

3400 DUE PROCESS.

3401 General. This section describes the Division's policy for reviewing and resolving an individual's request for review of any action, decision, or determination regarding that individual by the Rehabilitation Counselor and/or the Division. A request for review may be based on any instance in which the individual believes that s/he has been treated unfairly or inappropriately by the Division, including any alleged violation of the individual's rights. Any such request for review will be considered and acted upon by the Division as a request for fair hearing. Any meeting occurring in the due process will be held at a location that is convenient to the parties in the dispute. In all phases of the due process, the applicant or eligible individual may be represented by another person selected by the individual. The applicant or eligible individual (or the individual's representative) will be provided the opportunity to submit evidence and information to support the position of the individual.

3401.1 Exclusion. Separate procedures promulgated by the Social Security Administration apply to grievances by claimants for Social Security Disability Insurance (SSDI) and/or Supplemental Security Income (SSI) benefits. Therefore, the procedure discussed in this section does not apply to requests for review arising from the handling of SSDI or SSI benefit claims by the Disability Determination Section.

3401.2 Written Notification of Rights and Responsibilities. The Rehabilitation Counselor will provide the applicant or eligible individual a copy of *WVDRS-95, Rights and Responsibilities* which explains the individual's rights to due process immediately upon reducing, suspending, or terminating any rehabilitation services for the individual. A copy will be provided in the appropriate alternate format if necessary.

3401.3 Receipt of Complaint. Upon receiving an individual's complaint, either from the individual or from the individual's representative, the Rehabilitation Counselor will provide a written statement of individual rights and responsibilities to the individual, document in the case folder that the written statement was provided, and notify his/her immediate supervisor of receipt of the complaint.

A. *Explanation of Due Process Options.* The individual and/or the individual's representative also will be advised of the various due process options available, including the informal review process, mediation, and fair hearing. All options will be thoroughly explained.

B. *Form Used for Review.* A form, *WVDRS-14* (see Figure 3400-1), will be made available to the individual for the purpose of requesting a review; however, any type of written request from the individual will be acceptable. If the individual prefers, or if it is necessary to accommodate the individual's disability, the Counselor may accept the verbal notification, offer to complete the written complaint on the individual's behalf, and obtain the individual's signature. The written complaint will be recorded on the *WVDRS-14*, and will include the specific grievance of the individual and the relief sought from the Division. Once

the written request for review has been received from the individual, or the individual's representative, the request will be date stamped.

3401.4 Timeframe Requirements.

A. Timeframe for Filing a Request for Review. The Rehabilitation Counselor will inform the individual that s/he will be allowed a 60 calendar day time period in which to submit a written request for review. The 60 calendar day timeframe for requesting a review begins from the date the individual receives notification either verbally or in writing of any change in service, or other matter with which the individual disagrees. If the notification of change in services is in the form of mailed correspondence, the Counselor should follow-up with telephone communication, if at all possible, to ensure receipt of the notification. Once the written request for review has been received from the individual, or the individual's representative, the request will be date stamped. Effective from the date the request for review is received, the Division will have 60 days to conduct a fair hearing. The individual will be advised of the 60 day requirement and informed that s/he has the right to proceed immediately to the fair hearing level if so desired, or may utilize any or all of the due process options within the 60 days.

B. Timeframe for Response on Decisions. The individual will have 5 working days from the date of written request for review in which to notify the Division of his/her choice to begin with the Informal Review, or to proceed directly to either Mediation, Fair Hearing or both. This 5 working day time limit to choose a due process option applies to each level of the review process. If the individual or individual's representative elects to extend the 5 working day time limit on choosing the review option, the Division may request an extension of the 60 calendar day time requirement for conducting a fair hearing to a period of time that is agreeable to both parties. This agreed upon timeframe will be recorded on the WVDRS-14.

3401.5 Continuation of Services Pending Decision. Evaluation and assessment services, as well as services under an IPE, will not be suspended, reduced, or terminated until the outcome of the review process has been determined unless:

- A. The individual so requests; or,
- B. The Division has evidence that services have been obtained through misrepresentation, fraud, collusion, or criminal conduct by the individual; or,
- C. The continuation of services is contraindicated due to behaviors of the individual that constitute criminal conduct or may pose a danger to the individual or others.

3402 Informal Review. Individuals requesting a fair hearing will be offered the opportunity for informal review. However, participation in informal review is at the discretion of the individual and/or the individual's representative; rejection of informal review will not

prejudice the individual's right to mediation or fair hearing in any manner, and acceptance of informal review is not considered agreement to extend the 60-day time limit for conducting the fair hearing. The Division's informal review process consists of two phases: local reconciliation and administrative review.

3402.1 Scheduling for Informal Review. The immediate supervisor will determine from the individual whether the individual chooses to begin with a Local Reconciliation or proceed directly to an Administrative Review or other option. If the individual opts for a Local Reconciliation, the immediate supervisor will promptly schedule the Local Reconciliation meeting with the individual and the Rehabilitation Counselor for the earliest possible meeting date and concurrently notify the appropriate Assistant Director of the possible need to schedule an Administrative Review. In cases where the written request for review occurs in the field program, the Counselor's supervisor will then immediately notify the Assistant Director, Rehabilitation Programs and Field Services. Likewise, requests for reviews originating at the West Virginia Rehabilitation Center will be directed to the attention of the Assistant Director, WV Rehabilitation Center Services.

3402.2 Local Reconciliation. Upon agreement of the parties, the immediate supervisor, the Rehabilitation Counselor, and the individual and/or the individual's representative may meet to discuss the individual's grievance informally and to ascertain whether a mutually acceptable resolution may be negotiated.

A. *Timeframe for Response.* The individual or individual's representative will have 5 working days upon receipt of the results of the Local Reconciliation in which to notify the Division whether he/she accepts the resolution offered or chooses to proceed to the with another review option. If the individual or individual's representative does not respond within 5 working days upon receipt of the results of the Local Reconciliation, it will be implicit that the resolution has been accepted and the dispute is resolved.

B. *Form of Notification.* The outcome of the Local Reconciliation will be recorded on the WVDRS-14, and will include a statement and dated signature from the individual indicating either the individual's acceptance of the outcome or the next level of review chosen.

C. *Extension of Timeframe.* If the individual or individual's representative elects to extend the 5 working day time limit on choosing the next review option, the individual or representative must notify the Division of the need for the extension within the five day limit. If an extension is requested, the Division may extend the 60 calendar day time requirement to conduct the fair hearing to a period of time that is agreeable to both parties. This agreed upon timeframe will be recorded on the WVDRS-14.

3402.3 Administrative Review. When local reconciliation fails to yield a mutually acceptable resolution, administrative review will be offered. For complaints arising at the West Virginia Rehabilitation Center, the Assistant Director, WV Rehabilitation Center,

or designee, will be the reviewing official. For all other cases, the Assistant Director, Rehabilitation Program and Field Services, or designee, will be the reviewing official.

A. *Timeframe for Response.* The individual or individual's representative will have 5 working days upon receipt of the results of the Administrative Review in which to notify the Division whether he/she accepts the resolution offered or chooses to proceed to another review option. If the individual or individual's representative does not respond within 5 working days upon receipt of the results of the Administrative Review, it will be implicit that the resolution has been accepted and the dispute is resolved.

B. *Form of Notification.* The outcome of the Administrative Review will be recorded on the *WVDRS-14*, and will include a statement and dated signature from the individual indicating either the individual's acceptance of the outcome or the next level of review chosen.

C. *Extension of Timeframe.* If the individual or individual's representative elects to extend the 5 working day time limit on choosing the next review option, the individual or representative must notify the Division of the need for the extension within the five day limit. If an extension is requested the Division may extend the 60 calendar day time requirement to conduct the fair hearing to a period of time that is agreeable to both parties. This agreed upon timeframe will be recorded on the *WVDRS-14*.

3403 Resolution Following Informal Review. If a remedy negotiated through informal review is accepted by the individual and/or the individual's representative, and the request for review is withdrawn, the grievance will be considered resolved.

3404 Mediation. Individuals requesting a fair hearing will be offered the opportunity to resolve disputes through a mediation process. Mediation sessions are elective and not required prior to fair hearing. The individual may elect to proceed directly to fair hearing without benefit of mediation. The Division shall bear the cost of the mediation process. Mediation will not be used to deny or delay the right of an individual to an impartial hearing or any other rights afforded that individual under the Rehabilitation Act.

3404.1 Scheduling. If the individual elects to have a mediation session, either the Assistant Director, Rehabilitation Programs and Field Services (if the complaint originates from the field program) or the Assistant Director, WV Rehabilitation Center Services (if the complaint originates from the Center) shall notify the individual or the individual's representative in writing that a mediation session will be scheduled. Mediation sessions must occur within the 60-day time limit for conducting a fair hearing and do not extend the time limit for completion of the due process, except that either party may request a reasonable extension.

3404.2 Mediator. The Division will maintain a list of qualified mediators who are trained in effective mediation techniques and who: are not employees or family members of employees of the Division; are not members of the State Rehabilitation Council; have not

been involved previously in the vocational rehabilitation of the applicant or eligible individual; are knowledgeable of the vocational rehabilitation program and applicable federal and state laws and policies; and have no personal, professional, or financial interest that would be in conflict with the objectivity of the individual during mediation proceedings. The mediator will have responsibility for conducting the mediation sessions and for submitting a written report of the outcomes of the mediation to the Assistant Director, Rehabilitation Programs and Field Services, or the Assistant Director, WV Rehabilitation Center Services, as appropriate.

3404.3 Confidentiality. Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. The parties to the mediation process will be required to sign a confidentiality pledge prior to commencement of such process.

3405 Resolution Following Mediation. If a remedy negotiated through the mediation process is accepted by the individual and/or the individual's representative, and the request for fair hearing is withdrawn, the grievance will be considered resolved. If a remedy is not negotiated through the mediation process:

A. *Timeframe for Response.* The individual or individual's representative will have 5 working days upon receipt of the results of the Mediation in which to notify the Division whether he/she accepts the resolution offered or chooses to proceed to a Fair Hearing. If the individual or individual's representative does not respond within 5 working days upon receipt of the results of the Mediation, it will be implicit that the resolution has been accepted and the dispute is resolved.

B. *Form of Notification.* The *WVDRS-14* will include a statement and dated signature from the individual indicating either the individual's acceptance of the outcome of Mediation or the decision to proceed to Fair Hearing.

C. *Extension of Timeframe.* If the individual or individual's representative elects to extend the 5 working day time limit on choosing the next review option, the individual or representative must notify the Division of the need for the extension within the five day limit. If an extension is requested, the Division may extend the 60 calendar day time requirement to conduct the fair hearing to a period of time that is agreeable to both parties. This agreed upon timeframe will be recorded on the *WVDRS-14*.

3406 Fair Hearing. During the fair hearing, the individual will have opportunity to present evidence and witnesses, be represented by legal counsel or by an advocate, and be able to examine all witnesses and other sources of information and evidence.

3406.1 Scheduling. Either the Assistant Director, Rehabilitation Programs and Field Services, or Assistant Director, WV Rehabilitation Center Services, as appropriate, or the Impartial Hearings Officer shall notify the individual or the individual's representative in writing that a hearing will be scheduled. The Impartial Hearings Officer will assume

responsibility for scheduling, conducting, and reporting the fair hearing. The hearing will be scheduled so as to ensure that it will be conducted within 60 days of the Division's receipt of the individual's initial request for review, except that either party may request a reasonable extension. This agreed upon timeframe will be recorded on the *WVDRS-14*.

3406.2 Impartial Hearings Officer. The Impartial Hearings Officer will be a non-Division employed individual who is appointed by the Director on the basis of demonstrated ability in conducting hearings. The officer also will be a person who:

- A. Has not been involved in previous decisions regarding the dissatisfied vocational rehabilitation applicant or individual;
- B. Possesses background and knowledge of the delivery of vocational rehabilitation services;
- C. Is thoroughly familiar with provisions in the approved State Plan;
and,
- D. Has no personal, economic, or professional interest in the outcome of the hearing other than the proper application of federal and state laws, regulations, and policies.

3406.3 Setting Date, Time, and Place. The Impartial Hearings Officer will set the date, time, and place of the hearing. Immediately upon setting the date, time, and place of the hearing, the Impartial Hearings Officer will inform the parties. The parties will be informed by certified mail of the date, time, place, and other pertinent details.

3406.4 Withdrawal of Individual from Hearing. After receiving notice of the date, time, and place of the hearing, the individual may withdraw from the hearing at any time by giving written notice to the Impartial Hearings Officer. In turn, the Impartial Hearings Officer will notify all parties concerned, in writing, of the individual's withdrawal. The Counselor will file that notice in the case folder.

3406.5 Postponement of Hearing. After notice of the date, time, and place of the hearing has been published by the Impartial Hearings Officer, either party involved in the hearing may request a postponement. Postponements may be granted at the discretion of the Impartial Hearings Officer upon a determination that sufficient cause has been presented and both parties agree to the postponement. When a postponement is granted, the Impartial Hearings Officer will notify the parties by certified mail of the new date, time, and place of the hearing.

3406.6 Abandonment of Fair Hearing. Should the individual fail to appear for the hearing without giving prior notice of inability to be present, the hearing is considered to be abandoned. In such an instance, the Impartial Hearings Officer's report to the Division's

Director will state that the individual was not present, that the individual did not give notice of inability to be present, and that the hearing, therefore, is presumed abandoned without prejudice.

3406.7 Dismissal of Fair Hearing. During the course of the hearing, the individual and/or the individual's representative may request the Impartial Hearings Officer to dismiss the hearing. In such an instance, the Impartial Hearings Officer's report to the Division's Director will include a statement that the individual and/or the individual's representative requested that the hearing be dismissed and state the reasons for the request as announced by the individual and/or the individual's representative.

3406.8 Mailing of Impartial Hearings Officer's Decision to Individual. Within 30 days of completion of the fair hearing, the Impartial Hearings Officer will provide a full written report of findings, the decision, and grounds for the decision to the individual, and/or the individual's representative, and to the Division Director.

3406.9 Review of the Hearing Decision. The individual and/or the individual's representative and the Division may request review of the Hearing Officer's decision within 20 days after the decision.

3407 Reviewing Official. The Chief Official of the designated state agency, the Secretary of the West Virginia Department of Education and the Arts, serves as the Reviewing Official for the Division. If the Reviewing Official decides to review the decision made by the Hearing Officer, the Reviewing Official shall so notify the individual and/or the individual's representative in writing within 20 days of the mailing date of the Hearing Officer's decision, including notice that the individual and/or the Division will have the right to submit additional evidence and information pertaining to the matter under review.

3407.1 Reviewing Official's Decision.

A. If the Reviewing Official does not notify the individual and/or the individual's representative of intent to review the decision within 20 days, the Impartial Hearings Officer's decision will become final on the 21st day following its mailing date.

B. The Reviewing Official will not overturn or modify the Impartial Hearings Officer's decision unless s/he concludes, based on clear and convincing evidence, that the decision of the Impartial Hearings Officer is erroneous on the basis of being contrary to the State Plan or any state regulation or policy that is consistent with federal requirements.

C. The Reviewing Official will make a final decision with respect to the matter within 30 days and provide to the individual, the individual's representative, and the Division a full written report of the findings and grounds for such decision.

3407.2 Individual's Recourse. The decision of the Reviewing Official in the fair hearing is final and binding on the part of the Division. After the Reviewing Official's

decision is made, the individual's recourses for relief from within the Division are exhausted. Authority to overturn the Reviewing Official's decision rests with the courts. Any individual has the right to seek judicial review after all administrative reviews are exhausted. In the final decision, the Reviewing Official shall inform the individual of the right to review to any State or district court of the United States of competent jurisdiction for judicial review.

3408 Report to Rehabilitation Services Administration. The Division annually prepares and submits to the Rehabilitation Services Administration Commissioner a report containing:

- A. A description of state procedures for review;
- B. The number of reviews to the independent Impartial Hearings Officer and the Director, including type of complaint and the issues involved;
- C. The number of decisions by the Reviewing Official reversing in whole or in part the decision of the Impartial Hearings Officer; and,
- D. The number of decisions affirming the position of the individual assisted by the Client Assistance Program (CAP).