

This rule was file was 7 NMAC 26.4

**TITLE 7           HEALTH**  
**CHAPTER 26   DEVELOPMENTAL DISABILITIES**  
**PART 4        CLIENT COMPLAINT PROCEDURES**

**7.26.4.1           ISSUING AGENCY:** Department of Health Developmental Disabilities Division, 1190 Saint Francis Drive Post Office Box 26110, Santa Fe, New Mexico 87502-6110, Telephone No. (505) 827-2574  
[09/07/94; 01/15/97; Recompiled 10/31/01]

**7.26.4.2           SCOPE:**

- A.       This regulation applies only to clients and service providers as defined below.
  - B.       Except as described in Section VII (A), this regulation is not available to resolve disputes concerning the content of or the substantial failure to implement a community individual service plan. Any dispute concerning the content of a plan or any claim alleging substantial failure to implement a plan must be raised in the dispute resolution process, if available. This regulation is not available to review any action by a service provider or the department to suspend, terminate or reduce medicaid covered services if a fair hearing procedure is available pursuant to federal law.
  - C.       Nothing in this regulation alters or modifies the duty of any person having reason to believe that a person is being abused, neglected, or exploited to report that information as required by the Adult Protective Services Act, Section 27-7-30 NMSA 1978 (1992 Repl.) and the Abuse and Neglect Act, Section 32A-4-3 NMSA 1978 (1993 Repl.)
- [09/07/94; 01/15/97; Recompiled 10/31/01]

**7.26.4.3           STATUTORY AUTHORITY:** Section 9-7-6 NMSA 1978.  
[09/07/94; 01/15/97; Recompiled 10/31/01]

**7.26.4.4           DURATION:** Permanent.  
[01/15/97; Recompiled 10/31/01]

**7.26.4.5           EFFECTIVE DATE:** January 15, 1997, unless a later date is cited at the end of a Section or Paragraph.  
[09/07/94; 01/15/97; Recompiled 10/31/01]  
[Compiler's note: The words *or paragraph*, above, are no longer applicable. Later dates are now cited only at the end of sections, in the history notes appearing in brackets.]

**7.26.4.6           OBJECTIVE:** The purpose of this regulation is to promote the health, safety and welfare of individuals who are receiving supports and services for persons with developmental disabilities from service providers certified by or funded in whole or in part with state funds administered by the department through contracts or agreements. This regulation provides a procedure to address client complaints and provides that the department will enforce remedies for substantiated complaints through the service providers funding contract or provider agreements.  
[09/07/94; 01/15/97; Recompiled 10/31/01]

**7.26.4.7           DEFINITIONS:**

- A.       "Client" means a person with developmental disabilities who is receiving supports and services for individuals with developmental disabilities by a service provider certified by or funded in whole or in part with state funds administered by the department through contracts or agreements.
- B.       "Complainant" means a client or his or her legal guardian who files a complaint pursuant to this regulation.
- C.       "Days" means calendar days.
- D.       "Department" means the department of health.
- E.       "Developmental disabilities" means a severe chronic disability of a person that:
  - (1) is attributable to a mental or physical impairment, including the result from trauma to the brain, or a combination of mental and physical impairments;

- (2) is manifest before the person reaches the age twenty-two years;
- (3) is expected to continue indefinitely;
- (4) results in substantial functional limitations in three or more of the following areas of major life

activity:

- (a) self-care;
  - (b) receptive and expressive language;
  - (c) learning;
  - (d) mobility;
  - (e) self-direction;
  - (f) capacity of independent living; and
  - (g) economic self-sufficiency.
- F. "Director" means the director, developmental disabilities division or his or her designee.
- G. "Division" means the developmental disabilities division of the department.
- H. "Emergency" means a circumstance in which the health or safety of the client or another person is in immediate and serious jeopardy and must be protected immediately to stop or prevent harm.
- I. "Facilities" means institutions operated by the department.
- J. "Guardian" means the parent of an individual with developmental disabilities if the client is a minor or a legal guardian appointed or recognized pursuant to the Uniform Probate Code, Section 45-5-101. et. Seq. NMSA 1978 (1993 Repl.).
- K. "Office" means the Office of Quality Assurance or a regional office within the developmental disabilities division.
- L. "Plan" means the individual service plan for services, treatment or habilitation developed by the interdisciplinary team.
- M. "Service provider" means a private entity that has entered into a contract [sic] or provider agreement with the department or that is certified by the department for the purpose of providing supports and services to individuals with developmental disabilities. When the context requires, the service provider means the executive director or administrator having authority to bind the service provider. Service provider does not include facilities operated by the department.
- [09/07/94; 01/15/97; Recompiled 10/31/01]

#### **7.26.4.8 REASONS FOR ADOPTION:**

- A. These regulations provide a procedure to address client complaints and provides that the department will enforce remedies for substantiated complaints through the service providers funding contracts or provider agreements.
- B. These regulations are promulgated, in part, to satisfy requirements arising from the implementation of the decision in the Jackson v. Fort Stanton, N.M. Dist. CT. NO. Civ. 87-839, including agreements reached by the parties.
- C. Notice of public hearing on the proposed regulations was given in accordance with Section 9-7-6 NMSA 1978. On April 26, 1994, a public hearing was held in Santa Fe, New Mexico. Both written and oral testimony was accepted from all persons who desired to testify. Public comment was mixed. Those persons who either commented on or opposed the department's proposed regulation were concerned, among other matters, about the complicated process, the potential conflict that may arise from requiring employees of community DD service providers to assist in initiating complaints, the legalistic language, and the lack of listing of client rights, the violation of which may be addressed through these procedures. The department responded to these complaints, modifying the language of the regulations and, to the extent possible, simplifying some of the highly legalistic phrasing.
- [09/07/94; 01/15/97; Recompiled 10/31/01]

**7.26.4.9 REGULATION DOES NOT CREATE AN ENTITLEMENT TO SERVICES:** Nothing in this regulation shall provide and [sic] entitlement to programs, supports, services or benefits that does not otherwise exist pursuant to other law or regulation.

[09/07/94; 01/15/97; Recompiled 10/31/01]

**7.26.4.10 REGULATION DOES NOT CREATE A CAUSE OF ACTION:** Any remedies provided pursuant to this regulation that do not otherwise exist pursuant to other law or regulation are enforceable only through the complaint and appeal process provided herein and are not enforceable in court. Nothing in this

regulation shall create a right of judicial review of the administrative decision of the director or the secretary or his or her designee made pursuant to this regulation unless such review is available pursuant to other law or regulation. [09/07/94; 01/15/97; Recompiled 10/31/01]

**7.26.4.11 RETALIATION FOR INITIATION OF COMPLAINT PROCEDURE PROHIBITED:** A client has the right to present or make known a complaint without restraint, interference, or coercion. A service provider shall not retaliate or discriminate against a client who complains to the service provider or initiates a complaint procedure. [09/07/94; 01/15/97; Recompiled 10/31/01]

**7.26.4.12 COMPLAINT PROCEDURE AVAILABLE:**

**A.** The complaint process (Section 13 [now 7.26.4.13 NMAC] of this regulation) is available to resolve complaints alleging that a service provider, its employee, or a person acting under contract with the service provider has violated rights of the client set forth in the federal or state constitutions, statutes or applicable department regulations or policies and such violation adversely affects the client. The administrative appeal process Section 14 [now 7.26.4.14 NMAC] of this regulation) is available, however, only as to alleged violations of rights set forth in the federal and state constitutions, statutes and department regulations and policies designated "Client's Rights."

**B.** The complaint procedure shall be available to clients or their legal guardians. The client or the legal guardian has the right to a legal representative or advocate of his or her choice at no expense to the department.

**C.** If a complaint alleges a violation of statute, regulation or ordinance that another state agency or public entity has authority to investigate and enforce, the division may refer the complaint to that entity unless the client objects to the referral, except that the division shall report the violation when there is a statutory requirement to report. The division may decline to investigate the complaint.

**D.** The complaint procedure is not available to the service provider to review the final decision of the department. The service provider may seek redress for any adverse action if provided by the terms of the service provider's contract or provider agreement.

**E.** The client may withdraw his or her complaint at any time. If the complainant is not the client, the division shall not continue the complaint procedure under this regulation if the client objects. The division may pursue its own investigation and take corrective action as appropriate.

**F.** The complainant and the service provider may settle a complaint by mutual agreement unless the client objects. However, the complainant and the service provider may not modify a finding substantiating the complaint.

[09/07/94; 01/15/97; Recompiled 10/31/01]

**7.26.4.13 COMPLAINT PROCESS:**

**A.** Step One: Service Provider Review:

(1) Each service provider shall have a complaint or grievance procedure that is reviewed and approved by the division. Except as provided in section 15.1.7 [now Paragraph (7) of Subsection A of 7.26.4.13 NMAC] below, a client or a legal guardian must initiate a complaint with the service provider within 180 days of the event or occurrence that is the subject of the complaint and in the manner set forth in the service provider's complaint or grievance procedure.

(2) The service provider's complaint or grievance procedure shall provide, at a minimum, that:

- (a) the client is notified of the service provider's complaint or grievance procedure;
- (b) a complaint may be made orally or in writing;
- (c) the service provider shall meet with the complainant if a complaint is made. If the complainant is not the client, the client shall be notified of the meeting and allowed to attend;
- (d) the complainant and the client may have a representative(s) of his or her choice present at the meeting;
- (e) the complaint will be decided by an impartial person who is not involved in the incident complained of but who may be an employee of the service provider;
- (f) the complainant and his or representative, if any, will receive a written response within 15 days of the complaint;
- (g) the complainant has a right to file his or her complaint with the department if the complainant is not satisfied with the service provider's response; and

(h) the service provider will assist the client in filing a complaint with the division upon request.

(3) The employees or staff of the service provider shall have the responsibility to initiate a complaint on behalf of the client whenever they have reason to believe that a violation of the client's rights may have occurred.

(4) The service provider shall issue a brief written response to the client and the guardian stating the nature of the complaint and the result (s) requested by the complainant, the disputed facts, if any, the undisputed facts, if any, the resolution of the complaint of the attempts made to resolve the complaint.

(5) The service provider shall respond to the complaint in writing within 15 days of the initial complaint. The time line may be extended by mutual agreement of the complainant and the service provider. The service provider shall maintain a copy of each written response in the client's record and in a central file that is available to the department. If the complaint alleges abuse or neglect, the service provider shall, in addition to any other requirements, provide a copy of the response to child protective services or adult protective services. If the complainant alleges abuse or neglect or if the complaint involves a dangerous condition or a risk to the client's health or safety, the service provider shall provide a copy of the written response to the office.

(6) The failure of the service provider to issue a response to a client's complaint in writing shall be a separate and independent ground for filing a complaint with the division.

(7) If a complainant alleges abuse or neglect, or if the complaint involves a dangerous condition, or a risk to the client's health or safety, the complaint may be made [sic] with the division's office pursuant to step two without initiating a complaint with the service provider.

B. Step Two. Quality Assurance Review: Expedited Investigation: In addition to the investigation and review procedures and described herein, if the office has reason to believe that the health or safety of the client (s) is in jeopardy, the division shall, in cooperation with other agencies as necessary, take steps to ensure that the client is safe while the complaint is under investigation and shall expedite the investigation and issue preliminary findings within 10 days of receipt of the complaint. If the complainant alleges abuse or neglect or the office has reason to believe that abuse or neglect has occurred or is occurring, the office shall make an immediate referral to child protective services of adult protective services for investigation.

(1) If the complaint is not resolved, a complaint may be filed with the division's designated office. The complaint must be made orally or in writing within 20 days from the date of the written response of the service provider, unless the service provider has failed to respond in writing or the complainant is filing the initial complaint with the office as provided in paragraph 13.1.7 [now Paragraph (7) of Subsection A of 7.26.4.13 NMAC].

(2) The complaint shall be a brief statement of the act(s) that is the basis of the alleged violation. The complaint may be made orally or in writing. The complainant may provide the office a copy of the service provider's written response.

(3) If the office has reason to believe that abuse or neglect has occurred or is occurring, the Office shall make an immediate referral to child protective services (CPS) or adult protective services (APS) so that they may investigate the complaint immediately. The division shall coordinate with and assist CPS and APS as necessary.

(4) The office shall examine each complaint and determine whether the complainant alleges that a service provider, its employee, or a person under contract with the provider has violated rights of the client set forth in federal or state constitutions, statutes, or applicable department regulations or policies. If the complainant does not allege such violation of the rights of the client, or if the allegation is not against a service provider or its employee or contractor, the office shall refer the complaint to any federal, state or local governmental body or private entity with authority over the issue or subject matter unless the client objects the referral.

(5) The office shall notify the service provider of the complaint within 5 days of receipt of the complaint. If the complainant initiated the complaint with the service provider, the service provider shall provide the office a copy of its written response to the unresolved complaint upon request.

(6) The office shall review the complaint and determine whether an expedited investigation is necessary. If an expedited investigation is not necessary, the office will determine whether a full investigation is necessary to resolve the complaint. If the office determines that a full investigation is not necessary because the facts are not in dispute or the facts can be determined without a full investigation, the office shall issue a report within 15 days of receipt of the complaint.

(7) If the office initiates a full investigation of the complaint, the office shall contact and interview the client and his or her representative, if any. The office shall interview the client in person unless:

(a) the client has the capacity to be interviewed by telephone and

(b) the complaint does not involve a dangerous condition, a risk to the client's health or safety, a significant rights violation, or other serious circumstance. The complainant, the service provider, and any other

persons having relevant information shall be given the opportunity to present facts and documents relevant to the complaint.

(8) The office shall prepare a written report of the results of the investigation within 45 days of receipt of the complaint. The written report shall include a statement of the complaint, a summary of the findings of fact, a determination whether the allegation(s) is substantiated, and the reasons for the determination. If the alleged violation is substantiated, the written report shall include a recommendation of proposed action.

(9) The director shall review the office's written report. The director shall issue a written decision within 10 days of receipt of the written report, unless the director extends the time as provided in paragraph 13.2.1.9.1 [now Subparagraph (a) or Paragraph (9) of Subsection B of 7.26.4.13 NMAC] below.

(a) The director shall either adopt the findings of fact or return the matter to the office with specific instructions for additional investigation and findings if he or she determines that there is insufficient information on which to base a decision. If the director returns the complaint to the office for additional investigation and findings, the director shall state the deadline for completion of the investigation and additional findings, which shall be no more than 14 days unless the director determines that circumstances require additional time.

(b) Director shall determine whether there is reason to support the complainant's allegations and determine what action, if any, should be taken. If the director reflects the findings of fact or modifies the recommendation of proposed action, the director shall state the reasons for his or her decision.

(10) The written decision of the division director is final unless the complainant requests an administrative hearing as provided in Section 14 [now 7.26.4.14 NMAC] of this regulation.  
[09/07/94; 01/15/97; Recompiled 10/31/01]

**7.26.4.14 ADMINISTRATIVE APPEAL PROCESS:** The Administrative appeal process is available only to review the decision of the division director as to alleged violations by the service provider, its employees, or persons under contract with the service provider of rights set forth in the federal or state constitutions, statutes, or department regulations or policies designated "Client's Rights." The administrative hearing is intended to be accomplished without the involvement of legal counsel, but the complainant and the service provider may be represented by legal counsel of their choosing at their own expense.

A. Step One: Administrative Hearing:

(1) Request for hearing:

(a) If the complainant is not satisfied with the decision of the director, the complainant may request an evidentiary hearing before an impartial hearing officer. The request must be in writing, must be filed with the director, and must be mailed within 20 days from receipt of the director's decision.

(b) The appeal shall be a brief statement of the acts that are the basis of the alleged violation of rights.

(2) Assignment of hearing officer:

(a) The director shall assign a hearing officer within 10 days of receipt of the request for hearing.

(b) If any person who may appear at the hearing, as described in paragraph 14.1.2.3 [now Paragraph (3) of Subsection B of 7.26.4.14 NMAC], has reason to believe that the hearing officer cannot render an impartial decision, the person shall notify the director in writing stating the objection and the reason(s) therefor within 5 days of the date of the notice of the assignment. If the director determines that there is a good cause, the director shall assign another hearing officer within 10 days of receipt of the objection.

(3) Notice of hearing:

(a) The hearing officer shall conduct the hearing within 15 days of his or her assignment as hearing officer. The hearing officer may grant a continuance not to exceed 15 days for good cause shown.

(b) The hearing officer shall notify the complainant and the service provider (s) of the date, time and place of the hearing at least 5 days prior to the hearing. If feasible, the hearing shall be held in the city or town where the client resides or at a location convenient to the client.

(c) The service provider may decline to appear at the hearing and the hearing shall proceed. The complainant and the service provider may settle the complaint by mutual agreement at any time prior to the hearing unless the client objects. The complainant shall notify the hearing officer of the settlement by withdrawing the complaint in writing prior to the hearing. The hearing officer shall notify the division director that the complainant has withdrawn the complaint.

(4) Conduct of hearing:

- (a) The complainant has the burden to show by a preponderance of the evidence that:
  - (i) the act (s) complained occurred;
  - (ii) the act (s) constitutes a violation by the service provider, employee or a person under contract with the service provider, of rights of the client set forth in the federal or state constitution, statutes, or department regulations or policies designated "Client's Rights"; and
  - (iii) the client is adversely affected.
- (b) The complainant and the service provider (s) have the right to call witnesses on his or her behalf, question witnesses called by others, and present other evidence relevant to the complaint.
- (c) The hearing officer shall admit all relevant evidence that is reasonably likely to assist him or her in making a fully informed, fair decision. The hearing officer may exclude irrelevant or repetitious evidence. Conformity to rules of evidence is not required. The hearing officer's rulings on evidence are final.
- (5) Recommended decision of the hearing officer:
  - (a) The hearing officer shall render a recommended decision to the secretary of the department or his designee in writing within 10 days of the hearing.
  - (b) The recommended decision shall include:
    - (i) a statement of uncontested facts and finding of fact on contested issues; and
    - (ii) a recommendation dismissing the complaint as not supported by a preponderance of the evidence; or
    - (iii) a finding substantiating the complaint and a recommendation either adopting the department's relief or remedy or proposing individual relief or remedy.

**B. Step Two: Decision:**

- (1) The secretary or his or her designee may adopt the recommendation of the hearing officer or may reverse or modify the recommendation of the hearing officer. If the secretary or his or her designee modifies or reverses the recommendation of the hearing officer, he or she shall state the reasons for the decision.
- (2) The secretary or his or her designee shall notify the persons described in paragraph 14.1.1.3 [now Paragraph (3) of Subsection A of 7.26.4.14 NMAC] of the decision in writing within 15 days of receipt of the recommendations of the hearing officer.
- (3) The decision of the secretary or his or her designee is final and is not subject to judicial review. [09/07/94; 01/15/97; Recompiled 10/31/01]

**7.26.4.15 SANCTIONS, CORRECTIVE ACTION OR RELIEF:**

A. Sanction, corrective action or other relief for substantiation of a complaint may include a directive prohibiting any future violation, a corrective action plan that shall be implemented as a condition for the continuation of the service provider's contract or provider agreement and enforceable under terms of the contract or provider agreement, reimbursement or repayment by the service provider of a client's funds, recoupment by the department of a client's funds on behalf of the client, a requirement that the service provider take corrective or disciplinary action against an employee, or any other affirmative relief that is fair and just. Sanctions imposed under this regulation shall not include revocation or suspension of a license, denial of a license application, a monetary penalty, fine, compensatory damages (except reimbursement of client funds), or consequential or punitive damages except as may be specifically provided in the agreement between the service provider and the department.

B. In imposing sanctions, corrective action or other relief, the office, director or the secretary may consider prior substantiated complaints involving the service provider, if any, data from child protective services or adult protective services abuse or neglect reports, performance audit reviews, and the responsiveness of the service provider to prior remedial action imposed by the division or other authority.

C. If the complainant's allegation is substantiated and sanction or corrective action is imposed or other relief granted, the division may require that the service provider prepare and submit documents to the division or allow access to records necessary to demonstrate the service provider is in compliance with the provisions of the sanction, corrective action or other relief.

D. If the complaint is substantiated, the notice of final action shall state that the division may impose additional sanctions for failure of the service providers to comply with the decision and may impose sanctions, corrective action or other relief as provided in paragraph 15.1 [now Subsection A of 7.26.4.15 NMAC] in addition to the individual remedy or relief granted.

[09/07/94; 01/15/97; Recompiled 10/31/01]

**7.26.4.16 ACTION OF THE DIVISION NOT EXCLUSIVE OF OTHER ACTION:** The division shall cooperate with the department of health licensing and certification bureau, the long term care ombudsman, the children, youth and families department, the department of labor, and medicaid fraud unit, as appropriate, regarding any investigation, allegation or substantiated complaint. Any remedy imposed by the division for violation of department policy or regulation does not preclude other sanction or corrective action by other divisions of the department or preclude another agency or authority with jurisdiction over the subject matter from taking action arising from the same conduct, actions or omissions.

[09/07/94; 01/15/97; Recompiled 10/31/01]

**7.26.4.17 PUBLIC DISCLOSURE OF FINAL ACTIONS:**

A. The office of quality assurance will conduct its investigations in a manner that protects the clients' privacy.

B. Complaints and documents, materials, or records not otherwise exempt from public inspection shall be subject to public inspection. Requested public records containing information that is exempt and nonexempt from disclosure shall be separated or redacted by the custodian prior to inspection, and the nonexempt information shall be made available for inspection. The complaints and related documents shall not be available for public inspection until the investigation is concluded, action of the department is final, and any time period allowed for review or administrative hearing has expired.

C. Client identifying confidential information, records pertaining to physical or mental illness or medical treatment, and records protected from disclosure by statute or court-recognized rule are exempt from public inspection.

D. Those portions of the division's investigation file containing confidential sources, methods, and related investigation materials may be exempt from public inspection on public policy grounds if the harm to the public interest from allowing inspection outweighs the public's right to know.

E. The department may charge reasonable fees for copying public records.

F. The division will track complaints to ensure that the complaint process operates satisfactorily, meets time lines, and achieves any program changes required of service providers. Non-confidential data from the complaint tracking process will be available to the public. If the division produces periodic statistical reports containing aggregate information about substantiated and unsubstantiated complaints, including nonpersonally identifiable information about the complaints received, type or nature of the allegations, frequency of complaints by type and by service provider, resolution of substantiated complaints, tracking of corrective action and follow-up, other investigation results, and any other data the department deems appropriate, the statistical reports shall be subject to public inspection.

[09/07/94; 01/15/97; Recompiled 10/31/01]

**7.26.4.18 THIS COMPLAINT PROCEDURE IS NOT AVAILABLE FOR APPLICANTS:** This complaint procedure is not available to review financial eligibility determinations or denial of applications for services. Applicants for services may seek other review that may be available under law or regulations.

[09/07/94; 01/15/97; Recompiled 10/31/01]

**HISTORY OF 7.26.4 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center: DOH 94-06 (DDD), Client Complaint Procedures, 9/7/94.

History of Repealed Material: [RESERVED]