

TITLE 8 SOCIAL SERVICES
CHAPTER 11 ADULT PROTECTIVE SERVICES
PART 4 ADULT SERVICES

8.11.4.1 ISSUING AGENCY: Aging and Long-Term Services Department – Adult Protective Services Division.
[8.11.4.1 NMAC - Rp, 8.11.4.1 NMAC, 3/1/2012]

8.11.4.2 SCOPE: Protective services employees and contract providers and the general public.
[8.11.4.2 NMAC - Rp, 8.11.4.2 NMAC, 3/1/2012]

8.11.4.3 STATUTORY AUTHORITY: Adult Protective Services Act, Section 27-7-15 et seq. NMSA 1978, as amended; Public Health Act, Section 24-1-5L NMSA 1978, as amended; Probate Code, Section 45-5-301 et seq. NMSA 1978, as amended; Resident Abuse and Neglect Act, Section 30-47-1 et seq. NMSA 1978, as amended, and State Agency on Aging, Section 28-4-6 NMSA, as amended.
[8.11.4.3 NMAC - Rp, 8.11.4.3 NMAC, 3/1/2012]

8.11.4.4 DURATION: Permanent.
[8.11.4.4 NMAC - Rp, 8.11.4.4 NMAC, 3/1/2012]

8.11.4.5 EFFECTIVE DATE: March 1, 2012, unless a later date is cited at the end of a section.
[8.11.4.5 NMAC - Rp, 8.11.4.5 NMAC, 3/1/2012]

8.11.4.6 OBJECTIVE: To establish guidelines for the provision of adult services by the department that are consistent with statutory authority and legal mandates.
[8.11.4.6 NMAC - Rp, 8.11.4.6 NMAC, 3/1/2012]

8.11.4.7 DEFINITIONS:

A. “Ability to consent” means an adult’s ability to understand and appreciate the nature and consequences of the proposed protective services or protective placement, including the benefits, risks and alternatives to the proposed services or placement and to make or communicate an informed decision.

B. “Administrative hearing” is a formal process whereby a client receiving adult services can appeal a decision made by the department to modify or terminate services prior to the service plan’s expiration date.

C. “Administrative review” is an informal process, which may include an informal conference or may include only a review of the existing file. The administrative review does not create any substantive rights for the client.

D. “Adult day care” is the provision of contractual day care services for functionally impaired adults who have been abused, neglected or exploited or are at continued risk of being abused, neglected or exploited. Services are delivered in a licensed facility that provides structure and supervision.

E. “Aggrieved person” is someone who has been determined by the department to be abused, neglected or exploited and who has had his or her adult service plan for attendant care, home care or day care denied, modified or terminated.

F. “Assessment” is a process of completing structured and non structured interviews to acquire an understanding of multiple levels of the adult’s need and developing interventions within available resources, if appropriate.

G. “Attendant care” is the provision of temporary, non-medical personal care to a functionally impaired adult in his or her own home by a caregiver when no other service options exist.

H. “Eligibility” means the adult meets necessary criteria for adult services under this part.

I. “Emergency shelter/caregiver” is the placement of an adult in an appropriate facility or the use of a caregiver in the adult’s home to provide a temporary protected environment.

J. “Functional impairment” is the inability of an adult to perform independently some or most activities of daily living or instrumental activities of daily living.

K. “Home care services” are the provision of direct or contractual non-medical personal care and light housekeeping services for adults who have physical or mental disabilities that cause a functional disability to meet their basic care or home maintenance needs and who otherwise meet the criteria established in these regulations.

L. “Incapacitated person” means any adult with a mental, physical, or developmental condition that substantially impairs the adult’s ability to provide adequately for the adult’s own care or protection.

M. “Secretary” is the secretary of the aging and long-term services department or the secretary’s designee within the ALTSD.

N. “Service plan” a written, individualized plan defining specific services for a client in a specific timeframe.

[8.11.4.7 NMAC - Rp, 8.11.4.7 NMAC, 3/1/2012]

8.11.4.8 PURPOSE OF ADULT SERVICES: The purpose of adult services is to mitigate adult abuse, neglect and exploitation, to prevent inappropriate or premature institutionalization and to assist clients to remain safely in their home or the least restrictive environment possible.

[8.11.4.8 NMAC - Rp, 8.11.4.8 NMAC, 3/1/2012]

8.11.4.9 TYPES OF ADULT SERVICES: The department, based upon the adult’s eligibility and the availability of resources, provides or arranges for the following services for adults:

- A.** emergency caregiver/shelter care services;
- B.** home care services;
- C.** attendant care services; and
- D.** adult day care.

[8.11.4.9 NMAC - Rp, 8.11.4.9 NMAC, 3/1/2012]

8.11.4.10 GENERAL PROVISIONS:

A. Any adult who is not determined to be decisionally incapacitated may refuse services.
B. The department determines eligibility for specific services based on client need, client income and the availability of resources and available funding for each type of service under this part.

(1) The department assesses and determines the adult’s need for services.

(2) Adults who have been determined through a department investigation to have been abused, neglected or exploited and are assessed to continue to be at risk may be eligible to receive services on a short term basis without regard to income, as determined necessary by the department.

(3) Except for emergency shelter/caregiver services, the department utilizes the institutional medicaid income criteria for the determination of financial eligibility for services.

C. The department completes a recertification of income for adult services eligibility on an annual basis.

D. Any denial, modification or termination of adult services may be reviewed by the department pursuant to the administrative review process described in this part.

E. The department coordinates its adult protective services in order to ensure that there is no duplication of like services for the same hours of the same day.

F. Clients receiving APS adult services have the following responsibilities:

- (1) assisting with applying for waiver services eligibility, including medicaid and financial eligibility;
- (2) reporting on whether he or she needs help; and
- (3) appropriately using services paid by state funds.

G. Clients may be terminated from APS services for the following reasons:

- (1) moving out of the program service area;
- (2) consistently not complying with the service plan and is a person with decision-making capacity;
- (3) consistently refusing service or not allowing the agency to enter the home to provide services;
- (4) posing a significant risk to self or others;
- (5) demonstrating a pattern of verbal or physical abuse of attendants or agency personnel, i.e., use of

vulgar or explicit language, verbal or physical sexual harassment, excessive use of force, verbal or physically intimidating threats, and illegal use of narcotics or alcohol abuse;

(6) refusing to provide accurate financial information, providing false information or illegally transferring assets to receive services under this part;

(7) ceasing to meet the financial or non-financial criteria; or

(8) ceasing to meet the level of care criteria.

[8.11.4.10 NMAC - Rp, 8.11.4.10 NMAC, 3/1/2012]

8.11.4.11 CASE MANAGEMENT:

- A. The department provides short term case management of adult services.
 - B. The department conducts, and documents, at least quarterly, face-to-face visits with adults receiving home and attendant care services.
 - C. The department utilizes staffings and supervisory conferences to develop and review plans and to determine the need for continuation of services for each adult receiving services.
- [8.11.4.11 NMAC - Rp, 8.11.4.11 NMAC, 3/1/2012]

8.11.4.12 SERVICE PLAN:

- A. The department develops a written individualized service plan for each adult receiving services.
 - B. The department develops a service plan within 30 days of the dispositional staffing in which an APS supervisor and worker discuss the applicability of adult services to the client.
 - C. The department reassesses the service plan and the need for ongoing services within a minimum of 90 days after services commence.
- [8.11.4.12 NMAC - Rp, 8.11.4.12 NMAC, 3/1/2012]

8.11.4.13 EMERGENCY SHELTER/CAREGIVER SERVICES:

- A. Any adult who has been or is at continued risk of being abused, neglected or exploited may be eligible to receive emergency shelter/caregiver services if he or she requires a protected environment to maintain health and safety.
 - (1) Emergency shelter/caregiver services are provided without regard to income.
 - (2) Emergency shelter/caregiver services are utilized only in emergency situations and are temporary until a permanent safe environment can be located.
 - B. The adult may select his or her caregiver if the caregiver is a capable adult approved by the department prior to commencement of services.
 - C. The department may provide emergency shelter/caregiver services not exceeding 30 days unless an exception is approved by the department in writing for a specified longer period of time.
 - D. Placement is provided in the adult's home or an appropriate licensed facility or safe environment. Placement in a correctional facility is not permitted.
 - E. When the department enters into a written agreement with the facility or caregiver the agreement will include:
 - (1) the services to be provided;
 - (2) the rate of payment for the services; and
 - (3) the time frame that the service will be provided.
 - F. The department provides payment for placements based on the rate normally charged by the facility not to exceed the medicaid rate.
 - G. The department provides payment for caregivers at a predetermined rate.
 - H. The department places individuals pursuant to the Adult Protective Services Act.
- [8.11.4.13 NMAC - Rp, 8.11.4.13 NMAC, 3/1/2012]

8.11.4.14 HOME CARE SERVICES:

- A. Home care services may be provided or terminated by the department as resources and funding allows.
- B. Any incapacitated adult who is substantiated for abuse, neglect or exploitation may be eligible for home care. On occasion, an incapacitated adult, who is not substantiated for abuse, neglect or exploitation, may be considered for home care services if the department determines that the adult remains at imminent risk of abuse, neglect or exploitation. The following criteria apply to adults considered for home care:
 - (1) the adult must meet institutional care medicaid eligibility; and
 - (2) the adult must have a documented medical incapacity that limits their activities of daily living and their ability to provide their own care at home.
- C. The department, at its discretion, may provide home care by the department staff or through agencies under contract to the department.
- D. Adults receiving home care through adult protective services shall apply for long term care services through the appropriate medicaid programs or waiver program and, when approved to receive medicaid or waiver services, the adult must transition to the waiver service and discontinue home care through adult protective services. Adult protective services will discontinue its home care when the client is approved to receive medicaid or waiver home care.

[8.11.4.14 NMAC - Rp, 8.11.4.14 NMAC, 3/1/2012]

8.11.4.15 ATTENDANT CARE SERVICES:

- A.** Attendant care may be provided by the department as resources and funding allows.
- B.** Attendant care is non-medical personal care provided to a functionally impaired adult in their own home by a caregiver. An adult who is substantiated for or is at imminent risk of abuse, neglect or exploitation may be eligible for attendant care if no other care options exist and if attendant care will reduce the likelihood of the adult being admitted to a nursing home.
 - (1)** The adult must meet institutional care medicaid eligibility.
 - (2)** The adult must have a documented medical incapacity that significantly limits their activities of daily living and their ability to provide all of their own care at home.
- C.** Attendant care services are considered a temporary intervention and shall be discontinued when long-term services become available.
- D.** Adults receiving attendant care shall apply for long-term care services through the appropriate medicaid or waiver and, when approved to receive those services, the adult must transition to the medicaid or waiver service and discontinue attendant care through adult protective services. Adult protective services can discontinue its attendant care when the client begins receiving medicaid waiver attendant care.
- E.** The department may provide attendant care services based upon its assessment of need. The adult seeking attendant care services provides a medical report to the department documenting the client's medical condition and supporting the need for attendant care services.
- F.** The department approves the number of hours of service based upon the department adult protective service worker's assessment of the needs of the adult, the level of care criteria and the availability of funding.
- G.** Services are provided by individuals chosen and approved by the client and who are not department employees.
 - (1)** The department requires a criminal background check on all attendant care providers as required by law; a review of any substantiations of abuse, neglect or exploitation; and a review of the employee abuse registry.
 - (2)** Individuals selected by the recipient of attendance care services shall meet the following criteria established by the department:
 - (a)** have the physical ability to provide the services;
 - (b)** be age 18 or older;
 - (c)** is not currently listed on the employee abused registry; and
 - (d)** have been determined by APS, after consideration of the facts and circumstances, to be a safe and appropriate caregiver.
- H.** The department enters into a written agreement with the adult and the attendant care provider which specifies the following:
 - (1)** the services provided by the attendant;
 - (2)** the adult's/family's responsibilities;
 - (3)** the time frames for the provision of the service; and
 - (4)** that the failure of the attendant care provider to comply with the agreement will result in the termination of services or replacement of the provider.
- I.** The department makes payment at the established rates following the receipt of documentation of service delivery.

[8.11.4.15 NMAC - Rp, 8.11.4.15 NMAC, 3/1/2012]

8.11.4.16 ADULT DAY CARE:

- A.** Any incapacitated adult who has been substantiated for or is at risk of abuse, neglect or exploitation may be eligible for adult day care if adult day care will reduce the likelihood of future abuse, neglect or exploitation.
 - (1)** the adult must meet the institutional medicaid income eligibility.
 - (2)** the adult must have a documented medical incapacity that limits their activities of daily living or significantly limits their instrumental activities of daily living.
- B.** Adult day care services can only be delivered in a licensed facility that provides structure and supervision.

[8.11.4.16 NMAC - Rp, 8.11.4.16 NMAC, 3/1/2012]

8.11.4.17 DOCUMENTATION:

A. The department or contract provider documents case work activities and maintains records concerning services provided to all individuals receiving adult services.

B. The records created and maintained by the department or by the contract provider on behalf of the department are confidential and are only released as allowed for by law.

[8.11.4.17 NMAC - Rp, 8.11.4.18 NMAC, 3/1/2012]

8.11.4.18 ADMINISTRATIVE REVIEW: The department will provide an informational administrative review of its decision to deny, modify or terminate the adult's services. The aggrieved party must request a review in writing to the adult protective services division director within 15 days of receiving notice of the department's intent to deny, modify or terminate services. The request for a hearing shall be mailed or hand delivered to the specific office of the adult protective division director or to an alternate address, if set forth in the notice.

A. In the written request for review, the aggrieved party shall state the reason(s) why he or she should be eligible to receive the services in question and include any supporting documentation that has not been previously provided or considered by the department.

B. Upon receipt of the aggrieved party's request for the review, the department will reconsider its decision and inform the aggrieved party within 15 business days of the decision to affirm or reverse the denial, modification or termination of the services in question. The department's decision will be in writing. Except for a denial of service, the department will inform the aggrieved party of their right to request an administrative hearing before the secretary in accordance with 8.11.4.19 NMAC for such modification or termination. An administrative review of a denial shall be final and is not appealable unless otherwise provided by law. In cases of modification or termination of services, the aggrieved party may file a written request for an administrative hearing within 10 business days after receipt of the department's letter of decision on the administrative review.

[8.11.4.18 NMAC - N, 3/1/2012]

8.11.4.19 ADMINISTRATIVE HEARING:

A. If services are modified or terminated prior to the expiration date of the service plan and an administrative review has not resolved the matter, the aggrieved party may submit a written appeal of the administrative reviewer's decision to the secretary within 15 calendar days after the decision is issued, in accordance with 8.11.4.18 NMAC.

B. If the aggrieved party timely appeals the reviewer's administrative decision pursuant to 8.11.4.18 NMAC, the office of the secretary shall docket the appeal on the date received and shall provide notice of the appeal within 15 days of its receipt to the aggrieved party and the adult protective services division director. The secretary may hear the appeal or designate a hearing officer to hear the appeal and make a recommended decision to the secretary.

C. The secretary or the secretary's designee shall prepare a notice of hearing setting forth the date, time and place of the hearing. The notice of hearing shall be sent to the parties by regular mail within 15 days of the department sending notice of appeal to them. The hearing shall be held no sooner than 15 days and no later than 30 days of the date the notice of hearing is mailed to the parties. Either party may request a continuance of the hearing for good cause. If a hearing is continued it shall be rescheduled at the earliest date and time available to the parties.

[8.11.4.19 NMAC - N, 3/1/2012]

8.11.4.20 PRE-HEARING:

A. Upon receipt of the request for administrative hearing, the hearing officer shall establish an official record which contains all the filed notices, pleadings, briefs, recommendations, correspondence, documents and decisions.

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

C. The hearing officer may consolidate or join cases if there is commonality of legal issues or parties and if it would expedite final resolution of the cases and would not adversely effect the interests of the parties nor violate the confidentiality provisions of the Adult Protective Services Act. The hearing officer also may join the appeals of an appellant who has two or more appeals pending.

D. Upon request of either party or upon the hearing officer's own motion, the hearing officer may require a pre-hearing order or may schedule a pre-hearing conference at a time and place reasonably convenient to all parties to:

- (1) limit and define issues;
- (2) discuss possible pre-hearing dispositions;
- (3) identify and limit the number of witnesses; and
- (4) discuss such other matters as may aid in the simplification of evidence and disposition of the proceedings.

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

F. No offer of settlement made in a pre-hearing conference is admissible as evidence at a later hearing. Stipulation and admissions are binding and may be used as evidence at the hearing. Any stipulation, settlement or consent order reached between the parties must be in writing and must be signed by the hearing officer and the parties, and their attorneys if they are represented by counsel.

G. The hearing officer may dismiss an appeal with prejudice in accordance with the provisions of a settlement agreement approved by the secretary, upon a motion to withdraw the appeal by the aggrieved party or their legal representative at any time before the hearing.

[8.11.4.20 NMAC - N, 3/1/2012]

8.11.4.21 CONDUCT OF THE HEARING:

A. Failure of a party to appear on the date and time set for the hearing, without good cause shown, constitutes default and the hearing officer shall so notify the parties in writing and enter a default judgment against the party.

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

C. Any party may appear at the hearing through a licensed attorney, provided the attorney has made a written entry of appearance within a reasonable period of time prior to the hearing date.

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

E. Oral evidence is to be taken only under oath or affirmation.

F. Generally, except as provided in the following subsection or waived by the party, the order of presentation for the hearing is as follows:

- (1) opening of proceedings and taking of appearances by the hearing officer;
- (2) disposition of preliminary and pending matters;
- (3) opening statement of the department;
- (4) opening statement of the appellant;
- (5) department's case-in-chief;
- (6) appellant's case-in-chief;
- (7) department's rebuttal;
- (8) department's closing argument;
- (9) appellant's closing argument; and
- (10) closing of the proceeding by the hearing officer.

G. The burden of proof in matters arising from denial, reduction or termination of adult services lies with the department, which must prove its case by a preponderance of evidence.

H. The hearing officer shall admit only evidence that is relevant to the issue appealed.

I. The hearing is to be recorded by a sound-recording device under the supervision of the hearing officer. No other recording of the hearing, by whatever means, is permitted without the approval of the hearing officer.

[8.11.4.21 NMAC - N, 3/1/2012]

8.11.4.22 POST-HEARING:

A. The hearing officer may require or permit written closing post-hearing briefs and proposed findings of facts and conclusions of law.

B. The hearing officer shall submit a recommended decision to the secretary as soon as practicable, but no later than 20 working days after the expiration of any time set for the submittal of any last post-hearing proposed findings of facts and conclusions of law, arguments or briefs.

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

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

(2) If the secretary disagrees with the findings and conclusions of the hearing officer, the secretary shall issue a separate order which clarifies the findings and conclusions at issue and the reasons a different decision is warranted. An appeal of the final decision by the secretary may be made in accordance with applicable law.

D. The secretary shall render a final determination as soon as practicable but no later than 15 working days after submission of the hearing officer's recommended decision. A copy of the final decision shall be mailed or emailed to each party or attorney of record immediately upon entry of the secretary's final decision. The secretary's decision is final and non-appealable except as otherwise provided by law.

[8.11.4.22 NMAC - N, 3/1/2012]

HISTORY OF 8.11.4 NMAC:

Pre-NMAC History: The material in this Part was derived from that previously filed with the State Records Center and Archives under:

SSD 9.0.0, Domestic Violence - Definition and Goal Statement, filed 8/22/86.
SSD 9.1.0, Domestic Violence - General Provisions, filed 8/22/86.
SSD 9.1.0, Domestic Violence - General Provisions, filed 1/29/87.
SSD 9.1.0, Domestic Violence - General Provisions, filed 6/18/87.
SSD 9.1.0, Domestic Violence - General Provisions, filed 3/20/90.
SSD 9.2.0, Domestic Violence - General Guidelines, filed 8/22/86.
SSD 9.3.0, Domestic Violence - Department Responsibilities, filed 8/22/86.
SSD 10.0.0, Social Services - Definition and Goal Statement, filed 8/22/86.
SSD 10.0.0, Social Services - Definition and Goal Statement, filed 6/18/87.
SSD 10.0.0, Social Services - Definition and Goal Statement, filed 9/18/90.
SSD 10.1.0, Social Services for Adults - General Provisions, filed 8/22/86.
SSD 10.1.0, Social Services for Adults - General Provisions, filed 1/29/87.
SSD 10.1.0, Social Services for Adults - General Provisions, filed 6/18/87.
SSD 10.1.0, Social Services for Adults - General Provisions, filed 9/18/90.
SSD 10.2.0, Social Services for Adults - General Guidelines, filed 8/22/86.
SSD 10.2.0, Social Services for Adults - General Guidelines, filed 9/18/90.
SSD Rule #409.0000, Protective Services to Adults, filed 11/10/81.
SSD 10.3.0, Social Services for Adults - Department Responsibilities, filed 8/22/86.
SSD 10.3.0, Social Services for Adults - Department Responsibilities, filed 11/18/87.
SSD 10.3.0, Social Services for Adults - Department Responsibilities, filed 3/28/89.
SSD 10.3.0, Social Services for Adults - Department Responsibilities, filed 9/18/90.
SSD 10.3.0, Social Services for Adults - Department Responsibilities, filed 11/5/91.
SSD 10.4.0, Social Services for Adults - Provide Services, filed 9/18/90.
SSD 11.0.0, Day Care for Handicapped Adults - Definition and Goal Statement, filed 8/22/86.
SSD 11.0.0, Day Care for Handicapped Adults - Definition and Goal Statement, filed 6/18/87.
SSD 11.1.0, Day Care for Handicapped Adults - General Provisions, filed 8/22/86.
SSD 11.1.0, Day Care for Handicapped Adults - General Provisions, filed 6/18/87.
SSD 11.1.0, Day Care for Handicapped Adults - General Provisions, filed 1/13/88.
SSD 11.2.0, Day Care for Handicapped Adults - General Guidelines, filed 8/22/86.
HSSD 74-12, Social Services Manual, filed 3/11/74.
SSD A12.0.0, Home Care Services - Definition and Goal Statement: Home Care, filed 8/22/86.
SSD A12.1.0, Home Care Services - General Provisions: Home Care, filed 8/22/86.
SSD A12.1.0, Home Care Services - General Provisions: Home Care, filed 6/18/87.
SSD A12.1.0, Home Care Services - General Provisions: Home Care, filed 1/13/88.
SSD A12.2.0, Home Care Services - General Guidelines, filed 8/22/86.
SSD A12.2.0, Home Care Services - General Guidelines, filed 1/13/87.
SSD A12.3.0, Home Care Services - Department Responsibilities, filed 8/22/86.

History of Repealed Material:

8.11.4 NMAC, Adult Services, filed 4/14/2003 - Repealed effective, 3/1/2012.