

ADVOCACY

101

**Presenting Your Case Before the Office of Appeal
Hearings and the
Division of Administrative Hearings**

Revised 10/10

DISCLAIMER

This manual provides general information which addresses the most common types of hearings. For obvious reasons, this manual cannot address all possible hearing situations, nor is it intended to resolve issues in any particular case. This manual and its contents also are not intended to serve as legal advice or to establish an attorney-client relationship.

Readers are advised to consult the Rules of the Office of Appeal Hearings (Chapter 65-2, Florida Administrative Code) and the Division of Administrative Hearings (DOAH) (Chapter 28-106, Parts I and II, Florida Administrative Code). Provisions in this manual should not be substituted for the Rules. In the event of any perceived conflict between the Rules and this manual, the Rule provisions take precedence.

There is a copy of these Rules included in the Appendix to this manual for reference purposes. However, because the Rules are subject to change, the reader is advised to always consult the latest copy of the Rules, found at the Florida Administrative Code website: www.flrules.org

Finally, for legal advice on how to handle a particular hearing or issue, please contact an attorney.

ALTERNATIVE FORMAT AVAILABLE

This manual can be provided in an alternative format on request.

Please call, toll free:

800-342-0823 or (TDD ONLY) 800-346-4127.

WEBSITE FOR FURTHER RESOURCES

Agency for Persons with Disabilities:

www.apd.myflorida.com

Agency for Health Care Administration:

www.fdhc.state.fl.us

Division of Administrative Hearings:

www.doah.state.fl.us

Office of Appeal Hearings:

www.dcf.state.fl.us/admin/ig/appeal.shtml

Florida's Administrative Rules:

www.flrules.org/Default.asp

Florida's Statutes:

www.leg.state.fl.us/STATUTES/

Florida's Handbooks for Medicaid Services:

http://portal.flmmis.com/FLPublic/Provider_ProviderSupport/Provider_ProviderSupport_ProviderHandbooks/tabId/42/Default.aspx

What is the purpose of this manual?

- When an individual with disabilities disagrees with an agency’s decision to reduce, terminate or deny services, the individual has a legal right to an administrative hearing before either the Florida **Division of Administrative Hearings (DOAH)** or the Department of Children and Families’ **Office of Appeal Hearings (OAH)**. However, The agency need not grant a hearing if the sole issue is a Federal or State law requiring an automatic change.
- This manual was created to assist in this process. Specifically, this manual:
 - ▣ provides assistance and information to **individuals** appealing from an agency action without the assistance of an attorney; and
 - ▣ assists **attorneys or qualified representatives** who have limited experience with these types of administrative hearings.
- Following is some preliminary information that will allow you to better use this manual:
 - ▣ References to decisions of the “**agency**” in this manual refer primarily to decisions rendered by the Florida Agency for Healthcare Administration (AHCA) or the Florida Agency for Persons with Disabilities (APD). Although other state agencies may apply similar procedures, you are advised to research procedures specifically applicable to your case. Further, this manual is **not** meant to be a comprehensive guide to administrative procedures for all state agencies.
 - ▣ **Because this manual has sections on both OAH and DOAH hearings, and because some of the procedures differ between OAH and DOAH, before reading these sections, first determine which agency will be the venue for your hearing to enable you to choose the correct section of this manual.**
 - ▣ While OAH and DOAH procedures are similar, there are some critical differences. The letter you received informing you of the agency’s action---a “**Notice of Denial/Reduction of Services,**” for example, should indicate which agency your appeal will be in. This letter also should inform you of your right to an appeal and the correct procedures for filing it. You are strongly advised to thoroughly review these procedures.

- ▣ The person filing for an administrative appeal from an agency decision is referred to as the “Petitioner”. All references in this manual to the Petitioner, therefore, refer to either you or the person you are representing in the appeal.
- ▣ Representing oneself in a hearing is described in legal terms as acting “**pro se.**” Appeals from agency actions may take place at either the Office of Appeal Hearings or before an Administrative Law Judge at the Division of Administrative Hearings. While there is no restriction on representation by an attorney, both of these venues also are meant to be accessible by individuals who are not attorneys.
- ▣ In the hearing process, the person whose services have been denied is called the **Petitioner**. The agency is called the **Respondent**.
- ▣ At your hearing, while the agency may or may not have an attorney present, the agency always will have a representative at the hearing to present their case. You are advised to get both the name and contact information of the agency representative **at the very beginning** of the case to facilitate working with them in obtaining agency documents and for hearing preparation.
- ▣ DOAH and OAH use different terms for the “judge” in these hearings. In this manual, the judge will be referred to as the “presiding officer.” (More specific terminology is given below.)
- Specific information regarding agency appeals also is in the *Appendices* to this manual, including model forms, Florida Administrative Rules regarding the two venues, and relevant case law. When using the *Appendices*, please be aware that there may have been changes in any of these since this manual was published, so check to ensure that any cited information has not been superseded.

WHAT IS THE FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS (DOAH)?

- The Florida Division of Administrative Hearings (DOAH) is a state agency which employs full-time Administrative Law Judges (ALJ's) to conduct hearings in most cases where a state agency--such as the Agency for Persons with Disabilities (APD) or the Agency for Health Care Administration (AHCA)--makes a decision which unfavorably affects a person's rights.
- The Administrative Law Judges are impartial judges and do not work for the same agency which took the action.
- DOAH Administrative Law Judges preside over hearings which involve a "disputed issue of material fact." This means that you, as the Petitioner, do not agree with the facts which the agency used to make its decision.
- DOAH Administrative Law Judges often are very experienced in handling cases where the Petitioner does not have an attorney or a qualified representative.
- DOAH's website is www.doah.state.fl.us.
- Florida's statute and rules on administrative hearings are included in the *Appendices* to this manual.
- DOAH'S contact information is:

State of Florida
Division of Administrative Hearings
The Desoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675; Fax Filing (850) 921-6847

WHAT IS THE OFFICE OF APPEAL HEARINGS (OAH)?

- The Office of Appeal Hearings (OAH) is part of the Florida Department of Children and Families' Office of Inspector General. OAH employs full-time hearing officers who conduct hearings in cases where a state agency--- such as the Agency for Persons with Disabilities (APD) or the Agency for Health Care Administration (AHCA)---makes a decision which unfavorably affects a person's rights.
- OAH hearing officers are impartial and do not work for the same agency which took the action.
- OAH hearing officers handle hearings which involve a "disputed issue of material fact." This means that the Petitioner does not agree with the facts that the agency used to make its decision.
- OAH Hearing officers often are very experienced in handling cases in which the Petitioner does not have an attorney or a qualified representative.
- OAH's website is <http://www.dcf.state.fl.us/admin/ig/appeal.shtml>.
- Florida's statute and rules on administrative hearings are included in the *Appendices* to this manual.
- OAH'S contact information is:

Office of Inspector General, Appeal Hearings
1317 Winewood Blvd, Bldg. 5, 2nd Floor
Tallahassee, Florida 32399
(850) 488-1429 - Fax (850) 487-0662

KEY DIFFERENCES BETWEEN DOAH AND OAH

| | DOAH Division of Administrative Hearings | OAH Office of Appeal Hearings |
|-----------------------------|--|---|
| Terminology | The presiding officer at an administrative hearing is known as an “Administrative Law Judge” or ALJ. | The presiding officer at an administrative hearing is known as a “hearing officer.” |
| Timelines | You have 21 days to file for an appeal when a preexisting service is being reduced or denied. That service will continue through the appeals process ONLY if you file within 10 days. | You have 90 days to file for an appeal, unless your hearing is in response to an action taken by the agency regarding Medicaid services, in which case you have a 30 day limit to file an appeal. If a preexisting service is being reduced or denied, that service will continue through the appeals process ONLY if you file within 10 days. |
| Requesting a Hearing | The request must be made in writing and include particular information. | The request may be made in writing or orally, and only needs to clearly express the desire for an appeal hearing. However, it is strongly recommended that you submit a detailed, written request. |
| Review | There is no supervisory review of the appeal. | A supervisory review may take place before the hearing process begins and the issue may be remedied at that point in time. |
| Final Orders | The ALJ will issue a recommended order, to which objections may be offered by the petitioner which are not binding on the agency. | The hearing officer will issue a final order that is binding on the agency. |

What do I need to prepare for the hearing process?

- The presiding officer at your hearing may take a more or less informal approach to hearing procedures. Regardless of this, however, as Petitioner, you always have the right to:
 - ▣ present evidence;
 - ▣ bring witnesses;
 - ▣ explain your position;
 - ▣ cross-examine or question agency witnesses; and,
 - ▣ submit proposed findings of fact and conclusions of law.

- For a Petitioner to achieve a successful outcome in an administrative hearing, the Petitioner must:
 - ▣ 1. Present a convincing and logical argument for why you are entitled to services that are being reduced or denied.
 - ▣ 2. Offer factual evidence which proves that entitlement or need.

- As the Petitioner in this hearing, your argument may take many forms, depending on your individual circumstances, the agency to which you are responding, and the nature of the services being altered.

- As Petitioner, your argument **must** focus on specific and individual facts relating to you which demonstrate why the agency was wrong in its determination to deny or restrict your services. For example, arguing that a service should be maintained because it is medically necessary to your health or to your quality of life in the community is more convincing than simply asserting that you need the service, or that losing it would be unfair. The presiding officer will be listening for the specific details; not generalities.

- Your arguments must be reinforced with evidence which documents the facts that you are presenting. Evidence can be presented in four ways:
 - ▣ **Demonstrative evidence**---charts, photos, or videos, for example, that help to clarify facts of the case;

 - ▣ **Documentary evidence**---written information, letters, prescriptions, reports from doctors or other professionals, etc.;

 - ▣ **Real evidence**---for example, a wheelchair brought in to be used in a hearing where the Petitioner had been denied a new wheelchair; and

- ▣ **Testimony evidence**--- a witness or witnesses offering evidence by testifying at the hearing itself.
- It is very important that you assemble all your evidence, including the names of witnesses, as early as possible in the hearing process. Also, ensure that you have extra copies of all documents and that all witnesses know the location and time of your hearing, and that they must arrive on time.
- If you decide, as Petitioner, that you do not want to represent yourself at the hearing, you need to make this decision in the beginning of the process. You have two options for persons to represent you: a qualified representative (a non-attorney), or an attorney. Following is specific information concerning each of these.

QUALIFIED REPRESENTATIVE

- If you, as Petitioner, do not want to represent yourself in the hearing, you have the right to be represented during the hearing process by an attorney or a qualified representative---at your own expense.
- If you decide that you want a qualified representative to represent you at the hearing, you and the qualified representative must follow agency procedures to permit this representation. Following is some specific information about this process:
 - ▣ A qualified representative does not have to be an attorney. Anyone who meets the qualifications may serve. Requirements to become a qualified representative are governed by Florida Administrative Code Rule 28-106. A copy of this rule is in the *Appendices* to this manual.
 - ▣ A Support Coordinator also may be a qualified representative.
 - ▣ If you wish to appear on behalf of a Petitioner as a qualified representative, you must follow the Rule requiring that you list your credentials.
 - ▣ After you file a petition for a hearing and are assigned a case number, you may file a written request to the presiding officer stating the name, address, and phone number of the

representative and stating that you, as the petitioner, are aware of the services this representative can provide and that you have chosen to use the qualified representative. The qualified representative's credentials should be included with this written request in the form of an affidavit.

- ☐ After receiving this written request from you, the presiding officer will determine whether the qualified representative has the proper credentials.

CONTACTING AN ATTORNEY FOR ASSISTANCE

- These hearings of appeals from agency decisions have been designed to be user-friendly so that people without attorneys or representation may appear *pro se* (represent them self without an attorney). As stated above, you have the right to represent yourself at your hearing.
- If, however, you decide that you prefer to have attorney representation, it is extremely important that you act in a timely fashion: The time to contact an attorney to represent you in the case is **not** right before, during or after the hearing.
- Your case deserves to be fairly presented. Therefore, **immediately** after you receive the initial notice of agency action letter, you should fully consider whether you want to have an attorney present your case. And, if you decide that you do want an attorney, contact one immediately.
- Do **not** wait until you receive the Notice of Hearing before you contact an attorney. To adequately represent you, the attorney needs time to prepare and after the hearing date has been set, it may be too late.
- There is no right to free services of an attorney in these cases. If you cannot afford an attorney, you may contact Legal Services organizations in your area; The Florida Bar for a reduced fee consultation with an attorney knowledgeable in the field; or your local bar association. The availability of legal representation from these resources depends on several factors, including caseload, whether the organization handles these types of cases, and whether staff is available.

INITIATING THE APPEAL PROCESS

REQUESTING A FORMAL HEARING

- When you receive the initial letter denying your services (denial letter), it will include a statement of your rights and instructions on requesting a hearing to challenge the denial.
- The denial letter contains specific instructions on how to request a hearing and the timelines for doing so. You must understand and follow these instructions.
- **You should send your written Request for Hearing directly to the agency at the address given in the denial letter.**
- **If your appeal is at OAH**, someone else may send the request on your behalf. However, if the appeal is filed by someone other than the Petitioner, their attorney, a legal guardian, spouse, next of kin, or the grantee relative in cash assistance, or a person permitted by the Department of Children and Families to be an authorized representative to participate in the eligibility determination, the person who is making the appeal must have the written authorization of the Petitioner.
- As soon as the agency receives your request for a hearing, it sends your request to DOAH or OAH for the appointment of a presiding officer to hear your case.
- In the hearing process, the person whose services have been denied is called the **Petitioner**. The agency is called the **Respondent**.

AMERICANS WITH DISABILITIES ACT

- Both DOAH and OAH comply with the Americans with Disabilities Act, a federal law. In your notice of hearing and on the website for each of these agencies there are instructions for persons needing special accommodations. Special accommodations are provided for all persons attending the hearing, including witnesses. Persons needing a special accommodation at the hearing should contact the presiding officer's assistant at least **seven** days prior to the hearing.

TIME TO REQUEST A HEARING

- **Cases in OAH** that do not involve the agency's provision of Medicaid services may have up to 90 days to request a hearing, however it is best to request a hearing as soon as possible, so the 30 day limit is a better guideline even for those cases.
- **Cases in DOAH** that do not pertain to the agency's Medicaid services may have as little as 21 days to request a hearing.
- To calculate the time that you have, refer to the notification you received to determine exactly how much time there is for you to file your request for a hearing. **Always follow the timeline set out in your notification letter.**
- If you are receiving services that were reduced or denied in the agency's denial letter, to continue to receive the services that have been reduced or denied until the hearing is concluded, you **must** request a hearing within **10 DAYS** from the date you receive the notice. If you request a hearing within the **10 DAYS**, the services will be reduced or terminated only if your appeal is denied after the hearing process is over.
- The 10 day deadline, however, applies only to services you have been receiving. If you have been denied a request for a **new** service, you will not receive the service until and unless there is an order in your favor after the hearing.
- If you miss the 10 day deadline, you may still request a hearing, but the services in question will not continue during the hearing process.

HOW TO REQUEST A HEARING –THE PETITION

- **If your appeal is at OAH**, Rule 65-2.045 *Fla.Admin.Code* describes the request for hearing as: “any clear written or oral statement to the Department that the applicant/recipient or his authorized representative wants an opportunity to present the case to a higher authority.”
- **If your appeal is at DOAH**, Rule 28-106.201 *Fla.Admin.Code* describes the information you should put in your petition:
 - The name and address of the agency as found in the denial notice and your case or identification number, if known;

- The name, address, and telephone number of the petitioner;
 - The name, address, and telephone number of the petitioner’s representative if it is different from the petitioner if the petitioner has one;
 - An explanation of how the petitioner’s interests will be affected by the agency determination;
 - A statement of when and how the petitioner received notice of the agency decision;
 - A statement that you are requesting an administrative hearing;
 - A statement of all disputed issues of material fact. These are facts alleged by the agency in making its decision with which you disagree;
 - A statement of all facts you believe will show that the agency’s decision is incorrect;
 - A statement of applicable rules or statutes, if known; and,
 - A statement of the relief sought by the petitioner, which basically is a description of the action you are asking the presiding officer to order.
 - You **must** include a copy of the denial notice and its attachments.
- Regardless of whether your hearing is at DOAH or OAH, your request for a hearing should be made in writing. **This written request is called a *Petition for Formal Hearing*, and it should include all elements required by the DOAH rule.**

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| HOW TO PREPARE YOUR PETITION |
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- First, review the *Notice of Denial/Reduction of Services* letter you received: Does it state the reason for denial and is the rationale attached?
- Next, review your support plan for the services provided and the documentation submitted with the plan, along with all other documents related to this which you have or can access.
- After you have reviewed these documents, create a list of:

- The items in the *Notice of Denial* with which you disagree and your reasons for disagreeing;
 - All items which you believe the agency failed to consider; and,
 - Any additional information that you want to present.
- Specifically in this list, when you describe the reasons why you disagree with facts the agency used to make its decision, you should include a description of the petitioner’s present condition, why he/she needs the services, and why the agency was wrong in denying the services. For example:
 - “Although the agency’s notice states that Jon can ambulate, he cannot do so. Jon has cerebral palsy. He uses a wheelchair and he is dependent on others to help him transfer from chair to bed.”
 - In stating all facts you believe will show that the agency’s decision is incorrect, be specific. For example:
 - “Maximus did not follow the recommendation of the medical professionals who treat Jon. Jon’s doctor’s evaluation states Jon needs assistance with activities of daily living, specifically assistance with bathing and transferring from wheelchair to bed.”
 - “Jon has been receiving this service for 9 hours a day since 2003. The service is included in support plans that have consistently been approved each year. His condition has not changed, therefore there is no reason to justify a reduction of hours.”
 - When you refer to specific rules or statutes you might say, for example:
 - “Under the definition of medical necessity in 59 *Fl.Admin. Code Ann. R.* 59G-1.010 (166) (2006), APD was wrong in this case to find that the service was not medically necessary.”
 - “*F.S. 393.0651* states that the ultimate goal of each support plan shall be to enable the client to live a dignified life in the least restrictive setting, be that in the home or in the community. The APD decision is wrong in this case because reduction of the service would deny Jon the right to be in the least restrictive setting and would result in his institutionalization.”

NOTE: You can find information about services, manuals, and waiver requirements on the AHCA or APD websites and additional information is provided in the appendices to this manual. You may cut and paste the following link to Provider Handbooks in your internet address bar: http://portal.flmmis.com/FLPublic/Provider_ProviderSupport/Provider_ProviderSupport_ProviderHandbooks/tabId/42/Default.aspx You will need to identify the Handbook that governs the service(s) which you are seeking to obtain or continue. The handbook for the service contains rules about who may qualify for the service, any limitations for the service, and the allowable coverage for the service.

- After you have completed this written explanation of why you disagree with the agency’s denial, write a specific statement of how your interests, as the Petitioner, will be affected by the agency’s denial. A sample explanation might be:
 - “Reduction of the personal assistance service hours from 9 hours a day to 3 hours a day, as the agency is proposing, will harm Jon because he will then have no one to assist him with feeding, transferring from wheelchair to bed or commode. If this happens, Jon will ultimately have to be institutionalized to prevent his health from deteriorating.”
- Finally, include a statement describing the relief sought by the petitioner (what you are asking the presiding officer to order). For example:
 - “The decision to reduce the hours of service for Petitioner from 9 to 3 should be reversed, and the entire amount of 9 hours of PCA service should be approved.”

PRACTICAL HINTS FOR WRITING YOUR PETITION

- ∞ The only document that should be attached to your Petition is the *Notice of Denial*. Save your other supporting documents for the hearing.
- ∞ Number each item in the Petition separately.
- ∞ The Petition does not have to be in a particular form. There is a sample petition in the Forms section of the Appendices.
- ∞ It is appropriate and helpful if you also include a letter with your Petition summarizing all the information.

∞ If you as the Petitioner have an attorney or a qualified representative, it is the attorney's or qualified representative's address given in the Petition to indicate where all documents and orders should be sent during the course of the proceeding.

∞ If your address changes any time during the hearing process, it is extremely important you notify your presiding officer and the agency.

∞ Keep a copy of the Petition and all information you receive from the agency, including the denial letter and the notice of hearing. Keeping all this information related to the hearing in one file is helpful.

∞ Use the agency websites to find handbook/manual provisions which apply to your case and the services that are the subject of the case. Helpful websites are included in the Appendices.

∞ When you mail your Petition to the agency, be sure to send it to the address given in the notice of denial/reduction.

ASSIGNMENT OF YOUR CASE AND THE INITIAL ORDER

- When the agency receives your Petition, it will be forwarded to either OAH or DOAH.
- **If your case is at OAH**, your Petition may undergo a supervisory review, and you may be contacted directly to see if the issue can be resolved without a hearing. **If your case is at DOAH**, however, this does not occur.
- After that, a presiding officer will be assigned. Your assigned presiding officer has an assistant as well.
- You will then be sent a letter containing the presiding officer's name and contact number, your case number and the name of the agency representative assigned to the case, if one has been assigned at that time.
- Keep this letter in your file for easy reference.
- The presiding officer may send an initial order to both sides with instructions to respond to the judge within 7 days. The order will ask that you provide to the presiding officer the following information in writing:
 - the suggested location of the hearing;

- the estimated time it will take you to present your case;
 - whether you have any related cases before the court (there usually are none); and,
 - all dates you are available for the hearing.
- When you respond to the presiding officer's initial order, include several dates you will be available to attend the hearing. The dates must be within the span of time stated in the initial order (for example, with 14 – 70 days from the date of the order). Be sure to pick a date that will allow you enough time to prepare for the hearing; at least 30 days is a good guideline.
 - A sample **Initial Order and Response** is included in the Forms section of this manual's Appendices.
 - When you pick the location for the hearing, pick one that is convenient for you as the Petitioner and for the witnesses.
 - Review your written response to the initial order to ensure that it includes all the information the presiding officer requested.
 - Send your original written response to the hearing officer at the address given in the initial order, and send a copy to the agency's representative, whose name and address also should be in the initial order.
 - Keep a copy for your file.
 - Note on your calendar the dates you have proposed for the hearing.
 - Learn the name of the assistant assigned to the presiding officer. She or he can be invaluable in assisting you to resolve procedural and non-legal questions.
 - **AFTER YOU RECEIVE THE INITIAL ORDER WITH YOUR CASE NUMBER, INCLUDE THE CASE NUMBER ON ALL CORRESPONDENCE ABOUT YOUR CASE TO THE HEARING OFFICER.**
 - **YOU MUST COPY THE AGENCY REPRESENTATIVE ON ALL YOUR CORRESPONDENCE WITH THE JUDGE. The agency representative's name, address and telephone should be listed in the initial order. If you do not see the name, call the assistant to the presiding officer.**

PREPARING YOUR CASE: WHAT TO DO BEFORE THE HEARING AND DISCOVERY

- DO NOT WAIT UNTIL YOU GET THE HEARING NOTICE TO BEGIN COLLECTING INFORMATION TO PRESENT AT THE HEARING.

STEP ONE: COLLECT YOUR INFORMATION

- Review the denial notice, the explanation for the reduction/denial of services, the support plan, and supporting documentation.
- Review your Petition, the list of facts that you are disputing, and the list of facts you want the hearing officer to consider.
- Reviewing both of these documents will tell you what you need to put into evidence. Use them to determine the documents you will be introducing at the hearing and the witnesses who you will want to testify.

YOUR DOCUMENTS

Obtain the documents you will present at the hearing and then make a list of these. To begin, obtain:

- ∞ information and documents from the service provider and support coordinator;
- ∞ medical records and statements from doctors or other medical professionals;
- ∞ (if applicable) copies of the support plan, supporting documentation and copies of prior years' support plans showing what services were previously approved; and,
- ∞ any other documents that might support your argument at the hearing.

Which documents are important will change depending on what the issues of material fact are in your hearing. As Petitioner, you want to present documents showing that the agency's reasoning for denial or reduction of services was erroneous.

Make extra copies of the documents before the hearing that you may give to the presiding officer and the agency's representative at the hearing. Keep a set of copies for yourself.

YOUR WITNESSES

- There are 3 types of witnesses:
 - a. Professionals providing services who have direct contact with you as the Petitioner and can testify firsthand as to your disability and the specifics of your need for services. These persons include: the support coordinator, doctors, medical professionals (therapists, nurses), group home operators, direct service staff, and personal attendants.
 - b. Family and other persons in the community who know you as the Petitioner and can testify as to your daily activities, routines, and needs.
 - c. Experts in the area of your particular disability.
- Make a list of witnesses who will testify at your hearing.
- Include the names, addresses and contact information for each witness.
- Talk to each of the witnesses, explain what the hearing is about, and make sure they will be available to attend the hearing.
- You have the right to subpoena witnesses to the hearing. A properly served subpoena requires the witness to appear at the hearing. Should you need to subpoena a reluctant witness, contact the assistant to the presiding officer for a subpoena to serve on the witness. Do so early as the subpoenas are generally mailed to you from the presiding officer and you will need time to have them properly served.
- Witnesses may appear at the hearing by telephone if there is a notary public at the location from where they will be calling. To have witnesses appear by phone you **must** make arrangements with the presiding officer in advance of the hearing date.
- People and professionals who have firsthand knowledge of you as the Petitioner and your needs are your best witnesses.
- You may not need many witnesses. Witnesses who will only testify to the same set of facts as other witnesses will generally not be allowed.

STEP TWO: OBTAIN THE AGENCY'S INFORMATION

The exchange of information between a petitioner and a respondent in preparation for hearing is called **DISCOVERY**. The theory behind discovery is that there should be no surprises at the hearing for either party.

REQUEST THE AGENCY'S DOCUMENTS

- You have a right to obtain and examine the documents in the agency's files that are or may be useful to your case. Normally, the agency representative will send the agency's file on the petitioner upon request.
- Send a request for documents to the agency representative, and send a copy to the hearing officer. Do this early so that you are not forced to read and process a stack of documents the week of the hearing. You will want time to carefully review the agency's records and formulate your arguments to rebut or contradict those documents.
- Documents you want to request include:
 - The petitioner's entire agency file;
 - All documents considered by the agency or service provider in making its determination;
 - All documents that will be introduced at the final hearing; and
 - Policies or manuals that were used to make the decision.

INTERROGATORIES TO THE AGENCY

- Interrogatories are another name for questions you want the agency to answer before the hearing.
- You have the right to ask the agency questions to obtain information prior to the hearing.
- You cannot ask more than 30 questions.
- Send the interrogatories to the agency representative.

- Send the hearing officer a notice that you sent the agency your interrogatories and the date they were sent. You don't file the interrogatories with the hearing officer.
- **In the interrogatories, you may ask how the determination was made and the facts that they took into consideration. This is some of the most important information you can have going into your hearing, as it will shape your own arguments.**
- Always ask for:
 - The names, titles and contact information of the agency's witnesses and a summary of their testimony;
 - A list of all the documents the agency will introduce at the hearing; and
 - The names, titles and contact information of all persons who have any knowledge of the petitioner's case.

NOTE: The agency representative has 30 days to respond to your requests for discovery. If you do not get the documents or the answers in 30 days, you may ask the judge, in writing, to order the agency to respond. This is called a motion to compel. The hearing officer will make a ruling in the matter after the other party has responded in writing to the motion. If a hearing is held on the motion, it will generally be by telephone conference call.

THE AGENCY'S REQUESTS FOR INFORMATION FROM YOU

- The agency has the right to obtain discovery from the petitioner as well.
- The agency representative may send you interrogatories and/or a request for admissions. These are written requests for discovery. You **must** answer these to the best of your ability within 30 days. However, if you don't know the answer, you can say that.
- If you receive a request for discovery from the agency that you believe is unfair, you may ask the hearing officer to determine the appropriateness of the discovery request.
- These documents have instructions included with them.
- Answer the discovery truthfully and to the best of your ability.

- Do not conceal facts or hide “surprise” witnesses. You may be barred from presenting them at the hearing.
- Request for admissions are yes or no statements. If you don’t know, say so. Don’t guess and don’t admit to facts that you do not believe to be true.
- Requests for production ask for documents in the possession of the petitioner.
- Discovery must be completed 5 days before the date of the final hearing unless an extension of time for good cause is granted to either side.
- Depositions are live sessions consisting of questions by the representative or representative of potential witnesses who testify under oath.
- The questions and answers are recorded by a court reporter present at the deposition.
- Either side can take the deposition of a witness. Both sides have to be present at the deposition.
- The agency representative may ask to take the deposition of your witnesses, and has to contact you to obtain dates you will be available. He/she will send a notice of taking deposition once the final arrangements are made.
- Witnesses, except the petitioner, are subpoenaed to appear at depositions.
- In the depositions of your witnesses, you are **not** responsible for making sure they attend the deposition, unless it is the deposition of the Petitioner.
- Depositions are taken prior to the hearing and a transcript may be introduced at the hearing.
- The hearing officer is not present at the deposition.

THE NOTICE OF HEARING

- The judge will send you a notice of hearing telling you the date, time, duration and location of the hearing.
- The notice may be accompanied by an Order of Pre-Hearing Instructions.
- Read the notice and instructions carefully.

- Record the date of the hearing so you will not forget.
- Tell all of your witnesses the date of the hearing.

NOTE: IN MOST CASES THE NOTICE OF HEARING WILL BE ISSUED APPROXIMATELY 14 DAYS PRIOR TO THE HEARING.

PRE-HEARING ORDER AND CONFERENCE

- You may receive a pre-hearing order with the notice of hearing.
- The order generally requires that you and the agency representative:
 - discuss the possibility of a settlement,
 - exchange exhibits and witness lists prior to the hearing; and
 - discuss the possibility of agreeing to certain facts.
- You do not have to agree to settlement or agree to certain facts. You have the right to have the hearing officer hear your case.
- It is important to follow the instructions on the pre-hearing order by the deadline stated on the order.
- You may write a letter to the hearing officer that you complied with the pre-hearing order.

CONTINUANCES

- If you cannot attend the hearing due to an emergency, you may request a continuance. Note that a continuance is not granted for just any reason. The reason must be important.
- You must make your request for a continuance as soon as you discover that you cannot attend the hearing.
- You must contact the agency representative to see if he/she objects to the continuance and to get mutually agreeable dates for the rescheduled hearing. This information must be in your written request. If you cannot reach the agency representative to determine if he/she objects, include this in the

request for continuance indicating when and how you attempted to reach them.

- The request for a continuance must be made in writing to the hearing officer with a copy to the agency representative.
- The request must be made at least 5 days prior to the date of the hearing, except in cases of extreme emergency. If the presiding officer grants the continuance, he or she will issue an order setting a new date and time for the hearing.
- If time is short before the scheduled hearing, you may make your request by telephone to the hearing officer who may schedule a telephone conference call with the other parties to see if they have any objection and whether you have good cause for a continuance.

NOTE: You cannot assume that the continuance will be granted, until and unless you get an order granting the continuance. If you have not received an order, it is proper to contact the hearing officer's assistant to find out the status.

- You must notify all your witnesses that the case has been continued.
- It is a good idea to send your witnesses a copy of the order setting a new date and time to make sure they attend the hearing at the new time.

PREPARING THE HEARING

ORGANIZATION AND PREPARATION IS KEY TO A SUCCESSFUL HEARING

IF YOU ARE ORGANIZED YOU WILL BE LESS NERVOUS

EXHIBITS

- Exhibits generally consist of documents, charts, photos, and records.
- Make a list of all your exhibits in the order that you plan to use them.
- Make copies of all your exhibits for the presiding officer and the agency representative.

- Identify each exhibit by number on the originals and all the copies.
- Keep a copy of all your exhibits for yourself.
- Give a copy of the exhibits to the witness who will be referring to them.

WITNESSES

- Make a list of the witnesses who will be testifying at the hearing in the order you want them to appear.
- Next to the name of each witness, list any exhibits that you want the witness to address.
- Write your questions for each witness.
- Keep a separate folder for each witness with a copy of the exhibits you want them to discuss.
- Visit or call each witness, explain the purpose of the hearing, and go over your questions and their answer.
- **MAKE SURE YOU GIVE YOUR WITNESSES THE DATE, TIME, AND LOCATION OF THE HEARING AND CHECK TO SEE THAT THEY CAN BE AT THAT LOCATION AT THAT TIME.**

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| SUBPOENAS |
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- A *subpoena* is a legal document that essentially orders a witness to appear at the hearing and to give testimony.
- *Subpoenas* are used to command persons to appear at either a deposition or at the hearing. There are two types:
 - Subpoena Ad Testificandum* -- requests the person to appear as a witness and give testimony
 - Subpoena Deuces Tecum* -- requests a person to appear as a witness **and** to bring specific documents with them.
- *Subpoenas* are obtained by contacting your presiding officer or her/his assistant and requesting them. When you request the *subpoenas*, it is

advisable to request a number of them at the beginning of the appeal so you will have them available as witnesses are added. Because the subpoenas command witnesses to appear at the hearing, you must have the hearing date, time and place to be able to complete them.

- On the *Subpoena Deuces Tecum* you must specify documents you want them to bring with them to the hearing. For example: “All e-mails exchanged with any other party concerning Petitioner’s case.”
- After you’ve identified witnesses, and you have the hearing time, date, and place, complete the *subpoena* by typing in the person’s name and address, and the date, time and place of the hearing. The *subpoenas* will be signed by the presiding officer after you have completed them or may have been signed prior to delivery to you.
 - Fill out each *subpoena* according to the directions that accompany it, then have the *subpoenas* served either by a disinterested person or by the Sheriff’s Office. The *subpoena* should be served immediately so that the witness has time to get ready for the hearing. You must include a witness fee with the *subpoena*. If the witness lives in the county where the hearing will be held, the fee is \$5 per day plus 6 cents a mile for actual mileage.
 - Every witness should be *subpoenaed* unless you are certain they will come to the hearing. If you do not *subpoena* every witness, you have no surety you can question them on direct examination. This is very important because cross-examination (which is when you question a witness for the other side) limits the scope of questions you may ask a witness if you did not list the person on your witness list.
- No fees need be given to *subpoenaed* witnesses who are employees of state agencies. Read the instructions on the back of the *subpoena* to make sure that the person who serves the *subpoena* executes the affidavit on the reverse side.

BURDEN OF PROOF

- The “burden of proof” is a legal phrase which states who has the responsibility for proving the case. The burden of proof sets the order in which the case must be heard.
- In an appeal from an agency decision to reduce benefits or deny services which the Petitioner has been receiving, the agency has the burden of proving

that they made the right decision. Because the agency has the burden of proof, their case is presented first at the hearing.

- In an appeal from the denial of a request for new services, however, the Petitioner has the burden of proving that she/he is entitled to receive the services, and so the Petitioner's case is presented first at the hearing.
- It is the presiding officer's duty at the end of the hearing to determine whether the party who has the burden of proof has met its burden and, thus wins the appeal.

PRESENTING NEW INFORMATION AT THE HEARING

- **"De novo"** is a legal term. Basically, it means that, during your hearing the presiding officer may consider evidence not initially presented to the agency and may make a decision based on all evidence presented at the hearing, regardless of whether it was earlier provided to the agency.
- As Petitioner, you may present evidence of facts which occurred after you received the denial notice, such as a change in your condition or a new medical evaluation.
- During the hearing, if the agency representative objects to your testimony or exhibits on the ground that this evidence was not available to be considered by agency reviewers before the hearing, as Peititioner, your response should be that the hearing is *de novo*. After stating this, wait for the presiding officer to rule.
- **NOTE:** As Petitioner, you have a duty to--as soon as possible--give the agency representative copies of any documents you plan to refer to at the hearing that relate to any new evidence.

THE HEARING

- Administrative hearings are less formal than court trials. These hearings usually are held in conference rooms.
- **As Petitioner or qualified representative, you also may request to have a telephonic hearing. (A telephonic hearing is a substitute for a hearing in which all parties are at physically at the same hearing location.) At a telephonic hearing, all parties, including the Petitioner, "appear" at the hearing via a conference call. If you are going to request a telephonic hearing, be sure to make this known very early in the hearing process---**

preferably, at the time the hearing initially is scheduled. Also, ensure that all of your witnesses are informed that it is a telephonic hearing AND that all of them are provided with the call-in information which the presiding officer will provide.

- If you as the Petitioner fail to appear at the time and place of the hearing or to appear telephonically, you **must** call the presiding officer immediately to explain why. If you do not contact the presiding officer, or if you do not have an adequate explanation for not attending the hearing, the presiding officer may determine that you have abandoned the case and rule against you.
- If an emergency arises on your hearing date which will cause you to be late for the hearing, you should attempt to telephone the presiding officer at the hearing location and explain the problem. If you cannot reach the presiding officer at that location, call her or his assistant and explain the problem.
- Presiding officers in DOAH and OAH cases usually are experienced in handling cases in which persons who are not lawyers are Petitioners or their qualified representatives.
- Presiding officers are required to remain impartial so they may not assist Petitioners or their representatives with **substantive matters** in their cases or offer legal advice.
- Presiding officers will, however, assist Petitioners and representatives with **procedural matters**. So, if you, as the Petitioner, or as a qualified representative are confused about procedural matters of your case or other non-substantive matters, let the presiding officer know at any appropriate time during the hearing.
- During the non-telephonic hearings, the presiding officer sits at the head of the room with a court reporter or recording device nearby. There is a seat for witnesses near the presiding officer.
- At the beginning of the hearing, the presiding officer explains the procedures that will be followed.
- The Petitioner and his/her representative, if there is one, sit on one side of the room and the agency representative and staff on the other.
- Witnesses and observers sit in the back, unless the witnesses are asked to sit outside until they are called.

- The agency will have their representative and witnesses, and as Petitioner, you will have your witnesses.
- The Petitioner should attend the hearing, if at all possible.
- A court reporter or an audio recorder usually is present to record the hearing. The agency is responsible for paying the court reporter, but if you request a transcript of the hearing, you have to pay for your copy.
- The presiding officer will have everyone introduce themselves. This is the time to make sure you can clearly hear what is being said.
- Presiding officers often begin hearings by stating how exhibits will be handled (usually either all at once to get the exhibits into the record, or as they are entered by the Petitioner/representatives).
- Before exhibits may be entered into the record, the presiding officer must agree to admit them, and may not do so if the other side raises an objection to the exhibits with which the presiding officer agrees.

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| <p>PROCEDURE AND ORDER OF PRESENTATION DURING THE HEARING</p> |
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- There is a code of conduct for these hearings. It is not a good idea to become combative, make insulting remarks, argue with witnesses, the agency representative or the hearing officer. You may argue your point but you should be respectful at all times.
- The code of conduct applies both ways. If the agency representative becomes offensive or badgers a witness, the hearing officer will be quick to stop him/her.
- Each side may give an opening statement describing their case.
- The party who has the burden of proof goes first and presents their witnesses and exhibits.
- The first party asks their witnesses questions (direct examination). If it is the agency going first, listen carefully to the questions and answers, making notes if needed. Once the agency is through asking that witness questions, you may ask questions of their witness (cross examination). The questions in your cross examination of the witness should be limited to topics of direct examination.

- At the end of the agency’s case, you may present your case.
- You call each of your witnesses, one at a time.
- You ask each of your witnesses questions and introduce the exhibits to the presiding officer with a copy to the agency representative.
- The agency representative then asks your witness questions.
- You may then ask your witness additional questions if there is a need to clarify something the witness said during the cross examination.
- At any time the hearing officer may ask the witnesses questions. Remember, the presiding officer will need to evaluate the evidence and have all the facts needed to make his/her ruling.
- Either side can object to the question being asked by the other side.
- The presiding officer will determine if the witness has to answer the question. If the objection is overruled, the witness must answer. If sustained, the witness does not answer. The presiding officer will give the witness the instructions.
- After both parties have finished presenting their case, each party may give a closing statement arguing their position on the case.
- The presiding officer will not decide the case at the end of the hearing.
- The presiding officer may ask the parties if they want to submit a proposed order and set the time when the proposed order is due. Make sure you calendar the date the proposed order is due, or any other deadlines the hearing officer sets.
- A proposed order is not required.

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| <p>PROCEDURE AFTER THE HEARING: RECOMMENDED AND FINAL ORDERS</p> |
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- **In OAH**, within 90 days, the hearing officer will issue a written decision called a Final Order with findings of fact and conclusions of law along with a means of remedy if the agency is found to have acted incorrectly and corrective action dating back retroactively to the date of the action.

- **In DOAH**, the ALJ will issue a written decision called a Recommended Order with findings of fact and conclusions of law. The agency considers this order when crafting its own Final Order. After you receive the Recommended Order from the judge, you may send written objections to the agency within 15 days after the date of the recommended order. Such objections are called "exceptions" and must be sent to the agency head, not DOAH or the Judge.
- You may order a transcript of the hearing at your own expense. If the hearing was videotaped or tape-recorded, you must write and request a transcript.
- If the final decision is not in your favor, you have the right to appeal to an appropriate District Court of Appeal within 30 days of the date of the final order. The final order will explain the procedure for filing an appeal.