

# Fair Hearing Guide for Attorneys

  
**BENEFITS  
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HUB**

September 2022



Using the fair hearing process to appeal a denial, a cut to services, or an eligibility termination that involves benefits tech can be an effective tool to help your client regain their benefits. It also builds your understanding of how benefits determinations are made and the role of technology in this process.

**Note:** This Guide is provided for informational purposes only and is **not** legal advice. The requirements and processes for hearings vary by state and by benefits program so do not rely on this Guide for what is required or permitted in an appeals process. The Benefits Tech Advocacy Hub **cannot** provide any legal representation. Using resources provided by the Benefits Tech Advocacy Hub or contacting the Hub does **not** form a lawyer-client relationship.

## Filing the Appeal

- **File the appeal on time.** Medicaid, SNAP, unemployment, and other benefits have specific deadlines by which a recipient must appeal an adverse decision and request to receive benefits while the appeal is underway (if it is a termination or reduction). Follow these deadlines. Appeals generally do not have to be formal documents: they must contain the name of the recipient, enough information to identify the type of benefits, and a basic description of the decision you are appealing. Sometimes, the notice informing the recipient of the adverse action has a box to check, a fill-in-the-blank, or another form to be used for appeals.
- **Consider requesting continuing benefits.** The Due Process Clause of the Fourteenth Amendment of the Constitution guarantees beneficiaries the option of continuing to receive benefits while an appeal of a reduction or termination is pending. Your client probably wants to continue their benefits—and going without them can undermine the case that the recipient needs benefits at a certain level. That said, recipients can be liable for the amounts received if they ultimately lose the appeal. Discuss the risks and give advice based on your state’s practices for recouping these debts and the risks for the individual client based on their circumstances.

To request continued benefits, the recipient must file an appeal by a certain deadline (for Medicaid, it is often before the action takes place). In some programs, discontinued benefits may be reinstated if requested not more than 10 days after the date of the action. And, depending on the state, the recipient may have to check a box on a form or write a short statement that they want benefits to continue.

The appeal form should also indicate how to request interpreter services, auxiliary aids and services, or reasonable modifications on the basis of disabilities. Such services should be requested as soon as feasible if no timeline is indicated.

## Preparing for the Hearing

- **Consider challenging a deficient notice.** The state agency must explain a benefit cut or termination in terms comprehensible to the recipient, making a clear statement of the reason for the decision in light of the specific facts of the recipient's case. The notice must also contain the effective date of the action and the individual's rights to appeal. As part of the explanation of the reasons, the agency has to provide the individual with enough information that they can decide whether and how to appeal.

Agencies often fail to provide sufficient notice in relatively straightforward benefits decisions because of a lack of explanation or understandable reasons. In more complicated situations involving benefits tech, notices are even more likely to be lacking. In such situations, the notice may only list a very general reason based on codes in the system and provide very little individualized information. Or the decision may be based on an assessment of the individual's circumstances with very little information about the assessment other than that the individual did not meet the qualifications.

After the appeal is filed and assigned to an administrative law judge, consider filing a written motion to dismiss for deficient notice. The notice may also be deficient if your client requested notices in a different format or language and the notice has not met those reasonable requests. Sometimes in benefits tech systems the fields of information in the notice have not been translated or are not accessible. If you win, the agency cannot implement an adverse decision until it provides proper notice. This will at least buy the recipient more time and may defeat the adverse action entirely. For more information about notice deficiencies, see [this article on the requirement for ascertainable standards](#).

- **Review the file.** The agency's case file upon which the decision was based typically must be available to the individual or their representative in a way that is easy to review. The basis of the agency's decision, including

any individualized information about the client, should be contained in this file. The file should indicate that the decision relies on benefits tech if that is the case and provide information about how the tech was used (i.e. what information and process the tech used to make the decision).

- **Use discovery.** Some states allow recipients to use discovery procedures like interrogatories or depositions to get more information about the agency's decision. Here, you can ask for information about how the benefits tech works, how agency officials use it to make decisions about the recipient's benefits, how the tech reflects the underlying policies, and how it was tested and validated, including whether there was an evaluation of impact on different populations (see our Key Questions Guide). Even without formal discovery, you should be able to get previous assessments or agency decisions (showing that the agency previously thought that the client needed more services) and anything factoring into the present decision.
- **Gather evidence.** Past agency decisions can be a key piece of evidence to show that the same agency thought the client met certain criteria before and that the client's needs have not changed or have increased. Apart from this, you can look to the recipient themselves, people close to them with knowledge about the issue (e.g., in Medicaid, a caregiver), medical professionals, or other sources of information relevant to the adverse decision. Even if benefits tech is being used to make the decision, it is usually based on a policy that sets forth the requirements the individual must meet, and those are the criteria that the evidence should prove. If a key witness will not appear voluntarily, you can request that the administrative law judge issue a subpoena to compel attendance (depending on local rules).
- **Prepare with the recipient.** Although administrative hearings are meant to be informal, they are intimidating. The recipient is under oath and can be asked hostile questions by the agency's attorney or the judge. The recipient might be afraid of criticizing somebody like an agency nurse who comes to their home every year. In Medicaid home-care situations, recipients might downplay their needs because they are worried that needing lots of care will mean that they have to enter a nursing facility.

Or, sometimes, people simply want to focus on what they can do rather than all the things they cannot do. Discuss the expected questions, what the recipient might want to reveal or not, and the risks and trade-offs together.

Preparing also includes understanding what the person needs to fully access the hearing. For example, if they have communication barriers (such as limited English proficiency or if they require communication aids or devices) they may need information about the hearing environment and how to proceed if they do not understand something. A person with disabilities may need to request modifications in advance in order to have equal access to the hearing, such as more frequent breaks and how to indicate a need for one. Some hearings occur remotely through phone or video conference and may require different preparation.

## At the Hearing

- **Make any motions.** You can move to dismiss for deficient notice (make sure to mention the words “due process”) even if you did not file a written motion. You can ask for the hearing to be rescheduled if the agency did not give you key information about the adverse decision or access to the case file, or if a key witness did not appear.
- **Focus on problems with the benefits tech.** If the decision involves an assessment, try to show that the assessment was completed incorrectly or does not reflect the individual’s needs (the more inaccuracy, the better for your case), or that the recipient’s condition is worse now than at the time of the assessment. You may also be able to establish the correct procedure for the assessment and qualifications of the assessor and show that the normal course of business for completing the assessment, including using the benefits tech, was not followed, or even that the lack of standardization calls into question the validity of the process used with the client. It is also helpful to ask questions and provide evidence to show the agency did not explain the scoring possibilities to the recipient at the time the information was gathered, such that the recipient did not know what information was important or how to give an accurate response,

and connect that to due process arguments. It is important to connect the criteria for receiving the service to what the beneficiary needs, whether the benefits tech measures that, whether it explains why the beneficiary did or did not meet those standards, and how. You can also show that the agency officials have not received sufficient training or cannot explain the way the benefits tech system operates and connect that to due process arguments. You should also watch for any signs that the technology itself does not measure what it claims to or does not work as designed (see our Making Sense of Technology Problems Framework). If the decision involves fraud, highlight that there is no independent evidence showing the client's intent, as that is often a factor in fraud cases.

- **Offer an alternative to the benefits tech narrative (i.e., independent evidence of eligibility).** In the Medicaid home-care setting, the benefits tech system purports to measure a recipient's needs. Often, the agency will treat the system as the only legitimate measure of that need. You can show need independent of the benefits tech system by, for example, providing evidence in a denial of in-home care services that it takes X minutes to shower, use the restroom, bathe, eat, etc. You could even provide short videos of the individual that show them attempting tasks that they need support for, such as trying to put on a shirt (while otherwise dressed), or that show limited mobility. A person may meet the eligibility criteria for a service as defined in the state regulation, even if the assessment did not find the person eligible for that service. The assessment may not catch all the characteristics of eligibility or there may be a logistical error in the assessment itself. (For more on understanding the problems that can arise from benefits technology, see the Making Sense of Technology Problems Framework.) The judge might try to exclude or discount this evidence as irrelevant, but it is important to address it both for the hearing and later appeal.
- **Focus on the impact of the adverse action.** If it is a Medicaid home-care cut, it may be relevant to show that the cut will put the recipient at risk of harm through falls or worsening health conditions, or, if

applicable, that the lack of services would lead to an increased risk of institutionalization, through evidence that the reduced amount of services will cause care needs to go unmet. If it is a fraud or eligibility determination decision, highlight the consequences of the decision in light of whatever the benefits tech decision is.

- **Get all your facts and arguments in at the hearing (and get legal rulings).** Usually, the hearing is the place to establish all of your facts and legal arguments—higher courts often will not allow you to introduce new facts or issues on a subsequent appeal. The best way to preserve legal issues for subsequent appeal is to force the judge to rule on them by coming up with some evidentiary objection based on the benefits tech system. Object to the inclusion of the tech-related documents in the record. For example, if the agency cannot explain how a benefits tech system works, you might move to exclude the results because of improper foundation or on due process grounds. If the agency relies on a document without presenting a witness to authenticate it, you might move to exclude on the basis that it's hearsay (even though hearsay is often permitted in administrative hearings). In many instances, the judge will rule against you, but you will have preserved the issue for subsequent appeal.

If an evidentiary objection isn't possible, raise the legal arguments in your closing argument and ask the judge to rule on it in the written decision. Apart from due process, other frequent legal issues include discrimination (especially disability-related) and language access.

Depending on the state's hearing procedures, it may also be helpful to submit a written brief summarizing your legal arguments and relevant facts prior to the hearing officer closing the record.

## After the Decision

- **Review the decision carefully.** If the judge rules against you, consider whether the judge fairly characterized your evidence, how the judge determined credibility, and whether the judge ruled on your legal issues. If something is off or if you want to force a ruling on a legal issue, consider a motion to reconsider, filing objections with the decision, or whatever mechanism for disagreement is available in your state.
- **Consider appeal.** State trial court judges usually are not familiar with public benefits and often are not familiar with the relaxed procedures of administrative hearings. So, you want to consider appeal with an eye toward a strong evidentiary record, clearly preserved legal arguments, and sympathetic facts.

**Note:** Consider whether your jurisdiction's application of doctrines like administrative estoppel (i.e., claim/issue preclusion from administrative hearings), exhaustion, or abstention might hinder affirmative litigation during or after an administrative hearing.

- **Use what you learned in future advocacy.** You might find a line of argument that works for future hearings. You might learn that a particular agency official is involved in the benefits tech system. These and other facts learned at the hearing can inform future FOIA requests, discovery, or litigation.

**Note:** The authors are available to discuss any of these steps and provide more resources. Use our [intake form](#) to reach out.





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