

**TITLE 8            SOCIAL SERVICES**  
**CHAPTER 8       CHILDREN, YOUTH AND FAMILIES GENERAL PROVISIONS**  
**PART 4            ADMINISTRATIVE APPEALS**

**8.8.4.1            ISSUING AGENCY:** Children, Youth and Families Department.  
[8.8.4.1 NMAC - Rp, 8.8.4.1 NMAC, 3/15/2016]

**8.8.4.2            SCOPE:** Department staff and the general public.  
[8.8.4.2 NMAC - Rp, 8.8.4.2 NMAC, 3/15/2016]

**8.8.4.3            STATUTORY AUTHORITY:** Subsection D of 9-2A-7 NMSA 1978 provides that the secretary may make and adopt such reasonable procedural rules and regulations as may be necessary to carry out the duties of the department and its divisions.  
[8.8.4.3 NMAC - Rp, 8.8.4.3 NMAC, 3/15/2016]

**8.8.4.4            DURATION:** Permanent.  
[8.8.4.4 NMAC - Rp, 8.8.4.4 NMAC, 3/15/2016]

**8.8.4.5            EFFECTIVE DATE:** March 15, 2016, unless a later date is cited at the end of a section.  
[8.8.4.5 NMAC - Rp, 8.8.4.5 NMAC, 3/15/2016]

**8.8.4.6            OBJECTIVE:** The objective of this rule is to implement the department’s policy on administrative appeals hearings consistent with federal and state constitutions and laws.  
[8.8.4.6 NMAC - Rp, 8.8.4.6 NMAC, 3/15/2016]

**8.8.4.7            DEFINITIONS:**

**A.**            “Administrative hearing” means the process to address appeals, protests, and disputes dealing with substantiations of abuse and neglect, licensing, certification, procurement, contracts, termination or modification of existing services, or any other action that warrants the commencement of a formal hearing.

**B.**            “Appellant” means the party seeking administrative appeal of a decision of a division of the department.

**C.**            “Burden of proof” means the burden of persuasion, the onus on the party to convince the hearing officer of all elements of the case.

**D.**            “Cease and desist order” means a formal, enforceable order issued when a facility is found to be operating without a license.

**E.**            “Certification” means the determination which is conveyed to the appropriate oversight body as to whether a facility or agency complies with all federal or state regulations and conditions of participation to provide services. Certification of noncompliance may be the basis for a denial or termination of provider participation in a program.

**F.**            “Department” means the New Mexico children, youth and families department.

**G.**            “Director” means the director of any division of the children, youth and families department.

**H.**            “Emergency suspension” means the prohibition of operation of a facility for a stated period of time by the temporary withdrawal of the license or certification, prior to a hearing on the matter, when immediate action is required to protect human health and safety. The emergency suspension is carried out by personal service of an emergency suspension order and a notice of hearing.

**I.**            “Facility” means any facility or agency required to be licensed or certified under state or federal law or regulation.

**J.**            “Final decision” means the written document following a hearing, stating the final determination of the secretary made after review of the hearing officer’s report and recommendation.

**K.**            “Five-day hearing” means the hearing noted in the emergency suspension order and notice of hearing.

**L.**            “Hearing” means a proceeding in which legal rights, duties or privileges of a party are at issue which includes an opportunity for the parties to present testimony and evidence.

**M.**            “Hearing officer” means an individual designated by the secretary to conduct pre-hearing conferences and hearings and to make reports and recommendations, based on the evidence taken, to the secretary.

- N.** “Hearing office administrator” means an individual who assists the hearing officer with administrative tasks.
- O.** “IFB” means an invitation to bid and is used to initiate a competitive procurement contract.
- P.** “Intervenor” means a party permitted to intervene in the hearing proceeding by written order of the hearing officer and includes the department.
- Q.** “Official notice” means administrative notice, the act by which the hearing officer, in conducting the hearing or framing his/her decision, recognizes the existence and truth of certain facts without the production of evidence by the parties.
- R.** “Party” or “parties” means the persons, entities, or agencies with a direct interest and participation in the subject matter of a hearing and such intervenors permitted to intervene by written order of the hearing officer.
- S.** “Person” means an individual, partnership, proprietorship, agency, corporation, company, association, tribal government or tribal organization, state or local government entity, or similar legal entity and the legal successor thereof.
- T.** “RFP” means a request for proposals and is used to initiate a competitive proposal procurement.
- U.** “Secretary” means the secretary for the children, youth and families department.
- V.** “Service” means a notification by personal delivery, fax or certified mail.
- W.** “Subpoena” means a written command issued by the hearing officer to appear at a certain time and place to give testimony upon a certain matter. The subpoena may include a command to produce books, papers, documents and other things.
- X.** “Working days” means, when determining compliance with various deadlines in these regulations, Monday through Friday of each calendar week, excluding state observed holidays.  
[8.8.4.7 NMAC - Rp, 8.8.4.7 NMAC, 3/15/2016]

**8.8.4.8 HEARING OFFICER:**

- A.** All administrative hearings are conducted by a hearing officer appointed by the secretary or his/her designee. The hearing officer may be assisted by a hearing office administrator in completing mailings, notices of hearings, subpoenas, and other administrative tasks.
- B.** Qualifications of the hearing officer:
- (1) The hearing officer may be an employee of the children, youth and families department, but has not been involved, directly or indirectly, with the administrative decision at issue.
  - (2) The hearing officer need not be a licensed attorney. However, he or she shall be familiar with the applicable law, regulations, procedures, and constitutional requirements related to the administrative decision at issue.
- C.** Disqualification of the hearing officer:
- (1) A hearing officer shall not participate in any proceeding if, for any reason, the hearing officer cannot afford a fair and impartial hearing to either party.
  - (2) The hearing officer can only be removed for good cause. Any party seeking to recuse the hearing officer must file a motion with the officer within seven days of receipt of the initial communication from the hearing officer, setting forth the grounds for disqualification and accompanied by all supporting reasons, affidavits, and authorities. The hearing officer rules on the request to disqualify, and an appeal of the ruling may be made to the secretary within seven days of the ruling. The secretary promptly determines the validity of the grounds alleged and takes any appropriate action.
  - (3) A written request to disqualify and an appeal of the hearing officer’s ruling on the matter tolls any applicable timetable for completion of the proceedings.
- D.** The hearing officer may not dismiss a hearing and must submit all recommended decisions to the secretary upon completion of proceedings except as outlined in Subsection J of 8.8.4.9 NMAC.  
[8.8.4.8 NMAC - Rp, 8.8.4.8 NMAC, 3/15/2016]

**8.8.4.9 PRE-HEARING:**

- A.** Within five business days of receipt of the request for administrative hearing, the division director, or his/her designee, submits a memorandum of information to the hearing office, with a copy of the notice of contemplated action, cease and desist order, or emergency suspension order and a copy of the notice of appeal included. An additional copy of those items will be forwarded to the department’s office of general counsel.
- B.** Unless otherwise agreed, the hearing officer and all parties will confer within 30 days from the date the memorandum of information is received in the hearing office to choose an agreeable date for hearing.

**C.** The hearing shall be held within 180 days from the date the memorandum of information is received in the hearing office. Extensions may only be granted under extenuating circumstances as determined by the hearing officer.

**D.** Upon receipt of the memorandum of information, cease and desist order, or emergency suspension order and copy of the notice of appeal, the hearing officer or hearing office administrator establishes an official record which will contain all the filed notices, pleadings, briefs, recommendations, correspondence, documents or items admitted into evidence, recordings of the proceedings, and decisions. The hearing officer will make contact with the parties as soon as practicable, but in any case, no later than seven days from the date the appeal is filed in the hearing office.

**E.** No person may discuss the merits of any pending adjudicatory proceeding with the designated hearing officer or the secretary, unless both parties or their representatives are present.

**F.** The hearing officer may consolidate or join cases if there is commonality of legal issues or parties and if it would expedite final resolution of the cases and would not adversely affect the interests of the parties. The hearing officer may join the appeals of an appellant who has two or more appeals pending.

**G.** The hearing officer may permit a person to enter into a proceeding as an intervenor only when the intervention is necessary to protect some right or interest of that person which may be directly affected by the proceedings. The purpose of an intervention is to prevent delay and unnecessary duplication. A request may be denied, however, if it interferes with the rights of the original parties to conduct their cause on their own terms.

**H.** Upon request of a party or upon the hearing officer's own motion, a pre-hearing order may be required or a pre-hearing conference may be scheduled by the hearing officer at a time and place reasonably convenient to all parties to:

- (1) limit and define issues;
- (2) discuss possible pre-hearing dispositions;
- (3) set a discovery plan;
- (4) consider possible admissions of fact or stipulations;
- (5) identify and limit the number of witnesses; and
- (6) discuss such other matters as may aid in the simplification of evidence and disposition of

the proceedings.

**I.** A pre-hearing conference is an informal proceeding and may occur telephonically. The pre-hearing conference may or may not be recorded, at the discretion of the hearing officer.

**J.** No offer of settlement made in a pre-hearing conference is admissible as evidence at a later hearing. Stipulations and admissions are binding and may be used as evidence at the hearing. Any stipulation, settlement or consent order reached between the parties is written and signed by the hearing officer and the parties or their attorneys.

**K.** The hearing officer may dismiss an appeal with prejudice in accordance with the provisions of a settlement agreement approved by the hearing officer, upon a motion to withdraw the appeal at any time before the deadline for the completion of discovery, or for failure to prosecute.

**M.** Upon request of a party or upon the hearing officer's own motion, a status conference may be held to assess pre-hearing issues and progression of the case. A status conference is an informal proceeding and may occur telephonically. The status conference may or may not be recorded, at the discretion of the hearing officer.

**N.** The hearing officer has the power to compel the appearance of witnesses and the production of written materials or other evidence the hearing officer may deem relevant or material. The hearing officer, upon request by a party, may issue subpoenas and subpoenas *duces tecum*. The parties have a right to discovery limited to depositions or interviews of named witnesses, interrogatories, requests for production, and requests for admission. The parties shall confer in good faith to schedule requested interviews or depositions. All discovery is subject to the control of the hearing officer and may be made a part of the pre-hearing order.

[8.8.4.9 NMAC - Rp, 8.8.4.9 NMAC, 3/15/2016]

#### **8.8.4.10 HEARING ON IMMEDIATE SANCTIONS:**

**A.** An immediate sanction affecting a child care license or registration requires that a hearing is held within five working days of the effective date of the immediate sanction as noticed in the immediate sanction order and notice of hearing *unless*, no later than 24 hours prior to the expiration of the five-day period, the right to a five-day hearing is waived and a request for a hearing at a later date is made. An appeal of an immediate sanction does not stay the sanction. This section does not apply to actions against a foster care license.

**B.** If the person affected intends to appear for the five-day hearing noticed in the emergency suspension order and notice of hearing, a request for hearing need not be made.

**C.** If the person affected timely waives the five-day hearing and requests a hearing to be held at a later date, the extension is provided. Pre-hearing discovery can occur; however, an extension of the five-day hearing date does not stay the immediate sanctions.

**D.** A person or facility is operating illegally if operations continue after the effective date of an immediate suspension or revocation and is subject to appropriate administrative and judicial sanctions and criminal charges.

[8.8.4.10 NMAC - Rp, 8.8.4.10 NMAC, 3/15/2016]

**8.8.4.11 CONDUCT OF THE HEARING:**

**A.** Notice of a hearing is made by certified mail with return receipt requested at least 14 calendar days prior to the hearing unless prior agreement of the time and manner of the hearing has been agreed to in the pre-hearing order or otherwise agreed to by the parties and the hearing officer.

**B.** Failure of a party to appear on the date and time set for hearing, without good cause shown, constitutes a default, and the hearing officer so notifies the parties in writing.

**C.** The hearing is open to the public unless the hearing officer directs that the hearing be closed.

**D.** A party may appear at the hearing through a legal representative, provided such representative has made a written entry of appearance prior to the hearing date.

**E.** The hearing officer may clear the room of witnesses not under examination, if either party so requests, and of any person who is disruptive. The department is entitled to have a person, in addition to its attorney, in the hearing room during the course of the hearing, even if the person will also testify in the hearing.

**F.** The hearing is conducted in an orderly and informal manner without strict adherence to the rules of evidence that govern proceedings in the courts of the state of New Mexico. However, in order to support the secretary's decisions, there must be a residuum of legally competent evidence to support a verdict in a court of law.

**G.** Both parties have certain procedural due process rights during the hearing.

(1) Each party may make opening and closing statements.

(2) Each party may call and examine witnesses and introduce exhibits.

(3) Each party may cross-examine witnesses.

(4) Each party may re-direct their witnesses following cross-examination.

(5) Each party may impeach any witness.

(6) Each party may rebut any relevant evidence.

(7) Each party may introduce evidence relevant to the choice of sanction if it was raised as an issue in the pre-hearing order.

**H.** Oral evidence is taken only under oath or affirmation.

**I.** Generally, except as provided in the following subsection, the order of presentation for hearings is as follows:

(1) opening of proceeding and taking of appearances by the hearing officer;

(2) disposition of preliminary and pending matters;

(3) opening statement of the department;

(4) opening statement of the appellant;

(5) department's case-in-chief;

(6) appellant's case-in-chief;

(7) department's rebuttal;

(8) department's closing argument;

(9) appellant's closing argument;

(10) department's rebuttal argument; and

(11) losing of the proceedings by the hearing officer.

**J.** The order of presentation in a denial of an initial annual license or certification, denial of an award in an RFP or IFB, or cease and desist order matters, will vary from the general order of presentation in that appellant will make an opening statement before the department makes its opening statement, will present a case-in-chief before the department presents its case-in-chief, will make a closing argument before the department makes its closing argument, and will have the option to make a rebuttal argument following the department's closing argument

**K.** The burden of proof in matters arising from substantiation of abuse or neglect, suspension, revocation, denial of renewal of a license, certification, or registration, denial or termination of subsidies or monetary benefits, intermediate sanctions, emergency suspension, or emergency intermediate sanctions lies with the department. The burden of proof in matters arising from a denial of an initial annual license or certification, denial

of an award in an RFP or IFB, or cease and desist orders lies with the appellant. In all cases the parties must prove their case by a preponderance of the evidence.

**L.** The technical rules of evidence are generally not applicable but will be used as a guide and may be considered in determining the weight to be given any item of evidence. The hearing officer admits all evidence, including affidavits, if it is the sort of evidence upon which responsible persons are accustomed to rely in the conduct of serious affairs. The hearing officer may exclude, with or without formal objection, immaterial, irrelevant, unreliable or unduly cumulative testimony. The hearing officer may question witnesses.

**M.** The hearing officer may take official notice of those matters in which courts of this state may take judicial notice.

**N.** The rules of privilege are effective to the extent that they are required to be recognized in civil actions in the district courts of the state of New Mexico.

**O.** The hearing officer admits evidence relevant only to those allegations against the appellant included in the notice of results of investigation, notice of contemplated action, notice of revocation of foster care license, or which are contested issues as set forth in the pre-hearing order.

**P.** The hearing is recorded by a sound-recording device under the supervision of the hearing officer. No other recording of the hearing, by whatever means, is permitted without the approval of the hearing officer. [8.8.4.11 NMAC - Rp, 8.8.4.11 NMAC, 3/15/2016]

#### **8.8.4.12 POST-HEARING:**

**A.** The hearing officer may require or permit written closing arguments, post-hearing briefs and proposed findings of facts and conclusions of law according to a scheduling order issued by the hearing officer. If case law is cited, a copy of the case will be provided to the hearing officer.

**B.** After the expiration of any time set for the submittal of the last post-hearing requests of documents, findings and conclusions, arguments or briefs, the hearing officer submits a recommended decision to the secretary as soon as practicable, but no later than 25 working days for regular hearings and five working days for immediate suspensions and immediate revocations.

**C.** As a general rule, the secretary will only consider the hearing officer's recommended decision, post-hearing briefs, proposed findings of fact and conclusions of law. Where circumstances warrant, the secretary or designee may review all or a portion of the record before the hearing officer.

(1) The secretary or designee will not consider any additional evidence or affidavits not in the official record of the hearing or in pleadings not filed in accordance with the hearing officer's scheduling order.

(2) If the secretary or designee agrees with the findings and conclusions of the hearing officer, the secretary or designee will sign the decision as prepared by the hearing officer.

(3) If the secretary or designee disagrees with the findings and conclusions of the hearing officer, a separate order is issued which defines the findings and conclusions at issue and the reasons a different decision is warranted.

**D.** The secretary or designee renders a final determination as soon as practicable but no later than 20 working days after submission of the hearing officer's recommended decision. The hearing officer or hearing office administrator will notify parties of the final decision personally, by telephone, regular mail or electronic mail, and a copy of the final decision is mailed to each party or attorney of record as soon as practicable but no later than 15 working days from receipt of the secretary's final decision.

[8.8.4.12 NMAC - Rp, 8.8.4.12 NMAC, 3/15/2016]

#### **8.8.4.13 JUDICIAL REVIEW:**

**A.** An appeal of final decisions by the secretary must be made to the appropriate district court pursuant to Rules 1-074 or 1-075, NMRA.

**B.** The hearing officer or hearing office administrator is responsible for creating the record proper.

**C.** All exhibits admitted into evidence, orders, submissions or motions filed and tapes or other transcripts of the hearing compose the record proper.

**D.** The expense of copying tape recorded testimony and any other expense of preparing the record, including accompanying costs, are the appealing party's responsibility.

**E.** Filing for judicial review does not stay enforcement of the final decision. A motion in state district court is filed concerning any issuance of a stay. Health and safety of department clients is the primary consideration when a stay is requested.

[8.8.4.13 NMAC - Rp, 8.8.4.13 NMAC, 3/15/2016]

**8.8.4.14 PROCUREMENT PROTESTS:** Any bidder or offeror that falls within the scope and authority of the Procurement Code will have the right to protest as provided in 1 NMAC 5-2-80 through 5-2-93. [8.8.4.14 NMAC - Rp, 8.8.4.14 NMAC, 3/15/2016]

**HISTORY OF 8.8.4 NMAC:**

**History of Repealed Material:**

8.8.4 NMAC, Administrative Appeals, filed 2/15/2002 - Repealed effective 3/15/2016.