

TITLE 6 PRIMARY AND SECONDARY EDUCATION
CHAPTER 101 VOCATIONAL REHABILITATION - PROCEDURAL SAFEGUARDS
PART 2 FAIR HEARINGS AND ALTERNATIVE DISPUTE RESOLUTIONS RELATED TO
VOCATIONAL REHABILITATION

6.101.2.1 ISSUING AGENCY: Public Education Department.
[6.101.2.1 NMAC - Rp, 6.101.2.1 NMAC, 9/29/2020]

6.101.2.2 SCOPE: The provisions of this regulation apply to persons applying for or receiving vocational rehabilitation and aggrieved by any action or inaction of DVR or the director of DVR.
[6.101.2.2 NMAC - Rp, 6.101.2.2 NMAC, 9/29/2020]

6.101.2.3 STATUTORY AUTHORITY: This regulation is adopted pursuant to Sections 22-14-8 and 22-14-12 NMSA 1978.
[6.101.2.3 NMAC - Rp, 6.101.2.3 NMAC, 9/29/2020]

6.101.2.4 DURATION: Permanent.
[6.101.2.4 NMAC - Rp, 6.101.2.4 NMAC, 9/29/2020]

6.101.2.5 EFFECTIVE DATE: September 29, 2020, unless a later date is cited at the end of a section.
[6.101.2.5 NMAC - Rp, 6.101.2.5 NMAC, 9/29/2020]

6.101.2.6 OBJECTIVE: To establish a means by which an individual who has applied for or is a recipient of vocational rehabilitation services can appeal or request mediation of: a determination of a counselor concerning the furnishing or denial of services; or any action or inaction of the division of vocational rehabilitation or the director of vocational rehabilitation. A request for a fair hearing or mediation is to be construed liberally to allow a client to seek redress for DVR decisions that affect their case.
[6.101.2.6 NMAC - Rp, 6.101.2.6 NMAC, 9/29/2020]

6.101.2.7 DEFINITIONS:

A. "Client assistance program" means the independent private or public agency designated to:

- (1) advise and inform applicants for and recipients of vocational rehabilitation services of services and benefits available under the federal Rehabilitation Act of 1973;
- (2) assist and advocate for applicants for and recipients of vocational rehabilitation services in their relationships with projects, programs, and community rehabilitation programs providing services under the Rehabilitation Act of 1973; and
- (3) inform individuals with disabilities in New Mexico, especially individuals with disabilities who traditionally have been unserved or underserved by vocational rehabilitation programs, of the services and benefits available to them under the federal Rehabilitation Act of 1973 and Title I of the federal Americans with Disabilities Act of 1990.

B. "Division of vocational rehabilitation" or "DVR" means the division of vocational rehabilitation.

C. "Fair hearing" means an agency proceeding in which a person's rights and duties are decided after notice and an opportunity to be heard.

D. "Mediation" means the act or process of using an independent third party to act as a mediator, intermediary, or conciliator to assist persons or parties in settling differences or disputes prior to pursuing formal administrative or other legal remedies.

[6.101.2.7 NMAC - Rp, 6.101.2.7 NMAC, 9/29/2020]

6.101.2.8 CLIENT ASSISTANCE PROGRAM: DVR shall inform applicants for and recipients of vocational rehabilitation services, or their representatives, of the availability and purpose of a designated client assistance program including:

A. information on how to contact the client assistance program and obtain their assistance; and

B. the client assistance program's obligation to provide assistance in informing and advising all applicants for and recipients of vocational rehabilitation services of all benefits and services available under vocational rehabilitation programs.

[6.101.2.8 NMAC - Rp, 6.101.2.8 NMAC, 9/29/2020]

6.101.2.9 FAIR HEARING:

A. Requesting a fair hearing. A request for hearing shall be made to the DVR director. A hearing request should indicate the contested decision and the counselor assigned to the case. A hearing request shall be made within 45 days of the disputed decision.

B. Appointment of a hearing officer. A hearing officer shall be appointed on a random basis or by agreement between the client and the DVR director. The selection of a hearing officer shall be made from a pool of qualified hearing officers established jointly by the state rehabilitation advisory council and the DVR director. The hearing officer shall not be an employee of DVR.

C. Time of hearing. The hearing shall be held within 60 days from the date of the request for hearing. The time limit may be extended by the hearing officer upon the request of either party, for good cause shown. The time limit may also be extended upon agreement of both parties.

D. Opportunity to present evidence. At the hearing, the client or client's representative shall be allowed to present evidence, information, and witnesses to the hearing officer, and to examine all witnesses and other sources of evidence and information.

E. Duties of hearing officer. The hearing officer shall:

- (1) conduct a pre-hearing conference on a date reached by mutual agreement between the parties;
- (2) administer oaths and affirmations to the witnesses;
- (3) regulate the course and conduct of the hearing;
- (4) assure that all properly raised and relevant issues are considered;
- (5) rule on the introduction of testimony and other evidence (the technical rules of evidence do not apply);
- (6) assure that the proceedings are properly recorded;
- (7) review the evidence and testimony; and
- (8) make a decision based upon the facts presented at the hearing, the provisions of the approved state plan, the federal Rehabilitation Act of 1973 and accompanying federal regulations, and consistent state regulations and policies, the manual of operating procedures, and good rehabilitation practice.

F. Decision of hearing officer. The hearing officer shall issue a written decision within 30 days of the completion of the hearing. The decision shall fully set forth the findings of the hearing officer and the grounds for the decision. A decision by a hearing officer shall be final unless a party brings civil action under Subsection I of 6.101.2.9 NMAC.

G. Review by director. The director of DVR may not overturn a hearing officer's decision.

H. Provision of services pending appeal. Pending a final determination of a civil action, DVR shall not suspend, modify, or terminate services being provided under an individualized written rehabilitation program, unless such services have been obtained through misrepresentation, fraud, collusion, or criminal conduct on the part of the individual with a disability.

I. Civil action. Any party aggrieved by a final decision described in section Subsection F of 6.101.2.9 NMAC may bring a civil action for review of such decision. The action may be brought in any state court of competent jurisdiction or in a district court of the United States of competent jurisdiction without regard to the amount in controversy. In any action brought under this subparagraph, the court shall:

- (1) receive the records relating to the hearing and the records relating to the state review, if applicable;
- (2) hear additional evidence at the request of the party to the action; and
- (3) base the decision of the court on the preponderance of the evidence and shall grant such relief as the court determines to be appropriate.

[6.101.2.9 NMAC - Rp, 6.101.2.9 NMAC, 9/29/2020]

6.101.2.10 ALTERNATIVE DISPUTE RESOLUTIONS:

A. Requesting mediation. A request for a mediation proceeding shall be made to the director of DVR. The request shall indicate the contested decision and the counselor assigned to the case. The request shall be made within 45 days of the disputed decision.

B. Appointing a mediator. A qualified and impartial mediator shall be appointed on a random basis or by agreement between the client and the DVR director. The selection of a mediator shall be made from a pool of qualified mediators established jointly by the state rehabilitation advisory council and the DVR director. The mediator shall not be an employee of DVR.

C. Time of mediation. The mediation shall be held within 60 days from the date of the request for mediation. The time limit may be extended by the mediator upon the request of either party, for good cause shown. The time limit may also be extended upon agreement of both parties.

D. Mediation procedures. Mediations shall be scheduled and conducted in a timely manner, and held in a location and manner that is convenient to the parties to the dispute.

(1) During mediation processes, applicants for and recipients of vocational rehabilitation services may be represented by counsel or another advocate of their selection;

(2) The applicant for or recipient of vocational rehabilitation services, or their representative, shall have opportunity during the mediation to submit evidence or other information in support of their position;

(3) Either party may terminate mediation at any point in the mediation process. If mediation is terminated, either party may pursue resolution through an impartial hearing, pursuant to 6.101.2.9 NMAC;

(4) Discussions that occur during a mediation process shall be kept confidential and may not be used as evidence in any subsequent fair hearing or civil proceeding. Parties to a mediation process may be required to sign a confidentiality pledge prior to the commencement of the process;

(5) An agreement reached by the parties to the dispute in mediation shall be described in a written mediation agreement that is developed by the parties with the assistance of the mediator, and signed by both parties. Copies of the agreement shall be mailed to both parties; and

(6) DVR shall pay the costs of mediation, except that DVR shall not be required to pay for the costs related to the representation of an applicant for or recipient of vocational rehabilitation services.

E. Duties of mediator. The mediator shall:

(1) schedule the mediation session(s);

(2) regulate the course and conduct of the mediation; and

(3) assure that all properly raised and relevant issues are considered.

F. Provision of services pending appeal. Pending resolution through mediation, DVR shall not suspend, modify, or terminate services being provided under an individualized written rehabilitation program, unless such services have been obtained through misrepresentation, fraud, collusion, or criminal conduct on the part of the individual with a disability.

[6.101.2.10 NMAC - Rp, 6.101.2.10 NMAC, 9/29/2020]

HISTORY OF 6.101.2 NMAC:

6.101.2 NMAC, Fair Hearings Related to Vocational Rehabilitation , filed 12/31/1998, was repealed and replaced by 6.101.2 NMAC, Fair Hearings and Alternative Dispute Resolutions Related to Vocational Rehabilitation, effective 9/29/2020.