

## **REPEAL AND REPLACE - INTEGRATED**

This draft reflects what the rule would look like if it is adopted with the proposed changes.

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

**6.101.2.1            ISSUING AGENCY:** Public Education Department.  
[6.101.1 NMAC - Rp, 6.101.1 NMAC, 9/10/2024]

**6.101.2.2            SCOPE:** The provisions of this regulation pertain to applicants for or recipients of vocational rehabilitation services who may be aggrieved by any action or inaction of the New Mexico division of vocational rehabilitation (hereinafter, NMDVR) or of the director of the NMDVR that affects the provision of vocational rehabilitation services.  
[6.101.2.2 NMAC - Rp, 6.101.2.2 NMAC, 9/10/2024]

**6.101.2.3            STATUTORY AUTHORITY:** This regulation is adopted pursuant to the Rehabilitation Act of 1973, as amended, 34 CFR Part 361, Sections 9-24-8, 22-2-1, 22-2-2, 22-13-13, 22-14-8, and 22-14-12 NMSA 1978, and New Mexico Rules of Civil Procedure, District Court Rule 1-074.  
[6.101.2.3 NMAC - Rp, 6.101.2.3 NMAC, 9/10/2024]

**6.101.2.4            DURATION:** Permanent.  
[6.101.2.4 NMAC - Rp, 6.101.2.4 NMAC, 9/10/2024]

**6.101.2.5            EFFECTIVE DATE:** September 10, 2024, unless a later date is cited at the end of a section.  
[6.101.2.5 NMAC - Rp, 6.101.2.5 NMAC, 9/10/2024]

**6.101.2.6            OBJECTIVE:** To provide general policy for an applicant for or recipient of vocational rehabilitation services who is dissatisfied with any determination made by personnel of the NMDVR that affects the provision of vocational rehabilitation services to request a timely review of that determination through mediation or a fair hearing.  
[6.101.2.6 NMAC - Rp, 6.101.2.6 NMAC, 9/10/2024]

#### **6.101.2.7            DEFINITIONS:**

**A.            "Applicant"** means an individual applying for NMDVR services, and includes any representative of the applicant, such as a guardian, legal counsel, or other advocate.

**B.            "Burden of proof"** means the responsibility of the party asserting a claim to prove that the claim is valid through the introduction of credible evidence.

**C.            "Client assistance program" or "CAP"** means a nonprofit agency separate from the NMDVR that receives federal funds to provide information about and referral to services for individuals with a disability. The CAP also provides case advocacy for applicants and recipients to facilitate access to services funded under the Rehabilitation Act of 1973, as amended.

**D.            "Collateral estoppel"** means a legal doctrine that prevents a party from relitigating an issue that was resolved in a previous lawsuit or administrative proceeding, even if the issue relates to a different claim.

**E.            "Determination"** means any decision made by personnel of the NMDVR that affects the provision of vocational rehabilitation services to an applicant or recipient.

**F.            "Fair hearing"** means a voluntary impartial due process hearing in which an impartial hearing officer conducts a hearing to review a disputed determination, hears testimony and reviews evidence from the parties, and issues a written decision setting forth the findings and grounds for the decision.

**G.            "Fraud"** means a scheme that involves submitting false or misleading information to the NMDVR in order to obtain a service.

**H.            "Good cause"** means a substantial reason or legal justification for failing to appear, to request a continuance of any due process proceedings, to act, or to respond to an action. Good cause events are unforeseen and beyond the control of the party and include, but are not limited to, the following:

- (1) A personal emergency medical situation; or
- (2) Sickness or death of a close family member.

**I.            "Individualized plan for employment" or "IPE"** means a written agreement to help a recipient with a disability who qualifies for services to find, get, and keep a job. It is designed to achieve an employment

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outcome consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

**J. "New Mexico state rehabilitation council"** means the entity that reviews, analyzes, and advises the NMDVR regarding all rehabilitation programs and policies administered by the NMDVR under the Rehabilitation Act Amendments of 1998.

**K. "Mediation"** means a voluntary process by which the parties meet with an independent and impartial qualified mediator to assist them in settling differences or disputes prior to pursuing formal administrative or other legal remedies.

**L. "Mediation agreement"** means a written legal contract developed during mediation. Once a mediation agreement has been signed by both parties, it is binding.

**M. "Misrepresentation"** means an intentionally or negligently false representation made verbally, by conduct, or by nondisclosure or concealment, by an applicant or recipient for the purpose of deceiving, defrauding, or causing the NMDVR to rely on the representation in order to obtain a service.

**N. "Preponderance of evidence"** means the standard by which the party with the burden of proof shall show evidence to prove that the claim is more likely than not to be true.

**O. "Recipient"** means the individual receiving NMDVR services, and includes any representative of the recipient, such as a guardian, legal counsel, or other advocate.

**P. "Relevant evidence"** means evidence that is relevant if reasonable inferences can be drawn that shed light on a contested matter.

**Q. "Res judicata"** means a legal doctrine that another party cannot relitigate a matter for the same cause of action if a final judgement based on merits has been made previously in a lawsuit or administrative proceeding.

**R. "Vocational rehabilitation services"** means those services identified in 29 USC Section 723, which are provided to individuals with disabilities.  
[6.101.2.7 NMAC - Rp, 6.101.2.7 NMAC, 9/10/2024]

### 6.101.2.8 REVIEW OF DETERMINATION

**A.** Any applicant or recipient of vocational rehabilitation services who is dissatisfied with any determination made by personnel of the NMDVR that affects the provision of vocational rehabilitation services may request a timely review of that determination through mediation, a fair hearing, or both. An applicant or recipient may not request a fair hearing for a determination after mediation that results in a signed mediation agreement or after a hearing officer has rendered a final decision about that determination in a fair hearing.

**B.** Nothing in this rule shall be construed to create an entitlement to any vocational rehabilitation service.

[6.101.2.8 NMAC - Rp, 6.101.2.8 NMAC, 9/10/2024]

### 6.101.2.9 MEDIATION:

**A. Request.** A request for mediation shall be made in writing online, via email, or by mailed letter to the director of the NMDVR. Incomplete requests that do not contain all of the following required information shall not be considered:

- (1) the name of the NMDVR counselor assigned to the case;
- (2) the determination being contested; and
- (3) the date of the contested determination.

**B. Time limitation for request.** The request must be received by the director of the NMDVR within 45 calendar days of the date of the contested determination. Failure to submit the request within 45 calendar days may result in a denial of the request, as determined by the NMDVR, in its sole discretion.

**C. Appointment of mediator.** A qualified and impartial mediator shall be appointed on a random basis from a qualified pool of mediators established jointly by the New Mexico state rehabilitation council and the NMDVR or by agreement between the applicant or recipient and the director of the NMDVR. The mediator shall not be a current employee of the NMDVR.

**D. Duties of mediator.** A mediator facilitates discussions between the parties to help the parties come to a mutually agreed upon resolution of disputed issues by:

- (1) scheduling the mediation;
- (2) explaining how the mediation process works and the confidentiality of the process;
- (3) communicating with both parties to gather information about the contested issues and helping the parties work through the contestation;

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- (4) assisting the parties in understanding the applicable laws, precedents, and other established guidelines;
  - (5) helping the parties to find common ground and resolutions that both parties can accept;
- and
- (6) helping the parties complete the mediation paperwork at the conclusion of the mediation.

**E. Mediation process.** Mediations shall be scheduled and completed in a timely manner, but not later than 30 calendar days after receipt of the request if there is also a request for fair hearing pending. If no fair hearing request is pending, the mediation shall be completed no later than 45 days of the request.

- (1) The mediation shall be held in a location and manner that is convenient to the parties.
- (2) Mediation is voluntary on the part of both parties, and either party or the mediator may terminate the mediation at any point in the process for any reason. If the mediation is terminated for any reason, the applicant or recipient may request resolution through a fair hearing.
- (3) During the mediation process, the applicant or recipient may represent themselves or may be represented by a guardian, legal counsel, or another advocate of their choice.
  - (a) All expenses of such representation, including legal fees and travel costs, shall be the responsibility of the applicant or recipient.
  - (b) The applicant or recipient shall notify the NMDVR in writing of the name and contact information of the designated representative. Authorization for representation may be withdrawn at any time by giving written notice of the withdrawal to the NMDVR.
- (4) Both parties shall have the opportunity to submit relevant evidence in the form of documentation or other information in support of their position.
- (5) Discussions that occur during mediation shall be kept confidential and shall not be used as evidence in any subsequent fair hearing or civil proceeding. The parties will be required to sign a confidentiality agreement prior to the commencement of the process.
- (6) If the parties reach agreement during the mediation, the terms of the agreement shall be described in a written mediation agreement developed by the parties with the assistance of the mediator.
  - (a) The mediation agreement shall be signed by both parties.
  - (b) A copy of the mediation agreement shall be mailed or emailed to both parties by the mediator.
  - (c) A signed mediation agreement is a binding and final resolution of the contested decision.

**F. Cost of mediation.** The NMDVR shall pay the costs of the mediation up to eight hours. However, the NMDVR shall not be required to pay any costs related to the representation of the applicant or recipient.

**G. Impact on provision of services.** Pending resolution through mediation, the NMDVR shall not suspend, reduce, or terminate services being provided under an IPE, unless such services have been obtained through misrepresentation, fraud, collusion, or criminal conduct on the part of the applicant or recipient, as determined by the NMDVR, or the applicant or recipient requests a suspension, reduction or termination of services. [6.101.2.9 NMAC - Rp, 6.101.2.9 NMAC, 9/29/2020; A, 9/10/2024]

### 6.101.2.10 FAIR HEARING:

**A. Request for a fair hearing.** A request for a fair hearing shall be made in writing online, via email, or by mailed letter to the director of the NMDVR. Incomplete requests that do not contain all of the required information will not be considered. Requests shall include the following information:

- (1) the NMDVR counselor assigned to the case;
- (2) the determination being contested; and
- (3) the date of the contested determination.

**B. Time limitation for request.** The request for a fair hearing must be received by the director of the NMDVR within 45 calendar days of the contested determination. Failure to submit the request within 45 calendar days may result in a denial of the requests, as determined by the NMDVR, in its sole discretion.

**C. Appointment of a hearing officer.** A qualified and impartial hearing officer shall be appointed on a random basis from a qualified pool of hearing officers established jointly by the New Mexico state rehabilitation council and the NMDVR, or by agreement of the applicant or recipient and the director of the NMDVR. The hearing officer shall not be a current employee of the NMDVR.

**D. Timing of hearing.** The fair hearing shall be held within 60 calendar days of the NMDVR's receipt of the applicant's or recipient's request for review of the contested determination, unless informal resolution

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of a mediation agreement is achieved prior to the sixtieth calendar day or both parties agree to an extension of time. The time limit may be extended by the hearing officer upon the request of either party for good cause shown.

**E. Pre-hearing conference.** At least 10 calendar days prior to the date of the fair hearing, the hearing officer shall conduct at least one pre-hearing conference on a date and time agreed upon by both parties. The time limit may be extended by the hearing officer upon the request of either party for good cause shown.

(1) All parties shall attend and participate in a pre-hearing conference.

(2) Failure to attend and participate in a pre-hearing conference may result in dismissal of the action.

(3) At the pre-hearing conference, the hearing officer may take action and make rulings on issues including, but not limited to:

(a) identifying any accommodations needed by the parties, representatives, and witnesses in the hearing, which may include the necessity for hearing or interpreter assistance or the need for a party or witness to appear by phone or video rather than in person;

(b) identifying, simplifying, and clarifying issues and dates directly related to the contested NMDVR determination identified in the fair hearing request;

(c) eliminating irrelevant or non-hearable issues as determined by the hearing officer;

(d) identifying potential witnesses and exhibits from each party and establishing deadlines and procedures for the parties to share witness and exhibit lists and exhibits;

(e) establishing procedural matters pertaining to the conduct of the fair hearing; and

(f) establishing deadlines for pre-hearing motions and responses.

**F. Fair hearing process.** Fair hearings shall be scheduled and conducted within 60 calendar days of the request for hearing, unless the parties mutually agree to an extension in writing, or the hearing officer extends the time for good cause shown. Fair hearings shall be held in a location and manner that is convenient to the parties.

(1) Fair hearings are not open to the public.

(2) During the fair hearing process, the applicant or recipient may represent themselves or may be represented by a guardian, legal counsel, or another advocate of their choice.

(a) All expenses of such representation, including legal fees and travel costs, shall be the responsibility of the applicant or recipient.

(b) The applicant or recipient shall notify the NMDVR in writing of the name and contact information of the designated representative. Authorization for representation may be withdrawn at any time by giving written notice of the withdrawal to the NMDVR.

(3) Each party has certain procedural due process rights during the hearing, and may:

(a) make opening and closing statements;

(b) call and examine witnesses and introduce exhibits;

(c) cross-examine witnesses;

(d) re-direct their witnesses following cross-examination;

(e) impeach any witness; and

(f) rebut any relevant witness.

(4) Oral evidence shall be taken only under oath or affirmation.

(5) The order of presentation for hearings is as follows:

(a) opening of proceedings and disposition of preliminary and pending matters of the hearing officer;

(b) if the hearing officer requires, the applicant or recipient shall submit oral opening statements; otherwise, parties may submit oral opening statements voluntarily;

(c) if the hearing officer requires, the NMDVR shall submit oral opening statements; otherwise, parties may submit oral opening statements voluntarily;

(d) applicant's or recipient's case-in-chief;

(e) the NMDVR's case-in-chief;

(f) applicant's or recipient's rebuttal;

(g) the NMDVR's rebuttal;

(h) if the hearing officer requires, the applicant or recipient shall submit oral or written closing statements; otherwise, parties may submit oral or written closing statements voluntarily;

(i) if the hearing officer requires, the NMDVR shall submit oral or written closing statements; otherwise, parties may submit oral or written closing statements voluntarily; and

(j) closing of the proceedings by the hearing officer.

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### **G. Duties of hearing officer.** The hearing officer shall:

- (1) conduct a pre-hearing conference no later than 10 calendar days prior to the scheduled fair hearing date, unless extended by agreement of both parties, or for good cause shown.
- (2) administer an oath or affirmation to all witnesses before testimony is given.
- (3) regulate the course and conduct of the hearing.
- (4) maintain decorum during the hearing.
- (5) assure that all properly raised and relevant issues are considered.
- (6) make rulings on the introduction of testimony and other evidence. The formal Rules of Evidence and Rules of Civil Procedure do not apply but may lend guidance to the hearing officer when making rulings.
- (7) request post-hearing statements or documentation from both parties if needed.
- (8) ensure that all pre-hearing and hearing proceedings are properly recorded.
- (9) create the record on appeal of the case which shall include, but not be limited to;
  - (a) the recordings of the pre-hearing and hearing proceedings;
  - (b) all exhibits admitted into the record;
  - (c) all pleadings made by the parties;
  - (d) all correspondence related to the pre-hearing(s) and hearing(s) by the parties and the hearing officer, and
  - (e) the final written decision.
- (10) review the evidence and testimony and issue a decision and order based on the facts presented as the hearing, and the provisions of the approved vocational rehabilitation services portion of the Unified of Combined State Plan, the Rehabilitation Act of 1973, as amended, accompanying federal and state regulations, and NMDVR policies that are consistent with the federal requirements.
- (11) prepare a written report that states the findings and grounds for the decision and order. The written report shall be mailed and emailed to both parties within 30 calendar days of the completion of the fair hearing.

**H. Burden of proof.** The burden of proof at the fair hearing is on the applicant or recipient to prove by a preponderance of evidence that the contested NMDVR determination is in violation of the Unified or Combined State Plan, the Rehabilitation Act of 1973, as amended, accompanying federal and state regulations, or NMDVR policies that are consistent with the federal requirements.

**I. Dismissal prior to fair hearing.** The hearing officer shall consider a motion for dismissal without a fair hearing. If the hearing officer finds that a motion for dismissal should be granted, they may enter a final order of dismissal which may be appealed in accordance with Section 11 of this rule. The reasons to consider a motion for dismissal are:

- (1) lack of jurisdiction;
- (2) unripe or moot questions;
- (3) failure to pursue the cause by the applicant or recipient;
- (4) failure to raise a justiciable issue in the request for hearing;
- (5) unnecessary duplication of proceedings, res judicata, or collateral estoppel;
- (6) withdrawal of the request for hearing by the applicant or recipient;
- (7) failure to appear or participate at the pre-hearing conference or the fair hearing by the applicant or recipient; or
- (8) the matter was successfully resolved through informal resolution or a mediation agreement prior to the hearing.

**J. Cost of a fair hearing.** The NMDVR shall pay the costs of the fair hearing, including the pre-hearing conference. However, the NMDVR shall not be required to pay for any costs related to the representation or travel of the applicant or recipient, or the applicant's or recipient's representative.

**K. Impact on provision of service.** Pending the decision and order of the hearing officer, the NMDVR shall not suspend, reduce, or terminate services being provided under an IPE, unless such services have been obtained through misrepresentation, fraud, collusion, or criminal conduct on the part of the applicant or recipient or the applicant, as determined by the NMDVR, or recipient requests a suspension, reduction, or termination of services.

**L. Implementation of final decision.** The decision and order of the hearing officer is binding and shall be implemented pending review of any civil action filed with a court of competent jurisdiction. Either party has the right to contest the decision of the hearing officer by bringing a civil action in any state court of competent jurisdiction or in a district court of the United States with competent jurisdiction without regard to the amount in

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controversy. The civil action shall be brought within 30 calendar days of the hearing officer's final decision and in accordance with New Mexico Rules of Civil Procedure, District Court Rule 1-074.

**M. Cost of civil action litigation.** Each party shall bear its own costs for the civil action including, but not limited to, filing costs and attorney fees. The NMDVR shall not be required to pay for any costs related to the representation or travel of the applicant or recipient or the applicant's or recipient's or recipient's representative. [6.101.2.10 NMAC - Rp, 9/10/2024]

**HISTORY OF 6.101.2 NMAC:**

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

6.101.2 NMAC, Fair Hearings and Alternative Dispute Resolutions Related to Vocational Rehabilitation, filed 9/12/2020, was repealed and replaced by 6.101.2 NMAC, Fair Hearings and Alternative Dispute Resolutions Related to Vocational Rehabilitation effective 9/10/2024.

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