

Home and Community Based Services Manual

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APPEAL AND HEARING PROCESS

Upon receipt of a verbal or written request to appeal a denial, reduction, or closure ([Policy 5.00](#)) of Home and Community Based Services (HCBS), the Department of Health and Senior Services (DHSS), Division of Senior and Disability Services (DSDS) shall initiate the appeal process.

Anyone may make the initial request for a hearing on the participant's behalf. However, the participant/guardian must be contacted directly to confirm the request and all contact and attempts to contact must be documented in case notes.

- DSDS staff shall begin attempts to contact the participant/guardian within one (1) business day of receipt of a hearing request, when the request was made by someone other than the participant/guardian.
- DSDS staff shall make a minimum of three (3) attempts on at least three (3) consecutive business days to contact the participant/guardian.
- If unable to reach the participant/guardian by the third attempt, the request for hearing shall not be processed and the adverse action shall proceed as appropriate.

When contact is made with the current or potential participant/guardian, DSDS staff shall:

- Discuss any additional information that would affect the reason for the adverse action;
- Ensure the participant/guardian wishes to continue the appeal process;
- Notify the participant/guardian that HCBS at the current level will continue when the appeal is filed within ten (10) business days, unless the participant/guardian chooses not to continue receiving services at the current level.

NOTE: If the appeal is ruled in favor of DSDS, the participant/guardian and/or the participant's estate may be liable for the cost of HCBS delivered during the appeal process. The participant/guardian shall be notified of the possible liability.

- Notify the participant/guardian the proposed action will be implemented on the 11th day, if the participant/guardian does not appeal within ten (10) business days from the date the Adverse Action Notice ([HCBS-12](#)) was mailed;
- Notify participant/guardian whose initial request for HCBS was denied by DSDS they have ninety (90) business days from the date the [HCBS-12](#) is mailed to appeal the decision, but they do not have the right to receive HCBS pending the hearing decision;
- Notify participant/guardian placed on the Independent Living Waiver (ILW) Waiting List ([Policy 3.55](#)) they have ninety (90) business days from the date the [HCBS-12w](#) is mailed to appeal their number on the list;
- Advise the participant/guardian supervisory review will be conducted prior to forwarding the hearing request to DLS.
- Advise the participant/guardian the Department of Social Services (DSS), Division of Legal Services (DLS) determines the date of the hearing and DSS/DLS will notify the participant/guardian of that date, along with any other instructions needed.

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- Advise the participant/guardian copies of pertinent supporting documentation will be mailed to them.
 - If the participant/guardian wants to designate an authorized representative to receive mailed documents, the [Authorization for Disclosure of Consumer Medical/Health Information](#) shall be mailed to the participant/guardian for completion.

DSDS staff shall complete the Application for State Hearing ([HCBS-12a](#)) using information provided by the participant/guardian.

DSDS staff shall notify their immediate supervisor that a hearing has been requested and the case record is ready for review in the HCBS Web Tool.

NOTE: If a participant's care plan is adjusted at any point during the hearing process, a new Notice of Adverse Action ([HCBS-12](#)) may be required ([Policy 5.00](#)).

If the participant/guardian indicates at any point prior to the hearing they have obtained legal counsel, staff shall inform their supervisor and the DSDS HCBS Hearings Representative. The DSDS HCBS Hearings Representative shall submit the case to the Office of General Council (OGC) database as an Attorney General (AG) referral, include the date of the hearing, and indicate the date DSDS staff was contacted by the participant/guardian's attorney **or** the date the participant/guardian informed DSDS staff they have legal counsel, whichever happens first.

- If DSDS staff is not contacted by the participant/guardian's attorney by the date of the hearing, the hearing will continue without legal counsel for either DSDS staff or the participant/guardian.
- If DSDS staff arrives at a hearing and the participant/guardian brings an attorney without previous notice, DSDS staff will ask for a continuance and follow the process outlined later in this policy under [DSDS Responsibilities](#).

Supervisor Review

The DSDS supervisor shall review all hearing requests prior to submitting the request to DLS. The DSDS supervisor shall review the participant's case record and all supporting documentation within three (3) business days of the date of the request for hearing. Supervisory review shall be documented in the participant's case record in the HCBS Web Tool.

The DSDS supervisor review shall ensure the following:

- Accuracy and validity of the case action;
- Compliance with policy, statutes and regulations; and
- Appropriate judgment from DSDS staff.

The DSDS supervisor may, at their discretion, request additional collateral contacts be made to further verify validity. This additional contact should not exceed three (3) additional business days. All contacts shall be documented in the HCBS Web Tool.

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If the DSDS supervisor review determines the adverse action is inaccurate, the DSDS supervisor shall contact DSDS staff to discuss the case.

- Should the adverse action need to be withdrawn, DSDS staff shall notify the participant/guardian verbally, explaining the decision to reverse the proposed adverse action.
- Written notification shall be made by completing the Reversal of Adverse Action Notice ([HCBS-12b](#)).
- HCBS shall be (re)authorized, increased, or continued as authorized.
- If services are not restored to the previous level, a new [HCBS-12](#) shall be completed and the [HCBS-12a](#) shall be revised to reflect the updated information.

When a decision is made to move forward with the hearing, the DSDS supervisor shall ensure the Adverse Action Notice, Application for State Hearing, and Agency Witness List are completed and forwarded to DLS, DSDS HCBS Hearings Representative, participant/guardian, and any authorized representative.

- Upon completion of the review, the DSDS supervisor shall sign and date the [HCBS-12a](#) and ensure it is uploaded to the participant's case record in the HCBS Web Tool.

Hearing Exhibits

Information used in making the determination for adverse action shall be provided to the participant/guardian and presented into evidence at the hearing. The DSDS HCBS Hearings Representative shall complete and forward a Cover Letter for Hearing Request ([HCBS-12h](#)) listing all exhibits to the appropriate DLS office with case documentation. Each document shall be marked with the appropriate exhibit number.

All packets shall include the following:

- Adverse Action Notice ([HCBS-12](#)) or Waiting List Notice for ILW Services ([HCBS-12w](#)), as appropriate;
- Application for State Hearing ([HCBS-12a](#));
- Case Notes pertinent to the adverse action; and
- HCBS Assessment Attestation.

Additional information used to make the determination could include, but is not limited to:

- HCBS Care Plan and Participant Choice Statement (HCBS-3);
- HCBS Assessment (InterRAI HC), to include the LOC score;
- Printed Prior Authorization – Care Plan; Letter from the Department of Health & Human Services (DHHS), Centers for Medicare & Medicaid Services (CMS) regarding the reduction of any State Plan services (i.e., Basic Personal Care, Advanced Personal Care, or

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Authorized Nurse Visits) **for individuals residing in a Residential Care Facility (RCF) or Assisted Living Facility (ALF)**, ([Appendix 6](#)); and

- Any other supporting documentation (e.g., General Health Evaluation and Level of Care Recommendation from a provider nurse, letter from a physician, copy of the Saint Louis University Mental Status (SLUMS) exam, etc.) used to make the determination for the adverse action.

Additional documentation shall be required when the participant's ability to self-direct his/her own care with regard to the Consumer Directed Services/Independent Living Waiver (CDS/ILW) program is questioned. Documentation shall include:

- All documentation in Case Notes within the HCBS Web Tool as to why a potential participant does not have the capacity to direct his/her own care or can no longer fulfill the program responsibilities as a current CDS/ILW participant.
- Any additional information to support this determination such as the SLUMS exam ([Policy 4.00, Appendix 8](#)), the Self-Direction Assessment Questions ([Policy 4.00, Appendix 10](#)), documentation from the participant's physician, or a psychological evaluation.

Additional documentation shall also be required when a decision regarding services was made based on information received from the Special Investigations Unit (SIU). For hearings alleging CDS/ILW participant fraud, the following guidelines shall be followed:

- The DSDS HCBS Hearings Representative shall notify the SIU investigator of the appeal, obtain their contact information and availability and DLS will notify them of the hearing date.
- SIU staff shall work with the DSDS HCBS Hearings Representative by redacting the investigative case file and providing it to the DSDS HCBS Hearings Representative for the hearing packet.
- SIU staff shall testify for DSDS regarding their findings in the investigation.

Scheduling a Hearing

Upon receipt of the hearing request, DLS will register the request and schedule the hearing.

- A Notice of State Hearing will be sent by DLS to the participant/guardian, any authorized representative, participant's attorney, if applicable, DHSS/Office of General Counsel (OGC), and DSDS staff listed on the Agency Witness List. The Notice of State Hearing includes the time and place of the hearing and information regarding procedures for rescheduling.
- Upon receipt of the Notice of State Hearing, the DSDS HCBS Hearings Representative shall contact the appropriate [Family Support Division \(FSD\) office](#) to ensure a room is available to conduct the hearing, when necessary. If DSDS is not present at the FSD office for the hearing and the participant plans to appear in person, DSDS staff shall contact the

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appropriate FSD staff to ensure they are available to assist the participant in gaining access to the room and connecting to the hearing conference call.

- DSDS staff shall not contact a DLS Hearings Officer directly. If DSDS staff have questions concerning hearing logistics or scheduling, contact the DSDS HCBS Hearings Representative. The DSDS HCBS Hearings Representative shall coordinate with support staff at the appropriate DLS Regional Office for clarification.

Participant/Guardian and/or Authorized Representative Rights

Pursuant to the Code of Federal Regulations (CFR), specifically 42 CFR 431.242, the participant/guardian must be given an opportunity to do the following:

- Examine, **before the date of the hearing** and **during the hearing**, all documents to be used by DSDS at the hearing. In addition, upon request, they have the right to examine the entire content of their case record

NOTE: Exhibits are mailed out to the participant within 3 business days following submission of appeal request however they may be delayed if additional information is required prior to submission to DLS.;

- Bring witnesses to the hearing;
- Establish all pertinent facts and circumstances;
- Present an argument without undue interference; and
- Question or refute any testimony or evidence, including the opportunity to confront and cross-examine any adverse witness.

Participant/guardian may withdraw the appeal request at any time **prior to** the hearing. This request **must** be received in **writing** and shall be forwarded to the DSDS HCBS Hearings Representative. If this occurs and a hearing request has already been forwarded to DLS, the withdrawal request shall be forwarded to the appropriate DLS Regional Office ([Appendix 1](#)). A copy shall also be uploaded to the participant's case record in the HCBS Web Tool.

DSDS Responsibilities

DSDS staff attending the hearing shall ensure their understanding of the process and review the documentation that will be presented.

- When provider staff have completed the assessment and recommended the care plan, DSDS staff are responsible for presenting testimony to defend the case action taken based on that information. Therefore, staff must be prepared to address how that information impacted the decision.
- DSDS may request provider staff with pertinent knowledge of the participant's circumstances attend the hearing.

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When DSDS is informed an attorney (or other staff from an attorney's office) is representing the participant/guardian for their appeal, the DSDS HCBS Hearings Representative shall:

- Notify DHSS/OGC immediately at 573/751-6005 for appropriate action.
- Ask for a continuance of the hearing to secure legal representation, if it is discovered *on the date of the hearing* the participant/guardian is represented by an attorney (or other staff from an attorney's office).
- Document the information in the participant's case record in the HCBS Web Tool.
- Notify the DSDS supervisor to upload the information into the OGC database.

When there is a care plan change that impacts the adverse action **after** the hearing request information has been sent to DLS, a copy of the Reversal of Adverse Action ([HCBS-12b](#)) must be forwarded to DLS:

- If the participant/guardian is in agreement with the revised care plan and no longer wishes to appeal the original decision, DSDS staff shall inform the participant/guardian they must notify DLS in writing.
- If the participant/guardian is not in agreement with the revised care plan, copies of the new [HCBS-12](#) or [HCBS-12w](#), and [HCBS-12a](#) must be forwarded to DLS.

Hearing Protocol

The burden of proof lies with the party seeking the change in status quo. DSDS has the burden of proof where there is a proposed change that adversely affects the participant's *current* care plan. When a request for HCBS has been denied, the participant/guardian has the burden of proof.

During the hearing, DSDS staff and the DSDS HCBS Hearings Representative shall testify to qualify themselves and their position, establish the case, and state other facts relevant to the proceedings ([Appendix 2](#)). The DSDS HCBS Hearings Representative is also responsible for presenting evidence (exhibits) to support the decision.

Hearing Decision Issuance

The DLS Hearing Officer will issue a Decision and Order containing the Introduction and Appearances, Findings of Fact, Conclusions of Law, Decision, and Order.

- The law provides additional appeal rights for the participant/guardian if they are still aggrieved. Instructions for these appeal rights are outlined in the Decision and Order and can be initiated by the participant/guardian through DLS.

Hearing Decision Receipt

Once the Decision and Order is received, DSDS shall take appropriate action, as outlined below.

When DSDS action is affirmed:

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- All affected HCBS the participant received during the hearing process shall be reduced or closed as appropriate.
- The participant's number on the ILW Waiting List shall remain the same.
- DSDS shall notify the HCBS provider of the action taken.
- The date of receipt of the hearing decision, or the date action is entered into the HCBS Web Tool, shall be the date of the change.
- When the hearing involves participant fraud or falsification and DSDS is affirmed, the CDS Restricted Checkbox in the participant's case record in the HCBS Web Tool shall be checked to prevent the participant from receiving CDS and the reason documented in Case Notes.
 - The participant/guardian shall be informed of agency-option HCBS available to the participant and complete necessary care planning or close the case, as appropriate.

If DSDS action is reversed:

- The HCBS shall continue, be increased, be reassessed, or be immediately authorized as required by the Decision and Order.
- Participant's number on the ILW Waiting List shall be reevaluated and adjusted, as necessary. DSDS staff shall notify the HCBS provider of the action taken.
- The effective date shall be the date the adverse action was taken.

When the Hearing Officer includes in the Decision and Order a statement that DSDS must complete another assessment, the assessment shall be completed within fifteen (15) business days of receipt of the Decision and Order.

The Decision and Order shall be retained in the participant's case record in the HCBS Web Tool.