaid Program (including service options /appropriateness)
- ▶ Time-limited/specified period determinations
- ▶ Determination that specialized services are needed/not needed
- ▶ Discharge from nursing facility
- ▶ Private pay applicant/resident appeals appealing adverse PASRR decision
- ▶ Other Medicaid/PASRR related issues (timeliness)

Examples in Reconsideration of Adverse Action

- ▶ States can opt to establish procedures to reconsider adverse action decisions. These procedures may incorporate a review of documents which led to the determination by different clinicians.
- ▶ Typically, agency responsible for decision incorporates process where other clinicians review LOC, Level II assessment, and/or need for specialized services (SS). SMHA or SIDA make determination as to whether SS needs can be met.
- ▶ Additional medical documents and psycho-social information can be submitted for review.
- ▶ Reconsideration process can avert appeals hearings.

Examples of Steps in the Hearings Process: One State's Perspective

How state agency personnel can prepare for
a hearing

Typical Appeal Background

- ▶ Once a complaint is filed with the state office, the hearing is scheduled and all parties are advised through written notice of hearing date, place, and time as well as hearing procedures (notice timeframes outlined in state administrative procedures).
- ▶ Some states initiate a concurrent reconsideration process.
- ▶ The recipients current eligibility remains the same until a decision is rendered.
- ▶ The location of hearing may vary from all parties (complainant, witnesses) appearing before hearings officer at state local/regional office to all parties attending by phone. The applicant must be accommodated based on their disability.

Continuances and Representation

- ▶ Complainant or other parties may request a hearing be continued to another date if unable to attend; typically state procedures require request be made several days in advance (example 5 days in advance of hearing).
- ▶ Complainant has choice to:
 - 1) represent self at hearing
 - 2) choose a designated representative or
 - 3) select an attorney to represent them
- ▶ Designated representatives should have a written authorization signed by complainant.
- ▶ Legal representation may be obtained through private funds or publicly funded legal aid organizations.
- ▶ Attorney representing complainant may be required to file notice of appearance with Medicaid office, the hearing officer, and/or the state agency's legal counsel.

Right to Review

- ▶ Complainant, designated representative, or attorney has the right to review the case file for information or documents that relate to issues to be discussed at the hearing.
- ▶ Complainant has right to copies of documents in file that resulted in determination.

Preparing for the Hearing

- ▶ Make a list of points you or your attorney wish to present and want hearings officer to consider. You may wish to schedule a pre-hearing conference with your attorney in advance.
- ▶ Submit, or request your attorney to submit documents to the hearings officer in advance of scheduled hearing.
- ▶ Contact witnesses (MD, nursing facility, or hospital staff) to testify in support of your position at hearing or request hearings officer to issue summons or subpoenas to require attendance.

How are Fair Hearings Conducted?

- ▶ States determine through statute (administrative procedures act) and rule (administrative code) how requirements will be met under 42 CFR 431.200
- ▶ Generally, hearings officer decides most orderly and practical way to proceed.
- ▶ Each party is allowed to present witnesses as well as other evidence to support their position.
- ▶ Each party is allowed to question the other party's witnesses.
- ▶ Hearsay can be admitted during informal hearings; however final decisions are not based solely on witness statements made by another person before the hearing.

Fair hearings (continued)

- ▶ Parties & witnesses who testify are sworn to tell the truth.
- ▶ Informal hearings are electronically recorded, therefore it's important to speak loudly and clearly.
- ▶ Formal hearings may be recorded by a court reporter and available through transcription.
- ▶ Rules of evidence & testimony are applied in formal hearings.
- ▶ When the person who has filed request for hearing is NOT a current Medicaid recipient, the burden of proving that the state's position be reversed may lie with them. This applies to formal/informal hearings.
- ▶ Conversely, for current Medicaid recipients, the burden of proof is placed upon the state.
- ▶ Decisions rendered by the hearing officer must be adhered to, including making changes retroactively.

Roles of Hearing Officers

- ▶ Impartial, independent, neutral
- ▶ No interest in hearing outcome
- ▶ Can ask witnesses questions for clarification
- ▶ Job is to evaluate position of each party and attempt to determine truth
- ▶ Can request or permit additional documents to be submitted following hearing
- ▶ Hearings officers may request either one or both attorneys to prepare recommended order(s)
- ▶ Decision rendered as final order based on program rules and regulations and facts produced during hearing
- ▶ Federal guidelines require order to issued within 90 days, this time can be extended
- ▶ Hearing officer 's decision is only device in rule that can countermand a PASRR determination
- ▶ Hearings officer's order can be appealed to the appropriate District Court of Appeals

QUESTIONS

A Look at PASRR & Different Appeal Systems

Janet Spinelli PhD, RN, PCNS

Agenda

- ▶ Background
- ▶ Different Perspectives & Special Considerations
- ▶ Components of Appeal Systems
- ▶ Differences in Appeal Systems
- ▶ Hearing Process
- ▶ Testimony & Useful Tips
- ▶ Issues in Appeals
- ▶ Best Practices
- ▶ Next Steps

Background

- ▶ PASRR legislation emphasizes appeal rights
- ▶ Appeals can be a cumbersome process for individual, NF, and significant others
- ▶ PASRR appeal systems make opportunities for improving process or outcomes, minimizing adversities, complaints, and appeals
- ▶ Person-centered PASRR evaluation and determination approach can prevent complaints and appeals (i.e. person-centered evaluation, informed choice, outcome based determination, education)

Olmstead Issue

- ▶ Olmstead v. L.C., 527 U.S 581 (1999) was decided by the Supreme Court of the United States in June 1999, finding that it is a direct violation of the Americans with Disabilities Act (ADA) of 1990 to retain individuals with mental disorders in institutional settings if their needs are able to be met in the community.
- ▶ SUPREME COURT OPINION IN OLMSTEAD
“confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.”

Supreme Court of the United States No. 98–536

http://www.ada.gov/olmstead/olmstead_about.htm

Individual Perspectives: Rights and Responsibilities

- ▶ Right to all the requirements of the PASRR program in a timely manner
- ▶ Right to service entitlements for Medicaid recipients
- ▶ Right to notice of appeal rights and being informed of service options
- ▶ Right to choose provider and service based on service options
- ▶ Right to be informed of respective costs that may be charged
- ▶ Not to be transferred or discharged without cause or notice
- ▶ Right to ask questions of an individual involved with the decisions
- ▶ Right to notification of appeal rights and appeal actions
- ▶ Right to access information on the appeal process (e.g. how to submit appeal, appeal procedures, levels of appeals)
- ▶ Right to make complaint or grievance without fear of retaliation
- ▶ Responsible to make any appeals within federal and state appeal guidelines
- ▶ Right to express personal preference/legal guardian's preference
- ▶ Right to reasonable accommodations and individual consideration when establishing reconsideration and/or hearing forum
- ▶ Rights to respect, dignity, privacy/confidentiality.

State Perspectives: Rights and Responsibilities

- Responsible to provide a PASRR program based on federal and state rules, regulations, and laws
- Responsible to provide an appeal system
- Responsible for a state plan that appeal requirements are met
- Right to make a decision based on rules, regulations, and laws
- Right to counsel
- Right to appeal an administrative officer's decision to the courts

Right to Notice

Content of Notice

- ▶ a) State, skilled NF, or NF intended action
- ▶ (b) Reasons for the intended action
- ▶ (c) Specific regulations or change in Federal /State law requiring action
- ▶ (d) An explanation of—
 - ▶ (1) Individual's right to request an evidentiary hearing (if available), or a State agency hearing; or
 - ▶ (2) In action under change in law, the circumstances a hearing will be granted; and
- ▶ (e) An explanation of circumstances which Medicaid is continued if hearing is request.

See Content of notice and notice § 431.210 and § 431.206 (c)(2), (c)(3), or (c)(4)

Appeal Rights

–42 CFR Part 431 Sub E 431.201

- ▶ For any person adversely affected by the pre-admission screening or resident review
- ▶ Medicaid and non-Medicaid individuals appealing transfers, discharges and determinations of preadmission screening & resident reviews
- ▶ A termination, suspension, or reduction of Medicaid eligibility or covered services
- ▶ Determinations by skilled NF and NF to transfer or discharge residents
- ▶ Adverse Determinations: Does not require the level of services provided by a NF
- ▶ Does or does not require specialized services

Individual Considerations

CHOICE & APPEAL RIGHTS

- ▶ Individual with MI or ID/related conditions should be provided choice to access NF services, should their condition require the level of service and their needs can be appropriately met in a NF.
- ▶ Individuals with a mental disability or ID/related conditions should be given the opportunity to have their needs met in community options, even if they meet the rule-based standard for institutional placement.
- ▶ There should be appropriate weight assigned to the consumers/guardian's choice to live in a particular setting.
- ▶ There should be access to appeal system.

Other Special Considerations

- ▶ Notice on special procedures to access any restricted mental health record (make an appointment with MH providers to access information from health record)
- ▶ Guardian notification –(locating guardian)
- ▶ Special procedures for individuals with evidence of decision making issues
- ▶ Accommodations for disabilities
- ▶ Individual circumstances/preferences guide reconsideration, informal and/or formal hearing procedures (timing/platform)

Components in Appeal Systems:

A Feedback Process Improving Procedures, Outcomes, and Minimizing Adversities

- Determination and notice process: Person-centered & outcome based determinations
- Notification of action
- Submission process for complaints & appeals
- Complaint and appeal data receiving procedures
- Appeal classification, coordination, & scheduling
- Investigation and complaint resolution strategies
- Reconsideration procedures
- Hearing procedures and decision(s)
- Collect quality improvement data for continuous quality improvement: procedure for policy review & procedure for policy revision

Differences in Appeal Systems

- ▶ Different state offices responsible for various PASRR related hearings (e.g. Appeal office, MH, ID/DD, Medicaid authority, Attorney General office)
- ▶ Different agency staff participate in state reconsideration related activity
- ▶ Different agency representatives at hearings (e.g. PASRR /Agency administrator knowledgeable of the case, staff who took action (i.e. completing PASRR evaluation data and/or determination)
- ▶ Agency Representative may testify based on (1) a record evaluation (2) face-to face assessment, and/or (3) a case review
- ▶ Different terminology (e.g. appeals officer, appeals administrator, intermediary/case coordinator, agency representative)
- ▶ Different classification of complaints and appeals
 - Use of appeal request forms to classify complaints and appeals
 - Use of Appeal officers to classify complaint into adverse decision categories

Example of Pre-Hearing Procedures

Appeal related data entered into shared database for administration, prehearing and hearing procedures

- Record sharing procedures
- Agency provides individual and hearing officer adverse determination notice; documents on rationale for decision
- Investigations
- Multidisciplinary meetings may include:
 - Individual and/or legal guardian, representative (written signed document authorizing) or authorized advocate
 - State and local provider agencies
 - MH, DD Health care providers
 - Options counselors including MFP
 - NF Ombudsman or NF surveyor agency
 - Family or Significant others

Helpful hints for Testimony

- ▶ Dress appropriately
- ▶ Avoid argumentative discussions
- ▶ Due diligence to see facts
- ▶ Answer questions, OK to say I don't know
- ▶ Present clearly
- ▶ Present “black and white” factual data
- ▶ Provide supplement data throughout the oral proceedings
- ▶ Have supportive documents

Helpful Tips for Testimony

- ▶ Have a defined process for hearings
- ▶ Script is written around/reinforces legal regulations and rules
- ▶ Work collaboratively with Attorney
 - Seek support from attorney to write script
 - Have script around state policy/reinforces legal regulation
- ▶ Be aware of established practices expected by hearing officer
- ▶ Be aware that hearing decisions are rendered based on entire hearing “record” –not just testimony

Tips to Avoid Easy Mistakes

- ▶ Avoid deviation from procedure based decision making
 - Confusing ancillary or unrelated data
 - Can suggest that decision was not based on rules
 - Can suggest that decision was made arbitrary and capricious
- ▶ Documentation is critical
 - Clinical documentation
 - Action taken for complaint
 - All action documentation
 - Timeliness documentation

Example of Hearing Procedures

- ▶ Every administrative hearing has distinct components: (e.g. direct testimony, cross-examination, additional testimony, and a closing statement.)
- ▶ Statement by agency representative describing agency policy for action taken
- ▶ Statement by claimant or authorized representative
- ▶ Hearing Officer lead discussion on policy and related facts

Example of Hearing Procedures

- ▶ Hearing Officers Opening Role
 - Opening the hearing
 - Describe reason for hearing
 - Identify and confirm attendance of parties needed to conduct fair hearing proceeding
 - Discontinue hearing for absent attendee
 - An informal or formal reconsideration proceeding may occur after hearing officer discontinued hearings or dismiss themselves
 - Describe and clarify hearing procedures for one or more adverse action issues
 - Explain the determination notification procedure used to inform the individual of the adverse determination

Example of Script for Testimony

- ▶ Establish role and credentials
- ▶ Rules and regulations the action was based on
- ▶ When received or completed information used in determination
- ▶ State who received evaluation material from
- ▶ Date evaluation was done
- ▶ When received evaluation
- ▶ Define documentation

Example of Script for Testimony

- ▶ Show clinical definitions / medical necessity policy
 - Policy may have all affirmative requirements
 - Policy includes criteria a, b, c
- ▶ Show how clinical criteria matches regulations
 - Write up the steps in the decision making process
- ▶ Show how clinical decision making went through process
- ▶ Define how determine criteria is not detailed in data
- ▶ Show discrepancies to clearly see what is lacking
 - State reason denying due to...
 - State where clinical findings / documentation does not match criteria
- ▶ Summarize
 - State did not meet criteria
 - State did not meet all criteria

Other Common Issues in Appeals

- ▶ Timeliness on notice & determination
Timeliness for complaint
- ▶ Determination of needed services in appropriate placement determinations
- ▶ Addressing access to service benefits: clarifying process and responsible parties (i.e. state, individual, contractor, provider) for timely data and forms completed
- ▶ Develop understanding of what happens with services during various appeal processes
- ▶ Identifying adverse consequences
- ▶ Challenges in application of CFR 483.138

Learning from Appeal Hearing Procedures In Your State

- ▶ Review NF LOC hearing forum
- ▶ Service authorization hearings
- ▶ Disability review organization
- ▶ Eligibility determinations
- ▶ Look at policies
- ▶ Prehearing activities and reconsideration
- ▶ Hearing preparation
- ▶ Timeliness determination management (when sent out action/determination)
- ▶ Special procedures and lessons learned
- ▶ System reform based on findings

Example of Successful Practices

- ▶ Maximize transparency in determination & appeal
- ▶ Person-centered/ outcome based determinations, incorporation of section Q in PASRR outcomes, following up confirmation of discharge location
- ▶ Correspondence/cover letter describing rights
- ▶ Hearing schedule notices (prior to hearing, for parties failing to appear)
- ▶ Reconciliation and prehearing complaint resolution
- ▶ Web based procedure Instructions
- ▶ Procedure manual

Example of Successful Practices (cont)

- ▶ Training power point presentation
- ▶ Appeal system policies and procedure manual
- ▶ Delineate complaints and appeals on appeal request forms
- ▶ Scenario based training
- ▶ Written state testimony summary sent out prior to hearing
- ▶ Appeals officer cheat sheet
- ▶ Appeal summaries–summarize state’s action and regulation basis
- ▶ Quality improvement feedback procedures
- ▶ Self evaluation

Reconsideration & Hearing Process Taking Opportunity for PASRR Program Improvement

- ▶ Accessible laws, rules, regulations, and procedures
- ▶ Learn from past practice
- ▶ Review other state procedures
- ▶ Use brochures and training tools
- ▶ Networking
- ▶ Self evaluation
- ▶ Learn from scenario

Next Steps: Questions to Consider

- ▶ What is appealable?
- ▶ What is state timeframe/process to file appeals?
- ▶ Is there available information and instruction for appeal rights and pre-hearing procedures?
- ▶ What happens with services during various appeal processes?
- ▶ Is medical necessity determination consistent with policies describing eligibility requirements?
- ▶ Do appropriate placement determinations conflict with policy eligibility requirements?
- ▶ Are adverse appropriate placement determinations based on issues of unmet need?
- ▶ Other questions?

Networking with NAPP– Follow-up Conference Call

September 24th at 1PM EST

Call in 1-866-906-0040*5042759*
Information @www.PASRRassist.org

- ▶ Follow up discussion
- ▶ Differences in implementation strategies
- ▶ Networking support and strategies
- ▶ Brandon Sturgill, Ohio Hearing Coordinator, Office of Treatment & Recovery will provide more detailed examples from Ohio program

Questions

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