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Medicaid Fair Hearings in Georgia: Administrative Procedure

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1. Introduction and Background

1.1. Co-operative Program; compliance with federal law. Medicaid is a cooperative venture of the state and federal governments. If a state chooses to participate in the Medicaid program, it submits a state plan for the funding of medical services for the needy. The State plan must be approved by the Centers for Medicare and Medicaid Services (CMS). The federal government then subsidizes a certain portion of the financial obligations which the state has agreed to bear. A state participating in Medicaid must comply with the applicable statute, Title XIX of the Social Security Act of 1965, as amended, 42 U.S.C. §§ 1396, et seq., and the applicable regulations. *Ga. Dep't of Cmty. Health v. Freels*, 258 Ga. App. 446 (2002).

1.2. Single State Agency. The Department of Community Health (the "Department") is the single state agency with authority to administer Georgia's Medicaid program.[1] The Department must afford everyone an opportunity to apply for medical assistance.[2] Whether an applicant seeks Medicaid with or without the assistance of an attorney,[3] an understanding of the administrative process is critical. An Applicant[4] who is denied eligibility, who is approved for less than the coverage level sought, or who is not timely approved is entitled to a fair hearing.[5] Medicaid recipients[6] who are terminated, or who have their benefits reduced are also entitled to a fair hearing.

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[1] A single state agency must be designated to administer or supervise the administration of the State Plan. 42 U.S.C. § 1396a(5); 42 C.F.R. § 431.10(b)(1). Georgia's State Plan designates the Department of Community Health, http://dch.georgia.gov/sites/dch.georgia.gov/files/related_files/document/State_Plan_Attachment_1.pdf. In Georgia, applications are filed with the Department of Human Services, through the Division of Family and Children Services. DFCS is typically the respondent in Medicaid fair hearings, and must participate in the fair hearing since it is responsible for the eligibility determination. 42 C.F.R. § 431.243.However, the Department is the real party in interest; appeals from a fair hearing are to DCH.

[2] 42 C.F.R. § 435.906. "Medicaid assistance" is defined at 42 U.S.C. § 1396d(a). Among other goods and services, medical assistance includes the cost of nursing facility services for individuals 21 years of age and older who have income and resources insufficient to meet all of the cost of care. 42 U.S.C. § 1396d(a)(xvii)(4)(A).

[3] 42 C.F.R. § 435.908. The regulation does not specifically say "attorney;" it indicates the Department must allow an individual of the applicant's choice to accompany, assist, and represent the applicant.

[4] O.C.G.A. § 49-4-141(1) (defining applicant).

[5] 42 U.S.C. § 1396a(a)(3); 42 C.F.R. § 431.220; O.C.G.A. § 49-4-153(b)(1); O.C.G.A. § 49-4-13(a).

[6] O.C.G.A. § 49-4-141(7) (defining recipient). When the ABD Manual refers to an "A/R" it refers to both Applicants and Recipients. *See also ABD Manual*, Appendix E-2 (defining "A/R").

1.3. Federal Right to Hearing. Medicaid applicants and beneficiaries are entitled to adequate notice of state agency actions and a meaningful opportunity for a hearing to review those decisions whenever their claim for benefits is denied or not acted upon with reasonable promptness. Federal law, at 42 U.S.C. § 1396a(3); 42 C.F.R. Part 431, Subpart E, requires all state plans[7] to provide an opportunity for a fair hearing.[8]

1.4. State Hearing Statute. O.C.G.A. § 49-4-153 is the controlling *Georgia* statute governing Medicaid appeals.[9] The Administrative Procedure Act applies, in part, because hearings must follow the rules and regulations of the Office of State Administrative Hearings.[10]

O.C.G.A. § 49-4-153(b)(1) provides as follows:

> (1) Any applicant for medical assistance whose application is denied or is not acted upon with reasonable promptness and (2) any recipient of medical assistance aggrieved by the action or inaction of the Department of Community Health as to any medical or remedial care or service which such recipient alleges should be reimbursed under the terms of the state plan which was in effect on the date on which such care or service was rendered or is sought to be rendered shall be entitled to a hearing upon his or her request for such in writing and in accordance with the applicable rules and regulations of the department and the Office of State Administrative Hearings. As a result of the written request for hearing, a written recommendation shall be rendered in writing by the administrative law judge assigned to hear the matter. Should a decision be adverse to a party and should a party desire to appeal that decision, the party must file a request in writing to the commissioner or the commissioner's designated representative within 30 days of his or her receipt of the hearing decision. The commissioner, or the commissioner's designated representative, has 30 days from the receipt of the request for appeal to affirm, modify, or reverse the decision appealed from. A final decision or order adverse to a party, other than the agency, in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated, and the effective date of the decision

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7 Georgia's State Plan is at http://dch.georgia.gov/medicaid-state-plan.

8 In *Shakhnes v. Berlin*, (689 F.3d 244 (2nd Cir. 2012), the Court held the Medicaid fair hearing statute, 42 U.S.C. § 1396a(a)(3), as construed by the timeframe regulation, 42 C.F.R. § 431.244(f), creates a right, enforceable under § 1983, to receive a fair hearing and a fair hearing decision "[o]rdinarily, within 90 days" of a fair hearing request.

9 *See Ga. Dep't Cmty. Health v. Medders*, 292 Ga. App. 439 (2008). While O.C.G.A. § 49-4-153 controls appeals when an applicant follows the rules, O.C.G.A. § 49-4-146.1 governs those situations when someone violates the rules. O.C.G.A. § 49-4-146.1(b)(1) makes it unlawful to obtain, attempt to obtain, or retain medical assistance to which the person or provider is not entitled. Section 49-4-146.1(e) provides for an administrative hearing which is conducted in the same manner as any other contested case. If no hearing is requested, then the matter is treated as an unappealed case and the Commissioner's collection rights accrue. Collection procedures are described in Subsection (e)(3).

10 O.C.G.A. § 49-4-153(c) limits application of the Administrative Procedures Act. Rules for the Office of State Administrative Hearings are at Ga. R. & Regs. § 616-1-2-.01 et seq., available at http://www.osah.ga.gov/documents/procedures/administrative-rules-osah.pdf.

> or order. Findings of fact shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. Each agency shall maintain a properly indexed file of all decisions in contested cases, which file shall be open for public inspection except those expressly made confidential or privileged by statute.[11] If the commissioner fails to issue a decision, the initial recommended decision shall become the final administrative decision of the commissioner.

1.5. Open Records. Both O.C.G.A. § 49-4-153(b)(1)[12] and 42 C.F.R. § 431.244(g) require that all agency decisions be accessible to the public, except that the following information must be safeguarded:

(1) Names and addresses;
(2) Medical services provided;
(3) Social and economic conditions or circumstances;
(4) Agency evaluation of personal information;
(5) Medical data, including diagnosis and past history of disease or disability; and
(6) Any information received for verifying income eligibility and amount of medical assistance payments (see § 435.940ff). Income information received from SSA or the Internal Revenue Service must be safeguarded according to the requirements of the agency that furnished the data.
(7) Any information received in connection with the identification of legally liable third party resources under § 433.138 of this chapter.[13]

2. Right to Notices From Nursing Home

Carol and Wilbur Post are typical Elder Law clients. Carol married Wilbur more than forty years ago. Recently, Wilbur's health declined. Wilbur has dementia and is living on Planet Alzheimer's. Wilbur hears voices, especially when he wanders near the Post's barn. Wilbur needs assistance with activities of daily living. Carol recently admitted Wilbur to Valley Memorial Hospital. Wilbur stayed in the hospital for a week before being discharged to Happy Acres Nursing Center. Carol is now concerned about paying for Wilbur's care.

Happy Acres told Carol about Medicaid,[14] and provided Carol with a written description of how to establish Medicaid eligibility. It informed Carol of her right to an assessment of the couple's non-exempt resources,[15] and pointed Carol toward displayed information regarding how to apply for Medicaid.[16] Carol applied for Medicaid on behalf of herself (as community spouse) and Wilbur. The application was denied. Now Carol is wondering what she can do. She can't afford Happy Acres without medical assistance.

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11 42 C.F.R. § 431.244(g).
12 See also O.C.G.A. § 50-13-3(4).
13 42 C.F.R. § 431.305(b).
14 42 C.F.R. § 483.10(b)(5).
15 42 C.F.R. § 483.10(b)(7).
16 42 C.F.R. § 483.10(b)(10).

42 C.F.R. § 483.10:

(5) The facility must—
(i) Inform each resident who is entitled to Medicaid benefits, in writing, at the time of admission to the nursing facility or, when the resident becomes eligible for Medicaid of—
(A) The items and services that are included in nursing facility services under the State plan and for which the resident may not be charged;
(B) Those other items and services that the facility offers and for which the resident may be charged, and the amount of charges for those services; and
(ii) Inform each resident when changes are made to the items and services specified in paragraphs (5)(i) (A) and (B) of this section.
(6) The facility must inform each resident before, or at the time of admission, and periodically during the resident's stay, of services available in the facility and of charges for those services, including any charges for services not covered under Medicare or by the facility's per diem rate.
(7) The facility must furnish a written description of legal rights which includes—
...
(ii) A description of the requirements and procedures for establishing eligibility for Medicaid, including the right to request an assessment under section 1924(c) which determines the extent of a couple's non-exempt resources at the time of institutionalization and attributes to the community spouse an equitable share of resources which cannot be considered available for payment toward the cost of the institutionalized spouse's medical care in his or her process of spending down to Medicaid eligibility levels.
…
(10) The facility must prominently display in the facility written information, and provide to residents and applicants for admission oral and written information about how to apply for and use Medicare and Medicaid benefits, and how to receive refunds for previous payments covered by such benefits.

3. The Application Process

3.1. Filing the application. Applicants seeking Medicaid must file a signed application with the Department.[17] At this time, the application can be submitted through a portal at the nursing home, through the COMPASS system,[18] by visiting a local DFCS office,[19] or through a centralized number.[20] The initial phase of process is complete when an eligibility determination notice is issued. *Georgia Aged, Blind and Disabled Medicaid Manual 3480* (the "ABD Manual") § 2050-1; 42 C.F.R. § 435.906 through 909.[21]

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[17] Georgia ABD Manual § 2050. "[T]he agency must accept an application from the applicant, an adult who is in the applicant's household, ... or family, ... an authorized representative, or if the applicant is a minor or incapacitated, someone acting responsibly for the applicant.... 42 C.F.R. § 435.907(a) (effective January 1, 2014). The agency may require documentation necessary to establish eligibility, but may only require an applicant to provide the information necessary to make an eligibility determination or for a purpose directly connected to the administration of the State plan. 42 C.F.R. § 435.907(e).

[18] https://compass.ga.gov/selfservice/.

[19] http://dch.georgia.gov/contact-medicaid.

[20] http://dch.georgia.gov/contact-medicaid.

[21] In an SSI State, Medicaid eligibility is automatic and a separate application is not required when the individual receives SSI. 42 C.F.R. § 435.909(b)(1).

3.2. Department Response. The Department must dispose of each application by a finding of eligibility or ineligibility, unless: (1) there is an entry in the case record that the applicant voluntarily withdrew the application, and that the Department sent a notice confirming his decision; (2) there is a supporting entry in the case record that the applicant has died; or (3) there is a supporting entry in the case record that the applicant cannot be located. Eligibility must be considered for the current period and for the three months prior to the date of application if the applicant was eligible. 42 C.F.R. § 435.914(a); ABD Manual § 2053.

4. Applicants: Who can apply for Medicaid?

4.1. Opportunity; assistance. Federal law requires States to provide all individuals wishing to make application for medical assistance with the opportunity to do so and requires that assistance be furnished with reasonable promptness to all eligible individuals. 42 U.S.C. § 1396a(a)(8). The opportunity to apply must be provided without delay. 42 C.F.R. § 435.906.

4.2. Who can file. Anyone may apply for Medicaid benefits, including the following:

- The individual requesting assistance;
- A personal representative (PR) acting on behalf of the applicant. The PR can be a relative, friend, guardian or any person in a position to know the applicant's circumstances;
- The parent, specified relative[22] or individual who provides/provided care and control of a child or deceased individual;
- An individual acting on behalf of an AU, including a representative of a private law firm or cost recovery company;
- A child requesting assistance for himself/herself;
- A Medicaid provider, for a newborn via DMA Form 550, Newborn Eligibility Certification Form or via the web portal.[23]

The form of the application is governed by 42 C.F.R. § 435.907.

4.3. Notice of Rights. A Medicaid applicant must be informed of certain rights at the time of application,[24] which include: (1) the right to a hearing;

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[22] A Community Spouse is entitled to file a Medicaid application to avail himself or herself of the protection afforded in 42 U.S.C. § 1396r-5. Subsection (c) gives the community spouse the right to a resource assessment. The remainder of Section 1396r-5 describes the community spouse's income and resource rights. Subsection (e) gives the community spouse appeal rights.

[23] ABD Manual § 2050-1.

[24] Notice of these rights must also be provided at the time of any action affecting his or her claim; at the time a skilled nursing facility notifies a resident of a proposed transfer or discharge; and at the time an individual receives an adverse determination regarding a preadmission screening or annual review. 42 C.F.R. § 431.206(c)(2) through § 431.206(c)(4).

(2) the method by which he may obtain a hearing; and (3) that he may represent himself or use legal counsel, a relative, a friend, or other spokesman. 42 C.F.R. § 431.206(b) and (c).[25] Notices must be in simple and understandable terms. 42 C.F.R. § 435.905(b).[26]

5. Agency Response to the Application

5.1. Action. "Action" means a termination, suspension, or reduction of Medicaid eligibility or covered services. 42 C.F.R. § 431.201. A denial or an approval for less than the coverage sought is also appealable. 42 C.F.R. § 431.220(a)(1). Using the phraseology of O.C.G.A. § 49-4-153, appeals can relate to "any medical or remedial care or service which such recipient alleges should be reimbursed."

The Department's standards and methods for determining eligibility must be consistent with the objectives of the program and with the rights of individuals under the United States Constitution, the Social Security Act, title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, and all other relevant provisions of Federal and State laws. 42 C.F.R. § 435.901. Its policies and procedures must ensure that eligibility is determined in a manner consistent with simplicity of administration and the best interests of the applicant or beneficiary. 42 C.F.R. § 435.902. The Department must furnish Medicaid promptly to eligible beneficiaries. 42 C.F.R. § 435.930(a), although information may be verified consistent with 42 C.F.R. § 435.940 through § 435.965.

5.2. Inaction: Standard of Promptness. As the Statute indicates, inaction is also the basis for an appeal. 42 C.F.R. § 431.220(a); O.C.G.A. § 49-4-153(b)(1). After an application is filed, the Department has a limited period of time to determine eligibility. That period of time is known as the Standard of Promptness (SOP). The Standard of Promptness is ninety days for applicants who apply for Medicaid on the basis of disability; and forty-five days for all other applicants. 42 C.F.R. § 435.911(a).[27]

The Department must determine eligibility within the standards except in unusual circumstances. 42 C.F.R. § 435.911(c). The Department must document any reason for delay. 42 C.F.R. § 435.911(d). The SOP cannot be used as a waiting period or as a reason for denying eligibility. 42 C.F.R. § 435.911(e).

5.3. No secret rules. No agency rule, order, or decision shall be valid or effective against any person or party nor may it be invoked by the agency for any

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[25] This federal rule seemingly calls into question Ga. R. & Regs. § 616-1-2-.34 which prohibits a non-attorney from representing another person before an ALJ.

[26] At 77 F.R. 17208 (March 23, 2012), § 435.905 was revised to provide that information regarding rights and responsibilities must be provided in plain language that is accessible and timely, including to individuals with limited proficiency in English and to individuals with disabilities.

[27] At 77 F.R. 17209, § 435.911 was designated as § 435.912.

purpose until it has been published or made available for public inspection as required in this Code section. This provision is not applicable in favor of any person or party who has actual knowledge thereof. O.C.G.A. § 50-13-3(b). Although the Department's manual is not a "rule" that can be reviewed in a declaratory judgment action, *Georgia Dep't of Medical Assistance v. Beverly Enterprises, Inc.*, 261 Ga. 59 (1991), other notice provisions within the federal regulations would lead to the same result.

6. Notice of Action

6.1. Notice. The Department must send each applicant a written notice of decision regarding each application. The notice must include a finding of eligibility or ineligibility. 42 C.F.R. § 435.913(b)(1).[28] The notice must contain a statement of what action the Department intends to take. If eligibility is denied, the notice must state the reasons for the action, the specific regulation supporting the action, and an explanation of the applicant's right to request an evidentiary hearing. 42 C.F.R. § 435.912. A notice of adverse action must be timely. 42 C.F.R. § 435.919. The notice must also include an explanation of the circumstances under which Medicaid is continued if a hearing is requested. 42 C.F.R. § 431.210(e). The Department must include in each applicant's case record facts to support the Department's decision on his application. 42 C.F.R. § 435.913(a). *See also* 42 C.F.R. § 431.210; *ABD Manual*, Appendix B-1. Notice must be given at least 10 days prior to the date of action. 42 C.F.R. § 431.211.[29] Exceptions allowing the agency to shorten the 10 day notice period (e.g., when fraud is suspected) are at 42 C.F.R. § 431.213 and § 431.214.

6.2. Decision regarding administrative or judicial remedy. If a denial is issued, the Applicant must decide whether to pursue an administrative remedy. Ordinarily, applicants must use the administrative process unless doing so would be futile. *See Feminist Women's Health Center v. Burgess*, 282 Ga. 433 (2007).[30] In some cases, the pace of the administrative process may render it futile. This issue is discussed in *Moore v. Medows*, 2007 U.S. Dist. LEXIS 47087, *10-11 (N.D. Ga. 2007). "A recent case from the Georgia Court of Appeals demonstrates the potential length of these proceedings. In *Department of Community Health v. Freels*, 258 Ga. App. 446 (2002), a Medicaid beneficiary suffering from cerebral palsy petitioned the Department on September 3, 1999, to reimburse

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[28] A finding regarding eligibility is not required is the applicant voluntarily withdraws an application, dies, or the applicant cannot be located. 42 C.F.R. § 435.913(b)(1) – (b)(3).

[29] "Date of action" means the intended date on which a termination, suspension, reduction, transfer or discharge becomes effective. 42 C.F.R. § 431.201. In *Hodges v. Smith*, 910 F. Supp. 646 (N.D. Ga. 1995), the Court found that the Department failed to provide notice to a Medicaid recipient that it would terminate payments for Osmolite (a nutritional supplement) and enjoined the Department from ceasing payment of Osmolite pending a hearing on whether it was a health care supply.

[30] O.C.G.A. § 50-13-19(a). *See also Ga. Dep't Cmty. Health v. Ga. Society of Ambulatory Surgery Ctrs.*, 290 Ga. 628 (2012). The intent of the legislature when the APA was enacted was to require exhaustion of administrative remedies without resort to courts in the first instance. *Ga. State Bd. Of Dental Exmrs. v. Daniels*, 137 Ga. App. 706 (1976).

him for therapy related to his condition. Almost three months later, the Department denied his petition. An ALJ subsequently ruled against him and the Department issued a final denial. It was not until October 10, 2001, over two years after the initial petition was filed, that the superior court reversed the ALJ's decision."

William Browning, in a paper presented at the 2014 NAELA Institute (May 15, 2014), gave the following advice when considering whether to pursue an administrative or judicial remedy:

> These questions are very simple, but expand rapidly depending upon the issues presented.
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> A. If you lose the Fair Hearing – will you appeal? If the answer is "No", then you should proceed directly to the Fair Hearing. If the answer is "Yes" you may litigate through the Court processes, and you should consider filing a separate Court action immediately.
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> B. Is this a precedent setting-type case? If "Yes" you should consider filing a Court action and have it proceed briefly in conjunction with the Fair Hearing process.
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> C. If you win in the Court action, will the state likely appeal to the State Appellate Courts? If the answer is "Yes" then you should likely proceed with a Court filing contemporaneous with the Fair Hearing.

6.3. Spousal cases. In spousal cases, a separate court proceeding may be desirable. For example, 42 U.S.C. § 1396r-5(d)(5) provides: "if a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered." Similar relief is permitted in determining the community spouse resource allowance. 42 U.S.C. § 13965-r(f)(2)((iv) and (f)(3). *See, generally*, *Blumberg v. Tenn. Dept. of Human Servs.* (Tenn. Ct. App., No. M2000-00237-COA-R3-CV, Oct. 25, 2000), as modified by *McCollum v. McCollum*, (Tenn. Ct. App., No. M2011-00552-COA-R3-CV, April 12, 2012).[31]

7. Requesting a Hearing

7.1. Written request. The Department may require that hearing requests be in writing. 42 C.F.R. § 431.221(a); O.C.G.A. § 49-4-153(b)(1); *ABD Manual*, Appendix B-1.[32] The Department must grant a hearing to:

> (1) Any applicant who requests it because his claim for services is denied or is not acted upon with reasonable promptness.

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[31] http://www.tba.org/sites/default/files/mccollomb_041312.pdf.

[32] Although *ABD Manual*, Appendix B-1 indicates that an oral request for hearing is sufficient, if the request is made orally, the applicant must submit a written request within fifteen days following the original request.

> (2) Any beneficiary who requests it because he or she believes the agency has taken an action erroneously.
> ...
> (4) Any individual who requests it because he or she believes the State has made an erroneous determination with regard to the ... annual resident review requirements of section 1919(e)(7) of the Act.
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> 42 C.F.R. § 431.220(a).

The Department need not grant a hearing if the sole issue is a federal or State law requiring an automatic change adversely affecting some or all beneficiaries. 42 C.F.R. § 431.220(b).

7.2. No interference. The Department may not limit or interfere with an individual's right to request an appeal,[33] and must provide requested assistance completing the necessary documents. *ABD Manual*, Appendix B-1.

7.3. Group hearings. In some cases group hearings are permitted. The Department may respond to a series of individual requests for hearing by conducting a single group hearing; may consolidate hearings only in cases in which the sole issue is one of federal or State law or policy; must follow the policies of 42 C.F.R. Part 431, Subpart E and its own policies governing hearings in all group hearings and must permit each person to present his or her own case or be represented by his authorized representative. 42 C.F.R. § 431.222.

7.4. Timing. A request for hearing must be made within thirty days after notification of a decision.[34] *ABD Manual*, Appendix B-1. Requests for a hearing received within thirty days are forwarded to the Office of State Administrative Hearings (OSAH). Requests received more than thirty days after notification are reviewed by the Office of General Counsel to determine whether they will be forwarded.

7.5. Dismissals. The Department may deny or dismiss a request for hearing if the applicant/beneficiary withdraws the request in writing or the applicant or beneficiary fails to appear at a scheduled hearing without good cause. 42 C.F.R. § 431.223.

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[33] 42 C.F.R. § 431.221(b).

[34] 42 C.F.R. § 431.221(d) requires the Department to give applicant/recipient's a reasonable time to appeal, but no longer than 90 days. The date of notification of a decision is not necessarily the date on the hearing notice. Attorneys should have a system in place to track the date notices are received. If the notice was not timely mailed, a system tracking delivery of mail received in the office provides a basis for filing an appeal based on untimely delivery. The official postmark date on a document that was mailed is the date of receipt. O.C.G.A. § 50-13-23.

7.6. Referral to OSAH. After an Applicant requests a hearing, the agency refers the matter to OSAH using OSAH Form 1.[35] Case initiating documents must be filed with the clerk. Ga. R. & Regs. § 616-1-2-.04(2).

8. Continuing Benefits

If benefits are being terminated or reduced, the applicant/recipient may request that benefits continue while the appeal is pending. A request for continuation of benefits must be made within ten days following issuance of the notice.[36] Allowance should be made in the event the Applicant's reports late receipt of notification due to mail processing time. If the Applicant provides the envelope in which the notice was received, allow 12 days from the U.S. Postal Service date stamp to determine if benefits are to be continued. If the Applicant cannot provide the envelope in which the notice was received, allow 14 days from the date on the notice to determine if benefits are to be continued. In the event the 14th day is a weekend or holiday, allow until the close of business on the first workday following the 14th day. *ABD Manual*, Appendix B-2.

The Department must reinstate and continue services until a decision is rendered after a hearing if action is taken without providing the required advance notice. 42 C.F.R. § 431.231(c)(1). The Department must continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible. 42 C.F.R. § 435.930(b).

If benefits are continued and the individual loses the appeal, the Department may take action to recover the overpayment. 42 C.F.R. § 431.230(b).

9. Notice, Due Process, and Procedure.

9.1. Minimum federal requirements. The State's hearing system must provide for a hearing before the Department, or an evidentiary hearing at the local level with a right to appeal to the Department. 42 C.F.R. § 431.205(b). Georgia provides for an evidentiary hearing.

9.2. Notice of Hearing. As soon as practicable after a case is referred to the Office of State Administrative Hearings, the Administrative Law Judge shall issue a Notice of Hearing for the purpose of setting forth the date, time, and place of the hearing. Ga. R. & Regs. § 616-1-2-.09. In most cases, scheduling inquiries may be made to each judge's administrative assistant. Their email addresses are listed on the OSAH website.

9.3. Notice; opportunity to be heard. All parties must be afforded an opportunity for hearing after reasonable notice is served. O.C.G.A. § 50-13-13(a)(1); Ga. R. & Regs. § 616-1-2-09. Notice of the hearing must include (A) A statement of the time, place, and nature of the hearing; (B) A statement of the

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35 Ga. R. & Regs. § 616-1-2-.03. The referral form is on the OSAH website.

36 42 C.F.R. § 431.231(c)(2).

legal authority and jurisdiction under which the hearing is to be held; (C) A reference to the particular section of the statutes and rules involved; (D) A short and plain statement of the matters asserted;[37] and (E) A statement as to the right of any party to subpoena witnesses and documentary evidence through the agency. O.C.G.A. § 50-13-13(a)(2).

9.4. Place of hearing. The must be conducted at a reasonable time, date and place after adequate notice is given. It must be conducted by an impartial official who was not directly involved in the initial determination. 42 C.F.R. § 431.240. The Department is not required to offer local hearings in every political subdivision. 42 C.F.R. § 431.205(c). The Department may hold telephone hearings if appropriate. O.C.G.A. § 50-13-15(5).

9.5. Rights at hearing. An applicant/recipient must be allowed to bring witnesses, 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 adverse witnesses. 42 C.F.R. § 431.242(b)-(e).

9.6. Right to counsel. All parties have the right to counsel. O.C.G.A. § 50-13-13(a)(3). All parties have a right to respond and to present evidence on all issues involved. O.C.G.A. § 50-13-13(a)(3).

9.7. Goldberg requirements. 42 C.F.R. § 431.205(d) requires that the hearing system meet the due process standards in *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Goldberg*, the Supreme Court considered whether the State must provide an evidentiary hearing prior to terminating benefits and found that due process requires some form of hearing.

> "The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The hearing must be at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally."

Goldberg, at 267-268. One immutable principal of jurisprudence "is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Id*., at 270. Another such principal is the right to counsel.

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[37] If the agency or other party is unable to state the matters in detail at the time, the notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished. O.C.G.A. § 50-13-13(b)(2)(D).

Finally, the decision-maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. ... To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, ... though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. And, of course, an impartial decision maker is essential." *Id*., at 271.[38]

9.8. Procedure. The Department must maintain a hearing system which provides for (1) A hearing before the agency; or (2) An evidentiary hearing at the local level, with a right of appeal to a State agency hearing. 42 C.F.R. § 431.205. Hearings must meet the due process standards in *Goldberg v. Kelly*, 397 U.S. 254 (1970). 42 C.F.R. § 431.205(d). Hearings may be conducted by telephonic means if all parties consent and use of that procedure will not jeopardize the rights of any party. O.C.G.A. § 50-13-15(5).

Hearings in Georgia are governed by the Administrative Procedure Act, O.C.G.A. § 50-13-1 et seq. An Administrative Law Judge has discretion to relax procedural requirements to facilitate resolution of matters without prejudice to the parties. Ga. R. & Regs. § 616-1-2-.02(2).

The hearing officer may administer oaths and affirmations; sign and issue subpoenas; rule upon offers of proof; regulate the course of the hearing, set the time and place for continued hearings, and fix the time for filing briefs; dispose of motions to dismiss for lack of agency jurisdiction over the subject matter or parties or for any other ground; dispose of motions to amend or to intervene; provide for the taking of testimony by deposition or interrogatory; and reprimand or exclude from the hearing any person for any indecorous or improper conduct committed in the presence of the agency or the hearing officer. O.C.G.A. § 50-13-13(a)(6).

Documents filed subsequent to case initiation are filed with the assigned Administrative Law Judge. Ga. R. & Regs. § 616-1-2-.04(2), and must be served[39] on all parties. Ga. R. & Regs. § 616-1-2-.11. Filed documents must be signed by the submitting party. Ga. R. & Regs. § 616-1-2-.04(3). All legal authority not already part of the record must be included in full and not incorporated by reference with the following exceptions: published decisions of the Georgia appellate courts, the Official Code of Georgia Annotated, laws, rules and regulations published by the Secretary of State, and all federal statutes, regulations and published decisions. Ga. R. & Regs. § 616-1-2-.04(4).

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[38] Neither side is permitted to improperly influence the decision-maker. Ex parte communications with the ALJ are prohibited after a case is referred to OSAH. Ga. R. & Regs. § 616-1-2-10.

[39] Service is permitted by first class mail, fax, e-mail or personal delivery. Ga. R. & Regs. § 616-1-2-.11. Filings must be accompanied either by an acknowledgement of service, or by a certificate of service. Ga. R. & Regs. § 616-1-2-.11(3).

9.9. Publicize hearing procedure. The Department must issue and publicize its hearing procedures. 42 C.F.R. § 431.206(a). Georgia follows the OSAH rules and regulations. *See* O.C.G.A. § 49-4-153(b)(1). See also O.C.G.A. § 50-13-3(3).

10. Prehearing Conference

An ALJ may order a prehearing conference to simplify the issues being presented.[40] Conferences may be held in person or by telephone. The ALJ may require a party to submit written proposals regarding:

(a) a schedule for prehearing procedures, including the submission and disposition of all prehearing motions;
(b) simplification, clarification, amplification, or limitation of the issues;
(c) evidentiary matters, such as:
    (i) identification of documents expected to be tendered by a party;
    (ii) admissions and stipulations of facts and the genuineness and admissibility of documents;
    (iii) identification of persons expected to be called as witnesses by a party and the substance of the anticipated testimony;
    (iv) identification of expert witnesses expected to be called by a party to testify and the substance of the facts and opinions to which the expert witness is expected to testify and a summary of the grounds for each opinion; or
    (v) objections to the introduction into evidence at the hearing of any written testimony, documents, papers, exhibits or other submissions proposed by any party;
(d) matters for which official notice is sought; and
(e) other matters that may expedite hearing procedures or that the Administrative Law Judge otherwise deems appropriate. Ga. R. & Regs. § 616-1-2-.14.

11. Pre-Trial Motions

11.1. Form. All requests made to the Administrative Law Judge shall be made by motion. Unless made during the hearing, motions shall be in writing, shall state specifically the grounds therefor, and shall describe the action or order sought. A copy of all written motions shall be served in accordance with Rule 11. Ga. R. & Regs. § 616-1-2-.16(1).[41]

11.2. Timing. Unless otherwise provided, all motions shall be filed at least ten (10) days prior to the date set for hearing unless the need or opportunity for the

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[40] Ga. R. & Regs. § 616-1-2-.14. This provision is analogous to O.C.G.A. § 9-11-16(a) regarding pre-trial procedure.

[41] This rule is analogous to O.C.G.A. § 9-11-7(b).

motion could not reasonably have been foreseen. Such motions shall be filed as soon as the need or opportunity for the motion becomes reasonably foreseeable. Ga. R. & Regs. § 616-1-2-.16(3).

11.3. Response. A response to a motion may be filed within ten (10) days after service of the written motion. The time for response may be shortened or extended by the Administrative Law Judge for good cause prior to the expiration of the ten (10) day response period. Either party may request an expedited ruling. Ga. R. & Regs. § 616-1-2-.16(2).

11.4. Supporting documentation. All motions, and responses thereto, shall include citations of supporting authorities and, if germane, supporting affidavits or citations to evidentiary materials of record. Ga. R. & Regs. § 616-1-2-.16(4).

11.5. Hearings. The Administrative Law Judge may determine whether the nature and complexity of the motion justifies a hearing on the motion and notify the parties accordingly. A request for a hearing on a motion must be made in writing and filed by the date the response to the motion is due. Notice of a hearing on a motion shall be given by the Administrative Law Judge at least five (5) days prior to the date set for hearing. At the discretion of the Administrative Law Judge, a hearing on a motion may be conducted in whole or in part by telephone. The Administrative Law Judge shall rule upon motions promptly. Ga. R. & Regs. § 616-1-2-.16(5).

11.6. Multiple motions. Multiple motions may be consolidated for hearing or prehearing conference. The Administrative Law Judge may order the submission of briefs or oral argument relative to any motion. Ga. R. & Regs. § 616-1-2-.16(6).

12. Summary Determination

12.1. Form; timing. A Motion for Summary Determination may be filed no later than thirty days prior to the date a case is set for hearing. The motion may be based on supporting affidavits or other probative evidence, for summary determination in its favor on any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination. There shall be included in the motion or attached thereto a short and concise statement of each of the material facts as to which the moving party contends there is no genuine issue for determination. Ga. R. & Regs. § 616-1-2-.15(1).[42]

12.2. Response. The response to a Motion for Summary Determination is due within 20 days after the motion was served. Ga. R. & Regs. § 616-1-2-.15(2). It may include a counter-motion for summary judgment, but must include a short and concise statement of each material fact the opposing party contends is in dispute.

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[42] This rule is analogous to O.C.G.A. § 9-11-56.

A party opposing summary determination may not rest on mere allegations and denials, but must show by affidavit or other probative evidence that a genuine issue of material fact remains for determination. Ga. R. & Regs. § 616-1-2-.15(3). Failure to file a response may result in default. Ga. R. & Regs. § 616-1-2-.30(1).

12.3. Evidence. Affidavits shall be made upon personal knowledge, shall set forth facts that would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all documents to which reference is made in an affidavit shall be attached thereto and served therewith. Where facts necessary for summary determination are a matter of expert opinion, such facts may be resolved on the basis of uncontroverted affidavits or testimony of expert opinion. Ga. R. & Regs. § 616-1-2-.15(4).

12.4. Hearings; Initial Decision. The ALJ may set the matter for oral argument, call for proposed findings of fact, conclusions of law, and briefs.[43] The ALJ may continue hearings. Ga. R. & Regs. § 616-1-2-.15(5). A ruling on a motion for summary determination must be in writing. Ga. R. & Regs. § 616-1-2-.15(6). If all factual issues are decided by summary determination, the ALJ must issue an Initial or Final Decision. Ga. R. & Regs. § 616-1-2-.15(7).

12.5. Post hearing. If summary determination is not granted, or is granted in part, then the remaining issues should proceed to hearing. O.C.G.A. § 9-11-56(d), which applies in civil cases, indicates how that should occur: "If on motion under this Code section judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."

13. Discovery and Pre-Hearing Rights

As a general rule, discovery is not permitted in any proceeding before an ALJ, except to the extent specifically authorized by law. Ga. R. & Regs. § 616-1-2-.38. Federal law specifically grants the following discovery and pre-hearing rights:[44]

1. Examine the contents of the case record and all pertinent documents and records prior to the hearing;

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43 Ga. R. & Regs. § 616-1-2-.24.

44 42 C.F.R. § 431.242(a).

2. Present the case with or without the aid of a representative, including legal counsel, a relative, friend or other spokesperson;
3. Request assistance from the agency for transportation to/from the hearing.

14. Issues For Hearing

The fair hearing is a *de novo* hearing. 42 C.F.R. § 431.232(c).[45] The hearing includes consideration of the following:

1. Any agency action, including the following:
    a. Denial or approval of an application;
    b. Calculation of patient liability or cost share;
    c. Termination of benefits;
    d. Change in COA;
    e. Change in patient liability or cost share;
2. The agency's delay in action or failure to act, including:
    a. Delay in application processing;
    b. Failure to act, or delay in action on a change.

ABD Manual, Appendix B-3; 42 C.F.R. § 431.241.

15. Hearing Rights and Responsibilities

The Applicant and DFCS have the right to the following: [46]

1. Bring and/or subpoena witnesses;
2. Establish all pertinent facts and circumstances;
3. Present arguments without undue interference;
4. Question or refute any testimony or evidence, including the opportunity to question and cross-examine adverse witnesses.

DFCS has the responsibility for the following:

1. Ensuring the presence at the hearing of staff members with direct knowledge of the facts in dispute;
2. Ensuring that all relevant agency records and copies are legible and available as evidence;
3. Ensuring that non-agency witnesses and records are present, either voluntarily or by subpoena.[47]

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45 "De novo hearing" means a hearing that starts over from the beginning. 42 C.F.R. § 431.201.

46 42 C.F.R. § 431.242(b) through (e).

47 If the hearing involves an issue of eligibility and the Medicaid agency is not responsible for eligibility determinations, the agency that is responsible for determining eligibility must participate in the hearing. 42 C.F.R. § 431.243.

If the applicant's prima facie case supports eligibility, then the Department must present evidence rebutting the applicant's case.

16. Evidence

16.1. Burden of Proof. The applicant has the burden of proof with an initial application. The Agency has the burden of proof when reducing, suspending or terminating a benefit. Ga. R. & Regs. § 616-1-2-.07(e).

16.2. Rules must be fair, but need not be formal. In the context of Social Security administrative hearings, the Supreme Court held "(a) the Congress granted the Secretary the power by regulation to establish hearing procedures; (b) strict rules of evidence, applicable in the courtroom, are not to operate at social security hearings so as to bar the admission of evidence otherwise pertinent; and (c) the conduct of the hearing rests generally in the examiner's discretion. There emerges an emphasis upon the informal rather than the formal. This, we think, is as it should be, for this administrative procedure, and these hearings, should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone and operation. This is the obvious intent of Congress so long as the procedures are fundamentally fair." *Richardson v. Perales*, 402 U.S. 389 (1971).

16.3. Same rules as non-jury civil cases. The rules of evidence applicable in civil nonjury trials apply in administrative hearings.[48] Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. When necessary to ascertain facts not reasonably susceptible of proof under such rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs or if it consists of a report of medical, psychiatric, or psychological evaluation of a type routinely submitted to and relied upon by an agency in the normal course of its business. Agencies shall give effect to the rules of privilege recognized by law.[49] Objections to evidentiary offers may be made and shall be noted in the record.[50] Subject to these requirements, when a hearing will be expedited and the interest of the parties will not be prejudiced substantially, any part of the evidence may be received in written form. O.C.G.A. § 50-13-15(1).

16.4. Documentary evidence. Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. Upon request,

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48 O.C.G.A. § 24-1-2(d)(4); Ga. R. & Regs. § 616-1-2-.18(1).

49 Ga. R. & Regs. § 616-1-2-.18(3).

50 O.C.G.A. § 24-1-103(a) provides that error shall not be predicated upon a ruling admitting or excluding evidence unless a substantial right is affected and (a) in the case of one admitting evidence there is a timely objection or motion to strike stating the grounds for the objection; or (b) in the case of a ruling excluding evidence, the substance of the evidence was made known to the court by an offer or proof. Of course, this presupposes there is a record.

parties shall be given an opportunity to compare the copy with the original or have it established as documentary evidence according to the rules of evidence applicable to the superior courts of this state. O.C.G.A. § 50-13-15(2).

Documentary evidence must be authenticated. In *Medders, supra*, the ALJ erred in using an unauthenticated document to calculate the amount of a transfer of resources penalty. There, the DCH witness who testified was not the caseworker who made the decision to deny the Medicaid application. The witness DCH produced did not know whether the amount subject to the transfer penalty was the value of an entire estate, or the value of a renounced interest in the estate. Because the document was not authenticated and there was no evidence to establish the amount subject to the transfer penalty, there was no evidence to support the ALJ's finding regarding the penalty amount.

16.5. Medical issues. Of course, an applicant/recipient is free to develop his or her own evidence. However, if the hearing involves medical issues such as those concerning a diagnosis, an examining physician's report, or a medical review team's decision, and if the hearing officer considers it necessary to have a medical assessment other than that of the individual involved in making the original decision, such a medical assessment must be obtained at agency expense and made part of the record. 42 C.F.R. § 431.240(b). Federal funds are available to pay for these medical evaluations. 42 C.F.R. § 431.250(f)(3).

16.6. Cross-examination. A party may conduct such cross-examination as shall be required for a full and true disclosure of the facts. O.C.G.A. § 50-13-15(3); 42 C.F.R. § 431.242(e).

16.7. Privileges. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. O.C.G.A. § 50-13-22.

16.8. Judicial notice. Official notice may be taken of judicially cognizable facts. In addition, official notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence. O.C.G.A. § 50-13-15(4).

16.9. Subpoenas. If a witness is subpoenaed, subpoenas shall be issued without discrimination between public and private parties. When a subpoena is disobeyed, any party may apply to the superior court of the county where the contested case is being heard for an order requiring obedience. Failure to comply with such order shall be cause for punishment as for contempt of court. The costs of securing the attendance of witnesses, including fees and mileage, shall be

computed and assessed in the same manner as prescribed by law in civil cases in the superior court. O.C.G.A. § 50-13-13(a)(7); § 50-13-13(b).

16.10. Weight of evidence. The ALJ determines the weight given to any evidence based on its reliability and probative value.[51]

16.11. Rule of Construction. In *Cook v. Glover*, 2014 Ga. LEXIS 577, the Georgia Supreme Court found that federal statutory provisions adopted in the Deficit Reduction Act of 2005 relating to annuities were ambiguous. CMS had released a letter on July 27, 2006, interpreting the annuity provisions, and DCH had adopted CMS's construction. Relying on *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Court found it was appropriate to give effect to a permissible construction adopted by the agency. In a concurring opinion, Justice Nahmias indicated he was dubious of the majority's conclusion since the CMS opinion letter being relied upon was not the result of a formal adjudication or notice-and-comment rule making. Justice Nahmias' concurrence appears to be consistent with *Pruitt Corporation v. Georgia Department of Community Health*, 284 Ga. 158 (2008), where the Court held that the Department's manual was not entitled to judicial deference since it was not the product of a duly enacted statute, rule or regulation.[52]

17. Advice from the Bench

In preparing this presentation, the author spoke with one of the Administrative Law Judges (the Hon. Patrick Woodard) regarding what that Judge would want advocates to know about hearings.

17.1. Make copies. Although you may presume your judge knows Medicaid law, don't presume your judge is a Medicaid expert. Make copies of every published and unpublished regulation, rule and case you reference.

17.2. Brief complicated cases. A pre-trial brief is a great idea. Ideally it should be sent to the Court five to ten days prior to the hearing. If that is not possible, then bring your brief to the hearing.

17.3. Brief means "brief". If it was meant to be long, it would be called a "Long."

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[51] Ga. R. & Regs. § 616-1-2-.18(10).

[52] In *Georgia Society of Ambulatory Surgery Centers v. Georgia Department of Community Health*, 309 Ga. App. 31 (2011), the Court of Appeals indicated that the test of an administrative rule is twofold: whether it is authorized by statute and whether it is reasonable. ... In applying this test, we have explained that the interpretation of a statute by an administrative agency which has the duty of enforcing or administering it is to be given great weight and deference. ... However, an administrative rule which exceeds the scope of or is inconsistent with the authority of the statute upon which it is predicated is invalid."

17.4. KISS. Keep it simple. ALJs typically handle more than 600 cases each month. Simplicity counts. Assume the facts in your brief are true and summarize them with a reference to the appropriate exhibit. Two to three pages is ideal.

17.5. Prepare your witnesses. If you don't speak with your witnesses prior to the hearing, then you can expect to encounter problems. Do not assume a witness will say what your client claims they will say.

17.6. Don't hide the ball. Every hidden ball is eventually found. If you try to hide the ball, then when it is found, you should expect the Initial Decision will be vacated and the case will be re-set for hearing in front of a "ticked off" judge who has the State Bar on speed dial.

18. The Record

A record must be kept in all contested cases. 42 C.F.R. § 431.244 provides:

> (b) The record must consist only of—
>
> (1) The transcript or recording of testimony and exhibits, or an official report containing the substance of what happened at the hearing;
>
> (2) All papers and requests filed in the proceeding; and
>
> (3) The recommendation or decision of the hearing officer.
>
> (c) The applicant or beneficiary must have access to the record at a convenient place and time.

O.C.G.A. § 50-13-13(a)(8) provides that the record must include: (A) All pleadings, motions, and intermediate rulings; (B) A summary of the oral testimony plus all other evidence received or considered except that oral proceedings or any part thereof shall be transcribed or recorded upon request of any party. Upon written request therefor, a transcript of the oral proceeding or any part thereof shall be furnished to any party of the proceeding. The agency shall set a uniform fee for such service; (C) A statement of matters officially noticed; (D) Questions and offers of proof and rulings thereon; (E) Proposed findings and exceptions; (F) Any decision (including any initial, recommended, or tentative decision), opinion, or report by the officer presiding at the hearing; and (G) All staff memoranda or data submitted to the hearing officer or members of the agency in connection with their consideration of the case.

19. Standards Used in Determining Eligibility

In early and periodic screening, diagnostic, and treatment ("EPSDT") cases, the standard in evaluating whether services should be covered is whether the specific services are necessary to correct or ameliorate the Applicant's physical condition. *Freels*, at 450. *See also* 42 U.S.C. § 1396d(r)(5).

20. Initial Decision

The ALJ is a representative of the Department throughout the hearing process. As such, the ALJ makes a written recommendation known as the initial decision. *Greene v. Dep't of Cmty. Health*, 293 Ga. App. 201, 203 (2008). The initial decision is reviewable by the Department of Community Health.[53]

Federal regulations, at 42 C.F.R. § 431.244(a), provide that hearing recommendations or decisions must be based exclusively on evidence introduced at the hearing. *See also* O.C.G.A. § 50-13-13(a)(9).

42 C.F.R. § 431.244 provides:

> (d) In any evidentiary hearing, the decision must be a written one that—
> (1) Summarizes the facts; and
> (2) Identifies the regulations supporting the decision.
> (e) In a de novo hearing, the decision must—
> (1) Specify the reasons for the decision; and
> (2) Identify the supporting evidence and regulations.

The initial hearing decision is issued within ninety (90) days from the date the written request for a hearing is received by the agency, except in the event of a postponement or continuance. 42 C.F.R. § 431.244(f)(1).

An initial decision favorable to the Applicant may be final unless DFCS makes a final appeal to DCH.

An initial decision that is not favorable to the Applicant becomes final 30 days after the decision. No action may be taken to reduce or terminate Medicaid until the decision is final. 42 C.F.R. § 431.230(a).

If the decision is adverse to the recipient, then the Department must (a) Inform the applicant or beneficiary of the decision; (b) Inform the applicant or beneficiary that he has the right to appeal the decision to the State agency, in writing, within 15 days of the mailing of the notice of the adverse decision; (c) Inform the applicant or beneficiary of his right to request that his appeal be a de novo hearing; and (d) Discontinue services after the adverse decision. 42 C.F.R. § 431.232; 42 C.F.R. § 431.245. If the decision is adverse to the Department (or if the case is resolved in the beneficiary's favor without hearing), then the Department must promptly make corrective payments, retroactive to the date an incorrect action was taken. 42 C.F.R. § 431.246. If appropriate, the Department must also provide for admission or readmission to a facility.

21. Appeal to the Department

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53 *See* O.C.G.A. § 49-4-153(b)(1); Ga. R. & Regs. § 616-1-2-.01(h) (defining "initial decision').

After entry of an initial decision, the Clerk must certify the record, including the Initial Decision and any tapes or other recordings of the hearing, to the referring agency. Ga. R. & Regs. § 616-1-2-.33.

The Applicant or the Department may appeal. It is up to the Department to make a final decision. In making a final decision, the Department may take no action and allow the initial decision to become final by operation of law, or it may modify or reverse the initial decision. Through this process, the Department makes the ultimate decision regarding how to resolve an Applicant's claim.[54]

A review to the Department, which is an internal agency review, is not necessarily subject to the same limitations as subsequent appeals. In making its final decision, the Department is constrained only by the governing statute and by principles of due process. *Green*, *supra*, at 204.

A final decision or order adverse to a party, other than the agency, in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated, and the effective date of the decision or order. Findings of fact shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. O.C.G.A. § 49-4-153(b)(1).

Unless the record has been certified to a reviewing court pursuant to Rule 39, sixty (60) days following the entry of a Final Decision the OSAH Clerk shall compile and certify the record of the hearing, including the Final Decision and any tapes or other recordings of the hearing which have not been transcribed, to the Referring Agency. Ga. R. & Regs. § 616-1-2-.33.

22. Appeal to Superior Court

After exhausting all administrative remedies, the Applicant may file a Petition for Review in Superior Court. *See* O.C.G.A. § 49-4-153(c); O.C.G.A. § 50-13-19.

O.C.G.A. § 49-4-153(c) provides:

> If any aggrieved party exhausts all the administrative remedies provided in this Code section, judicial review of the final decision of the commissioner may be obtained by filing a petition within 30 days after the service[55] of the final decision of the commissioner or, if a rehearing is requested, within 30 days after the decision thereon. The petition may be filed in the Superior Court of Fulton County or in the superior court of the county of residence of

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[54] O.C.G.A. § 50-13-17(a) would give the Department authority to take additional testimony or remand the case to the hearing representative for that purpose. It is unclear whether O.C.G.A. § 49-4-153(c) limits the Department's ability to rely on the APA or whether it simply limits a reviewing Court's ability to hold the Department to standards in the APA.

[55] In *Gladowski*, the Court ruled that a hearing request must be filed within 30 days of service, rather than 30 days from receipt. See also O.C.G.A. § 5-3-20.

> the petitioner. ... Copies of the petition shall be served upon the commissioner and all parties of record. The petition shall state the nature of the petitioner's interest, the facts showing that the petitioner is aggrieved by the decision, and any grounds upon which the petitioner contends that the decision should be reversed or modified. Judicial review of the commissioner's decision may be obtained in the same manner and under the same standards as are applicable to those contested cases which are reviewable pursuant to Code Section 50-13-19; provided, however, that no other provision of Chapter 13 of Title 50 shall be applicable to the department with the exception of Code Sections 50-13-13 and 50-13-15. Notwithstanding any other provision of law, a stay of the commissioner's final decision may be granted by a reviewing court to a provider of medical assistance only on condition that such provider posts bond with the commissioner in favor of the state, with good and sufficient surety thereon by a surety company licensed to do business in this state, in an amount determined by the commissioner to be sufficient to recompense the state for all medical assistance which otherwise would not be paid to the provider but for the granting of such a stay. A stay may be granted and renewed for time intervals up to three months, so long as bond is posted for every interval of time in which the stay is in effect. (Emphasis added).

Application of the APA is limited by O.C.G.A. § 49-4-153(c).[56] The Civil Practice Act does not apply in these appeals. *See Gladowski v. Dep't of Family & Children Services*, 281 Ga. App. 299 (2006).

A copy of any petition for judicial review shall be field with OSAH by the party seeking review simultaneously with service on the reviewing agency. The suggested form of appeal is as follows:[57]

(NAME OF INFERIOR JUDICATORY)
STATE OF GEORGIA

	)	
	)	
v.	)	(Case number
	)	designation)
	)	
	)	

APPEAL TO SUPERIOR COURT

Notice is hereby given that _____, appellant herein, and _____, above-named, hereby

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[56] In *Gladowski v. Dep't of Family & Children Services*, 281 Ga. App. 299 (2006), the Court interpreted Section 49-4-153(c) to mean that O.C.G.A. § 50-13-23 does not apply to medical assistance cases. In *Ga. Dep't of Medical Assist. v. Beverly Enters.*, 261 Ga. 59 (1991), the Court was asked to consider whether the APA applies to Medicaid administrative appeals, but failed to reach that issue.

[57] O.C.G.A. § 5-3-21. No appeal shall be dismissed because of any defect in the notice of appeal. O.C.G.A. § 5-3-27.

appeals to the Superior Court of County from the judgment (or order, decision, etc.) entered herein on _____ (date) , .[58]

Dated: .

Attorney For

Appellant
Address

Section 50-13-19(b) provides that the Petition for Review must be filed within 30 days after service of the Department's final decision. The Petition may be filed in the Superior Court of Fulton County, or in the superior court in the Applicant's county of residence. Copies must be served on the Department and all parties of record. The petition must state the nature of the petitioner's interest, the facts showing that the petitioner is aggrieved by the decision, and the grounds upon which the petitioner contends that the decision should be reversed or modified.

Grounds justifying reversal include (1) the decision is in violation of constitutional or statutory provisions; (2) In excess of the statutory authority of the agency; (3) Made upon unlawful procedure; (4) Affected by other error of law; (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;[59] or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In *Pruitt Corporation*, *supra*, the Court indicated that an administrative tribunal is not entitled to affirmance on the basis of the "any evidence" standard. The Court stated:

> Judicial review of an administrative decision requires the court to determine that the findings of fact are supported by "any evidence" and to examine the soundness of the conclusions of law that are based upon the findings of fact. OCGA § 50-13-19(h). As to the first step, OCGA § 50-13-19(h) provides that
>
> > [t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact [but] . . . [t]he court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings . . . are: . . . (5) [c]learly erroneous. . . .

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[58] The suggested statutory form omits the following elements required by § 49-4-153(c): "The petition shall state the nature of the petitioner's interest, the facts showing that the petitioner is aggrieved by the decision, and any grounds upon which the petitioner contends that the decision should be reversed or modified."

[59] Under the Administrative Procedure Act, the administrative agency's findings are judicially reviewable if they are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Freels*, *supra*, at 451; O.C.G.A. § 50-13-19(h)(5). The reviewing court cannot substitute its judgment for that of the ALJ as to the weight of the evidence on questions of fact.

> "Thus, the statute prevents a de novo determination of the evidentiary questions leaving only a determination of whether the facts found by the [agency] are supported by 'any evidence.'" *Hall v. Ault*, 240 Ga. 585, 586 (242 SE2d 101) (1978). ...
> Thus, the court is statutorily required to examine the soundness of the conclusions of law drawn from the findings of fact supported by any evidence, and is authorized to reverse or modify the agency decision upon a determination that the agency's application of the law to the facts is erroneous. A determination that the findings of fact are supported by evidence does not end judicial review of an administrative decision. (Emphasis added).

Review in Superior Court is limited to those matters raised with the Department. O.C.G.A. § 50-13-19(c).[60] If Department action is imminent, the filing of a Petition for Review does not act as an automatic stay; the Department or the reviewing court may grant a stay for good cause shown. O.C.G.A. § 50-13-19(d).

Within 30 days after the service of the petition or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review.[61] By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record. O.C.G.A. § 50-13-19(e).

If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material and there were good reasons for failure to present it in the proceedings before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court. O.C.G.A. § 50-13-19(f).

23. Court of Appeals

Appeals to the Court of Appeals are not automatic. A petition for appeal must be filed. If it is granted, then appeals follow the typical appeal process. O.C.G.A. § 5-6-35 provides the rule for discretionary appeals:

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60 In *Medders*, *supra*, the issue of estate recovery was improperly raised since it was not a disputed issue at the hearing. However, where an issue is raised, other legal arguments supporting that issue may be heard on appeal. *See Ga. Dep't of Cmty. Health v. Fulton-DeKalb Hosp. Auth.*, 294 Ga. App. 431 (2008).

61 Ga. R. & Regs. § 616-1-2-.39. No appeal shall be dismissed because of .... The failure of the lower court, agency or other tribunal to transmit the pleadings or other record; but the superior court shall at any time permit such amendments and enter such orders as may necessary to cure the defect. O.C.G.A. § 5-3-27.

(a) Appeals in the following cases shall be taken as provided in this Code section:

> (1) Appeals from decisions of the superior courts reviewing decisions of the State Board of Workers' Compensation, the State Board of Education, auditors, state and local administrative agencies, and lower courts by certiorari or de novo proceedings; provided, however, that this provision shall not apply to decisions of the Public Service Commission and probate courts and to cases involving ad valorem taxes and condemnations;
> …

(b) All appeals taken in cases specified in subsection (a) of this Code section shall be by application in the nature of a petition enumerating the errors to be urged on appeal and stating why the appellate court has jurisdiction. The application shall specify the order or judgment being appealed ….

(c) The applicant shall include as exhibits to the petition a copy of the order or judgment being appealed and should include a copy of the petition or motion which led directly to the order or judgment being appealed and a copy of any responses to the petition or motion. An applicant may include copies of such other parts of the record or transcript as he deems appropriate. No certification of such copies by the clerk of the trial court shall be necessary in conjunction with the application.

(d) The application shall be filed with the clerk of the Supreme Court or the Court of Appeals within 30 days of the entry of the order, decision, or judgment complained of and a copy of the application, together with a list of those parts of the record included with the application, shall be served upon the opposing party or parties as provided by law, except that the service shall be perfected at or before the filing of the application. When a motion for new trial, a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict has been filed, the application shall be filed within 30 days after the entry of the order granting, overruling, or otherwise finally disposing of the motion.

(e) The opposing party or parties shall have ten days from the date on which the application is filed in which to file a response. The response may be accompanied by copies of the record in the same manner as is allowed with the application. The response may point out that the decision of the trial court was not error, or that the enumeration of error cannot be considered on appeal for lack of a transcript of evidence or for other reasons.

(f) The Supreme Court or the Court of Appeals shall issue an order granting or denying such an appeal within 30 days of the date on which the application was filed.

(g) Within ten days after an order is issued granting the appeal, the applicant, to secure a review of the issues, shall file a notice of appeal as provided by law. The procedure thereafter shall be the same as in other appeals.

(h) The filing of an application for appeal shall act as a supersedeas to the extent that a notice of appeal acts as supersedeas.

…

The complete appeal process is summarized in *Cook v. Glover*, 2014 Ga. LEXIS 577 (2014).

> We granted certiorari in *Cook v. Bottesch*, 320 Ga. App. 796 (740 SE2d 752) (2013) to consider whether the Court of Appeals properly interpreted 42 USC § 1396p ... In this case, the Georgia Department of Human Services, Family and Children Services ("DFCS") granted appellee Jerry L. Glover's application for Medicaid benefits but imposed a multi-month asset transfer penalty .... Glover appealed the penalty to an Office of State Administrative Hearings Administrative Law Judge ("ALJ") who issued an initial decision reversing the penalty. DFCS thereafter filed a request for agency review by the Georgia Department of Community Health ("DCH"), the state agency responsible for administering Georgia's Medicaid program, and DCH issued a final decision upholding the penalty. Pursuant to OCGA § 50-13-19 of the Administrative Procedure Act, Glover then sought judicial review from the Superior Court of Hall County which affirmed the final agency decision. The Court of Appeals granted Glover's application for discretionary appeal and reversed the superior court, ...

As with appeals to the Superior Court, the Court of Appeals limits its review to whether the record supports the initial decision of the local governing body or administrative agency. *Freels, supra*.

When an administrative agency decision is appealed, judicial deference is to be afforded the agency's interpretation of statutes it is charged with enforcing or administering and the agency's interpretation of rules and regulations it has enacted to fulfill the function given it by the legislative branch. *See Pruitt Corp. v. Ga. Dep't of Cmty. Health*, 284 Ga. 158 (2008). Agency deference may be due a statute, rule or regulation, but it is not due a departmental manual, the terms of which had not undergone the scrutiny afforded a statute during the legislative process or the adoption process through which all rules and regulations must pass.

The final decision of the administrative agency is not entitled to affirmance on the basis that there is "any evidence to support it." *Id*. Judicial review of an administrative decision requires the court to determine that the findings of fact are supported by "any evidence" and to examine the soundness of the conclusions of law that are based upon the findings of fact. Although a reviewing court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, the Court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings are clearly erroneous. While the judiciary accepts the findings of fact if there is any evidence to support the findings, the court may reverse or modify the Department's decision if substantial rights of the appellant have been prejudiced because the administrative decision is: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the

agency; (3) made upon unlawful procedure; (4) affected by other error of law. Thus, the court is statutorily required to examine the soundness of the conclusions of law drawn from the findings of fact supported by any evidence, and is authorized to reverse or modify the agency decision upon a determination that the agency's application of the law to the facts is erroneous. A determination that the findings of fact are supported by evidence does not end judicial review of an administrative decision. *Id*.