



# **OFFICE OF HEARINGS HEARING OFFICER APPEAL PROCEDURES**

**April 25, 2025**

**Version 1.0**



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## **OFFICE OF HEARINGS**

### **HEARING OFFICER APPEAL PROCEDURES**

#### **I. OVERVIEW**

##### **A. Introduction**

The Centers for Medicare & Medicaid Services (CMS), Offices of Hearings and Inquiries (OHI), Office of Hearings (OH), Division of Hearing Officer Services (DHOS) is an impartial hearing office that adjudicates institutional-level appeals.

Congress has granted agencies broad discretion to promulgate procedural rules governing adjudications. *See* 5 U.S.C. § 559 (“Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise.”).

OH Hearing Officer Procedures will be referred to as “Procedures.” These Procedures provide instructions, guidance, and formatting requirements for hearings before the OH Hearing Officer or CMS Reviewing Official (referred to herein as “Hearing Officer”). The object of these Procedures is to provide consistency, administrative efficiency, and direction to all party participants before the Hearing Officer. These Procedures are meant to be read in conjunction with regulations, OH directives, and other authorities. Examples of appeal types over which the Hearing Officer presides include (but are not limited to) the following:

- Accountable Care Organization Shared Losses (42 C.F.R. Part 425, Subpart I);
- Affordable Care Act (ACA) Financial Appeals (45 C.F.R. § 156.1220; 45 C.F.R. § 153.630(d)(3));
- Cost Plans Reimbursement Appeals (e.g., Cost Health Maintenance Organizations (HMOs)) (42 C.F.R. §§ 417.576(d)(4), § 405.1801(b)(2)(iii)-(iv));
- Final Settlement Payment Appeals (42 C.F.R. §§ 422.529 (MA) and 423.522 (Part D));
- Group Health Plan Non-Conformance Appeals (42 C.F.R. §§ 411.120-124);
- Health Maintenance Organization Competitive Medical Plan (HMO/CMP) Contract Related Appeals (42 C.F.R. § 417.640 (contract denial), § 417.492 (non-renewal), § 417.500 (intermediate sanctions, non-monetary), § 417.494 (termination));
- Medicaid State Plan Materials / Compliance Determinations (i.e., SPAs) (SSA § 1116(a)/42 U.S.C. § 1316, 42 C.F.R. §§ 430.60-430.104);
- Medicare Administrative Contractor (MAC) Termination Appeals (42 C.F.R. § 421.128 (Intermediary), 42 C.F.R. § 421.205 (Carrier));
- Medicare Advantage/Prescription Drug Plan (MA/PD) Contract Related Appeals (42 C.F.R. §§ 422.641-422.696 (Part C), 42 C.F.R. §§ 423.641-423.668 (Part D));
- Medicare Limited Income Newly Eligible Transition (LI NET) Program (42 C.F.R. §§ 423.2520 (terminations) and 423.2524 (payment appeals));
- Medicare Part D Reconciliation Payment Appeals (42 C.F.R. § 423.350);

- Medicare Provider Cost Report Reviewing Official (< \$10K) (42 C.F.R. § 405.1834);
- Organ Procurement Organization (OPO) Decertification Appeals (42 C.F.R. § 486.314);
- Organ Procurement Organization (OPO) Reimbursement Appeals (42 C.F.R. § 413.200(g), 42 C.F.R. § 405.1834);
- Programs of All-Inclusive Care for the Elderly (PACE) Sanction and Termination Appeals (42 C.F.R. § 460.54, 42 C.F.R. § 460.56(a));
- Retiree Drug Subsidy (RDS) Appeals (42 C.F.R. § 423.890); and
- Termination of Discount Program Agreement Appeals (42 C.F.R. § 423.2345).

OH may periodically update these Procedures and reserves the right to infrequently issue orders and/or alerts, as necessary. For such updates and issuances, parties must check the Hearing Officer website at <https://www.cms.gov/medicare/regulations-guidance/cms-hearing-officer>.

## **B. Hearing Officer's Authority**

The Hearing Officer may review jurisdiction on their own motion at any time. Any appeal/matter found to be outside the Hearing Officer's jurisdiction will be dismissed. While a motion challenging jurisdiction may be raised at any time during the appeal, for judicial economy, the Hearing Officer strongly encourages filing any challenges as soon as possible. The parties cannot waive jurisdictional requirements.

## **C. Accessibility Standards**

The Hearing Officer is committed to making the appeals process accessible to people with disabilities and strives to meet or exceed the requirements of § 508 of the Rehabilitation Act (codified at 29 U.S.C. § 794d), as amended in 1998. If the electronic appeals system cannot be accessed due to a disability, please contact our Section 508 Team via email at [508Feedback@cms.hhs.gov](mailto:508Feedback@cms.hhs.gov). For more information on CMS Accessibility and Compliance with Section 508, see the CMS Accessibility & Nondiscrimination for Individuals with Disabilities Notice at <https://www.cms.gov/about-cms/web-policies-important-links/accessibility-nondiscrimination-disabilities-notice>.

If accommodations are required at any time during the appeal process, including at a hearing, contact your Hearing Officer through the Office of Hearings Case and Document Management System (OH CDMS). If you cannot access the electronic appeals system, contact the OH CDMS Help Desk at 1-833-783-8255 or email [helpdesk\\_ohcdms@cms.hhs.gov](mailto:helpdesk_ohcdms@cms.hhs.gov).

## **II. OFFICE OF HEARINGS CASE AND DOCUMENT MANAGEMENT SYSTEM**

### **A. Parties' Submissions to the Hearing Officer through OH CDMS**

OH CDMS is a web-based portal for parties to electronically file and maintain their cases and to correspond with the Hearing Officer. Registration to use OH CDMS is required prior to filing an appeal request. Therefore, the parties are encouraged to complete registration for OH CDMS as early as possible in the timely filing period as it is a multi-step process that involves obtaining secure access to both the web-based portal and OH CDMS. Access to specific cases is limited to the parties of each case, including representatives. OH CDMS will notify the parties of all submissions (e.g., appeal requests, correspondence, briefs, exhibits, motions, Administrative Record or medical records) into the system.

All case submissions must be filed electronically using OH CDMS. Likewise, questions about a case must be filed in OH CDMS to ensure that the opposing party is notified of the question/communication. The timing of data entry and document uploads to OH CDMS is captured in OH CDMS via a Confirmation of Filing/Submission document. The system-generated notice confirming the filing will satisfy the requirement for service on the opposing party. Electronic submissions through OH CDMS will be accepted as timely filed until 11:59 p.m. Eastern Time on the filing due date. Please consult the OH CDMS Hearing Officer Module - User Manual for further instructions on how to file documents and navigate within OH CDMS.

Password protected documents must not be filed in OH CDMS.

Refer to the webpage at <https://www.cms.gov/medicare/regulations-guidance/hearing-officer/hearing-officer-electronic-filing> to access links for the following:

- The CMS Salesforce Enterprise Integration (SEI) Portal. — The CMS SEI portal is the website portal through which OH CDMS may be accessed.
- The OH CDMS External Registration Manual. — This manual provides instructions on how to initially register as a user of OH CDMS through the CMS SEI Portal. Be aware that you must first register for access to the SEI portal before you can proceed with registering for access to OH CDMS.
- The OH CDMS Hearing Officer Module User Manual. — This manual, with its related supplements, provides instruction on how to properly file appeal-related documents within OH CDMS and manage your account. If there are any inconsistencies between the Hearing Officer OH CDMS User Manual and the Office of Hearings Hearing Officer Appeal Procedures, then the Office of Hearings Hearing Officer Appeal Procedures control.
- The OH CDMS Hearing Officer Module Quick Start Appeal Filing Instructions. — These abbreviated instructions address filing an initial appeal request within OH CDMS and assume that the user has already registered for access to OH CDMS.

The manuals and other documents on this webpage will be revised as necessary to reflect modifications and enhancements to OH CDMS. It is the user's responsibility to check regularly for updates, modifications, and changes to the OH CDMS Hearing Officer Module User Manual.

For any technical system issues, please contact the OH CDMS Help Desk at 1-833-783-8255 or email [helpdesk\\_ohcdms@cms.hhs.gov](mailto:helpdesk_ohcdms@cms.hhs.gov).

**B. Exemptions to Electronic Filing**

The Hearing Officer recognizes that, in limited circumstances, it may be necessary for a party to request to file an appeal or other documents in an existing case(s) outside of OH CDMS. A party who desires an exemption to the electronic filing requirement must file a request as described below. An exemption may be granted for a specified period of time or on a permanent basis. If the Hearing Officer grants a request, then the Hearing Officer will explain the scope and duration of the exemption.

- **Disability.** — If filing through the electronic appeals system cannot be completed or is materially hindered due to a disability (*see* Procedure I.C.), the party should contact the Hearing Officer at least five (5) calendar days prior to the filing deadline at the email or number listed below.
- **Extraordinary Circumstances.** — A party may file a request for an OH CDMS exemption due to extraordinary circumstances. Except in cases of impossibility, the request must be filed via email at [HearingOfficer@cms.hhs.gov](mailto:HearingOfficer@cms.hhs.gov) and received by the Hearing Officer at least five (5) calendar days prior to any filing deadline(s) impacted by the extraordinary circumstances. If a party is unable to file by email, please contact the OH CDMS Help Desk at 1-833-783-8255.

**C. All Hearing Officer Issuances will be Sent through OH CDMS**

The Hearing Officer utilizes OH CDMS to send emails notifying the parties of all Hearing Officer issuances, including but not limited to, the Acknowledgement Letter, Request for Information, Notice of Hearing, jurisdictional and substantive decisions, etc. The email notification will include an attachment containing the issuance. Hearing Officer issuances may also be viewed within the OH CDMS case record.

**D. Deadline Extension Due to Technical Difficulties with Electronic Filing**

The Hearing Officer will set deadlines for filings in existing appeals. If a party experiences technical issues during filing within OH CDMS (including technical issues related to becoming a registered user), they should seek assistance from the OH CDMS Help Desk both to document their issue and resolve it prior to the set deadline. To the extent the issue cannot be resolved by the set deadline and the party submits a late filing, the party should document their issues and submit their filing electronically within twenty-four (24) hours of the issue being resolved by the Help Desk. As part of this filing, the party must request an extension due to technical difficulties and provide satisfactory proof to establish good cause for the late filing. In this regard, the request should:

- Describe the technical issue;
- Describe when the issue was identified;
- Describe efforts to resolve the issue;



- Identify the OH CDMS Help Desk ticket number opened to address the issue;
- Include a copy of the notice from the OH CDMS Help Desk confirming that the technical issue was resolved; and
- Confirm whether there are any other registered users in the case representative's organization and, if so, explain why the other user(s) could not make the filing.

If the Hearing Officer finds good cause for the requested extension, then the Hearing Officer will accept the filing as timely. Note that, for purposes of this Procedure, an extension may not be based on administrative oversight, an ongoing discussion for administrative resolution, a change in case representative, or scheduled maintenance for OH CDMS.

### **III. GENERAL REQUIREMENTS**

#### **A. Case Representative and OH CDMS Access**

##### **1. Case Representative**

For OH CDMS purposes, each party may designate a case representative. There may only be one case representative per party. The case representative may be an external individual (e.g., attorney or consultant) or an internal staff member (e.g., employee or officer of the Petitioner or its parent organization).

All actions taken by the case representative are considered to be those of the party and notice of any action or a decision sent to a case representative has the same effect as if it had been sent to the party itself. The email address of the case representative for each party is the only recipient of notifications issued via OH CDMS. Therefore, the case representative should regularly check their email (including any filtered email) to ensure they do not miss notifications related to their pending case(s) (e.g., notice of Hearing Officer deadlines, Hearing Officer rulings or decisions, or documents filed by the other party).

The case representative is responsible for ensuring their contact information is current, including a current email address and phone number.

##### **2. Change of Case Representation**

If the Petitioner wishes to change its case representative, the required Change Representative letter must be uploaded into OH CDMS. See OH CDMS Hearing Officer Module User Manual for complete instructions on how to change the representative.

##### **3. Secondary Case Representative**

The Hearing Officer recognizes that parties may elect to use a team of secondary representatives along with the official case representative through the lifecycle of the case. Examples include multiple attorneys signing a brief or appearing at hearing. If a secondary representative is employed by the same organization as the official case representative and is registered in OH CDMS, that representative maintains the ability to view all case materials within OH CDMS

and file submissions as well. However, such case representative will not receive the notifications described in the paragraph above.

If a party elects to use a secondary case representative who is not employed by the official case representative's employer, such secondary representative will not have access to OH CDMS.

The official representative is ultimately responsible for ensuring that such co-representative receives copies of all filings.

## **B. Title, Caption and File Naming Convention**

### **1. Title**

Each document should contain a title which includes the party's name and describes the document, e.g., CMS' Motion to Strike, Plan's Reply Brief, Parties' Joint Stipulations.

### **2. Caption**

All party filings and correspondence must contain the following information in the caption or Re: line for the filing:

- The docket number (except for the initial hearing request);
- The name of the Petitioner;
- Petitioner contract number;
- The contract year(s) being appealed; and
- Reason for communication, i.e. Request for Extension.

### **3. File Naming Convention**

The electronic file naming convention should be as follows:

XXXX.XX.XX [Year.Month.Date] [Petitioner Name], [Description of Submission]

For example:

2024.06.02 ABC Plan, Plan's Appeal Request

2024.07.09 XYZ Plan, CMS' Initial Brief

## **C. Confidential and Proprietary Information**

The Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and the Privacy Act of 1974 requires a covered entity and its business associates to make reasonable efforts to limit the use, disclosure, and requests for protected health information (PHI) or personally identifiable information (PII) to the minimum necessary to accomplish the intended purpose. While the Privacy Rule permits uses and disclosures for litigation, subject to certain conditions, such information is generally not necessary for documentation submitted to the Hearing Officer.

It is the party's responsibility to carefully review their documents to ensure that they do not contain patient names and identifiers, including but not limited to Social Security Numbers, addresses, or other information that identifies individuals. If the parties need to include materials with such information they should redact (i.e., untraceably remove) the information unless the party believes that the confidential information itself is necessary to support its legal position or redacting information would be overly burdensome. If the party does not redact the information, the party must notify the Hearing Officer by filing a notice in OH CDMS providing the reason why the party believes the material should not be redacted and specifying where the information is located.

In addition, any exhibits that contain proprietary or confidential information must be clearly identified prior to filing the exhibits in OH CDMS.

Password protected documents must not be filed in OH CDMS.

#### **D. Foreign-Language Documents and Translations**

All documents filed with OH should be in the English language or accompanied by an authenticated English translation.

An affidavit in English by a person who does not understand English must include a separate translator's affidavit under oath stating that the underlying affidavit has been read to the person in a language that the person understands and that, to the best of the translator's knowledge, the affiant understood it before signing. The translator's affidavit must also state facts demonstrating that the translator is competent to translate the language of the witness as well as a representation that the interpretation was true and accurate to the best of the translator's abilities.

A translator's affidavit authenticating the translation of a foreign-language document must be typed, signed by the translator, and identify and accompany the foreign language document. If a translator's affidavit is filed in connection with the translation of multiple documents, the certification must specify the documents covered by the translator's affidavit. A translator's affidavit must include facts providing a basis to conclude that the translator is competent to translate the language of the document and a representation that the translation is true and accurate to the best of the translator's abilities.

A translated document accompanied by a proper translator's affidavit is admissible in the adjudication to the same extent as it would be if it were not translated.

In the alternative, parties may submit a joint stipulation regarding an agreed upon translation.

#### **E. Due Dates - Nonwork Days**

If the due date falls on a Saturday, a Sunday, a federal legal holiday or on any other day all or part of which is declared to be a nonwork day for federal employees by statute or Executive Order, or a day on which the Hearing Officer is unable to conduct business in the usual manner (e.g., if OH CDMS were down for the entire last day of a deadline), the deadline becomes the next day

that is not one of the aforementioned days. 42 U.S.C. § 1395ii; Social Security Act § 216(j); *see* Rule 6(a) of the Federal Rules of Civil Procedure.

#### **IV. FILINGS**

##### **A. Appeal Request**

Petitioners must timely file a letter requesting review of the adverse final determination that they wish to challenge. The case representative filing the appeal request on behalf of a Petitioner must:

- Identify the Petitioner;
- Identify the affected contract year or appealed period;
- Identify the date the final determination was issued;
- Include a copy of the adverse final determination decision being appealed;
- Ensure that the appeal request meets all the applicable regulatory requirements for the corresponding appeal type (e.g., Retiree Drug Subsidy appeals, MA PD contract determinations, cost plan reimbursement cases). This includes, where applicable, specifically identifying those aspects of the final determination that the Petitioner is challenging.

##### **B. Motion to Consolidate Cases**

The parties may request consolidation of cases that have identical factual or legal issues or related parties. The parties should file such a request through OH CDMS (with a copy of the request in each impacted docket number) and indicate why consolidation is appropriate and whether the opposing party agrees that the consolidation should be granted. If the Hearing Officer grants the consolidation of cases, the Hearing Officer will designate a lead case and the parties will only file materials in the lead case (as opposed to all of the individual cases). Additionally, if a consolidation is granted, the case caption on the cover page for each filing must still list all docket numbers being consolidated, as opposed to the lead case only.

#### **V. DEADLINES AND EXTENSION REQUESTS**

OH will issue a Request for Information or a Notice of Hearing establishing the applicable procedural and briefing deadlines. All requests for due date extensions should be filed using the “Other” case action functionality in OH CDMS. The “motion” functionality should not be used for due date extensions. When filing an extension request, the filing party should consult with the opposing party to ascertain whether the opposing party objects to the request and then indicate the opposing party’s position within the request. Parties should submit any extension requests as early as possible to ensure that the Hearing Officer has ample time to consider the request before the deadline. Deadlines will remain in force unless an extension is granted. If granted, however, all subsequent deadlines will also be extended, and a new Request for Information or Notice of Hearing will be issued to reflect such revised deadlines.

## **VI. SUBMISSION REQUIREMENTS**

### **A. Administrative Record/Reconsideration Record**

The Hearing Officer may request, or the regulations may require, that CMS, CMS' reconsideration official or CMS' contractor provide a copy of the materials that CMS and/or its contractors considered when issuing the appealable determination. Such submission may be referred to as the Administrative Record or Reconsideration Record (that includes the Administrative Record as well as any additional materials reviewed by the reconsideration official), as applicable. The Administrative Record or Reconsideration Record should contain all the information that the Medicare contractor/CMS considered in making its final determination. *See, generally*, 5 U.S.C. § 706. Accordingly, as OH does not have access to the records or systems of CMS' program offices, the Administrative Record or Reconsideration Record must contain copies of all materials that were considered, issued or reviewed below.

Every page of the Administrative Record must be Bates numbered centered at the bottom of the page with "AR XXXX." The Bates numbering must be sequential, starting with the first page of the first document continuing through the last page of the last document. The party proffering the record must separate and number each document by tab page with identification as TAB 1, TAB 2, etc. The Administrative Record must also contain a Table of Contents identifying each document submitted, tab identification, and the applicable Bates number page range.

While the Administrative Record should contain all materials that were considered when issuing the appealable determination, the Petitioner may file a Motion to Strike materials filed within the Administrative Record, or a Motion to Supplement if it believes materials were improperly excluded from the Administrative Record.

### **B. Briefs**

The parties' briefs must:

- Identify any issues that were raised in the appeal but are already resolved and require no further documentation to be submitted.
- Provide a fully developed narrative for each issue that was timely appealed that has not been fully resolved, that:
  - States the material facts and legal principles relied upon.
  - States the basis for the disputed facts and legal principles.
  - Identifies the controlling authorities (e.g., statutes, regulations, policy, or case law).
  - Provides a conclusion applying the material facts or legal principles to the controlling authorities.
  - Provides a list of exhibits referenced in the brief.
- Number every page of the brief in the bottom center of each page.

If the Petitioner fails to provide a fully developed narrative for an appealed issue in its brief, the Hearing Officer may consider the issue abandoned and effectively withdrawn. If at hearing or through a brief, a party presents an argument or evidence expanding the scope of the appealed

issue, the Hearing Officer may, upon objection or own motion, exclude such arguments or evidence from consideration.

**C. Reserved**

**D. Reserved**

**E. Reserved**

**F. Exhibits and Exhibit List**

With the briefs, the parties may upload exhibits to support their respective positions (OH does not have access to the records or systems of CMS' program offices). The parties are responsible for ensuring that any references cited within their respective materials (final determination, appeal request, briefs) are filed in the Administrative Record and/or as an exhibit. *See* Procedure VI.A. on "Administrative Record." To avoid duplication, if a particular document was filed within Administrative Record or Reconsideration Record (*see* Procedure VI.A.), it is unnecessary to include such document as a briefing exhibit.

Briefing exhibits should be identified as either Petitioner exhibits (P-1, P-2, etc.) or Medicare contractor/CMS exhibits (C-1, C-2, etc.). Each exhibit shall be Bates numbered centered at the bottom of the page. If a party wishes to submit additional exhibits after their first brief, the exhibit numbering should continue from the party's previously-filed exhibits.

The parties are encouraged to discuss whether there will be objections to exhibits prior to the hearing and attempt to work out differences. If the parties agree, exhibits may be added up to the time of the hearing. In those cases in which there is an in-person or virtual hearing, at the commencement of the hearing, the Hearing Officer will ask the parties to identify their respective exhibits and will ask if there are any objections to the opposing party's exhibits. Upon objection or the Hearing Officer's own motion, the Hearing Officer will determine the propriety of admitting objectionable exhibits.

If a party is submitting exhibits, an exhibit list must also be filed. The exhibit list should identify each document submitted and include the exhibit number and applicable Bates number page range.

Either party may file a Motion to Strike any exhibits proffered by the opposing party. *See* Procedure VI.G.

Additionally, any documents filed in OH CDMS should not be password protected.

**G. Motions**

A motion is a formal request directed to the Hearing Officer. If applicable, the moving party should indicate whether the non-moving party concurs with the request. All motions should include the legal and factual basis supporting the motion, as well as any necessary supporting documentation. Parties should submit motions as early as possible to ensure the Hearing Officer has ample time to

consider the request. The non-moving party may file a response to a motion subject to any due date set by the Hearing Officer.

#### **H. Stipulations**

A stipulation is a written agreement between the parties regarding factual evidence or the application of law or policy. Stipulations may be utilized in all hearing types (record, virtual, or in-person) before the Hearing Officer. While the Hearing Officer encourages the parties to file written stipulations in advance of the hearing to assist the parties and Hearing Officer in preparing for hearing, oral stipulations may also be entered into the record during the hearing.

#### **I. Withdrawal of Appeal or Issue**

A Petitioner must file a request to formally withdraw an appeal or specific issues within an appeal. When a Petitioner requests to withdraw its appeal, the Hearing Officer will subsequently send an Order dismissing the case. However, the Hearing Officer will not issue an Order when the Petitioner withdraws specific issues from a case. The Hearing Officer will note any withdrawal(s) in the final decision.

#### **J. Affidavits and Declarations**

Affidavits/declarations are to be made based on personal knowledge and signed before an officer authorized to administer oath (e.g., a notary). Affidavits/declarations must set forth such facts as would be admissible in evidence and must show affirmatively that the affiant/declarant is competent to testify to the matters stated therein. As an affidavit/declaration in which the affiant/declarant does not appear at hearing for cross-examination is subject to objection, it is recommended that the party filing such an affidavit/declaration obtains written consent from the opposing party.

### **VII. HEARINGS**

#### **A. Methods of Appearance**

A hearing may be conducted in-person, virtual, or based upon the record. However, the method of appearance may be limited by the specific hearing authority. A party may request a preferred hearing type if applicable, or the Hearing Officer may schedule a hearing on their own motion. If an in-person or virtual hearing is scheduled, OH will issue a Notice of Hearing.

#### **B. Postponements**

If a party wishes to change their hearing date, they must file a request for postponement through the “Other” Case Action, as soon as possible, with a brief explanation indicating why the postponement should be granted. The moving party must also indicate whether the non-moving party concurs and, if so, provide several mutually agreed-upon hearing dates for the Hearing Officer’s consideration.

### **C. Conference Notification**

The parties may request, or the Hearing Officer may schedule, a virtual conference (e.g., scheduling/briefing, procedural issue, pre-hearing, etc.). For example, the Hearing Officer may schedule a pre-hearing conference to narrow issues and discuss logistics to facilitate the hearing. As applicable the parties are expected to have discussed matters related to the following with each other prior to each conference with the Hearing Officer:

- The use of stipulations to narrowing procedural and substantive issues remaining in the appeal;
- Proposed Briefing Schedules and Hearing Dates;
- Witnesses, including the necessity for and extent of expert testimony (where appropriate);
- Documentary evidence;
- Estimated length of hearing; and
- Audio and visual needs for an in-person hearing.

### **D. Witnesses**

#### **1. Non-Expert Witness List**

Not all Hearing Officer authorities provide for witness testimony. For those authorities that permit witness testimony, if a virtual or in-person hearing is conducted, each party must file a witness list which provides the witness's name, occupation, and a brief description of the nature of the witness's testimony. Unless otherwise indicated through a Hearing Officer issuance, each party's witness list is due at least thirty (30) calendar days before the hearing date. The witness list should also include any expert witnesses.

#### **2. Expert Witness List**

An expert witness is a person, who by virtue of their knowledge, skill, expertise, training or education has knowledge in a particular subject area outside the expertise of the Hearing Officer sufficient that others may use their testimony to better understand or determine a fact at issue. As such, expert qualification is appropriate for areas material to the dispute but in which the Hearing Officer does not have expertise. As experts must be qualified in their respective field of expertise, the party presenting the expert must demonstrate that the expert is qualified in the designated area of expertise, and the proposed expert is subject to questioning by the opposing party and the Hearing Officer as to their qualifications. The Hearing Officer does not generally recognize expert testimony that provides legal interpretation.

If the parties are considering presenting expert witnesses, the parties are encouraged to consult and discuss in the very early stages of the proceeding. If a party intends to qualify a witness as an expert, the party must file the following documents at least forty-five (45) calendar days before the hearing date:

- A notice that identifies the expert witness as an intended expert, designates the field of expertise, and states the subject matter of the testimony;



- A copy of the expert's resume; and
- A report from the expert which summarizes their anticipated testimony and the bases supporting such testimony.

If a party identifies an expert witness, the opposing party may identify a rebuttal expert witness and file the documents listed above thirty (30) calendar days before the hearing date.

For efficiency purposes, the parties may also stipulate (before or during the hearing) that a party accepts the qualification of the opposing party's expert witnesses as proffered with the acknowledgment that such acceptance does not preclude the party from objecting to expert witness testimony (for example, on the grounds that it is beyond the scope of the expert witness' area of expertise) and without waiving a party's ability to ask questions of expert witnesses regarding their training, education, experience, etc.

### **3. Testimony/Objections**

Under no circumstances may witnesses communicate with others (in same room or electronically) while testifying. If a party objects to a question posed in direct or cross examination, or a witness' answer, a party must briefly state the grounds for the objection.

### **4. Availability of Witnesses**

Unless agreed upon in advance or formally excused by the Hearing Officer, all witnesses must attend the entire duration of the hearing.

### **5. Sequestration of Witnesses**

The Hearing Officer, upon motion of a party or upon own motion, may sequester witnesses to ensure that their testimony will not be influenced by the testimony of other witnesses. As part of the sequestration order, the Hearing Officer will notify the affected witnesses and parties of the terms of the sequestration.

## **E. Participant List**

No later than five (5) calendar days prior to a scheduled in-person or virtual hearing, each party should file a participant list containing the name, organization and professional title of each hearing attendee. Additionally, an email address or phone number should be provided for each attendee (in the event of technical difficulties).

## **F. Order of Hearing**

### **1. Summary**

Generally, the Petitioner presents its case first. The parties may agree to a different order of presenting evidence, or the Hearing Officer may request a different order. In cases involving

multiple issues, the parties may propose presenting the case issue-by-issue as opposed to each party presenting all their issues consecutively.

## **2. Hearings That Permit Testimony**

Unless the parties agree otherwise, the typical order of proceedings is as follows:

**Opening Statements** The parties open with a brief statement to serve as a “road map” for the presentation. The parties should outline the nature of the issue(s) in dispute and present a concise preview of the facts and evidence that will be presented during the examination of any witnesses, including experts (as permitted under the regulations governing the various hearing types).

**Direct Examination** consists of questioning by the party representative proffering the witness testimony. Direct examination should be based on the witness’ knowledge and be confined to matters relevant to the issues in dispute.

**Cross-examination** consists of questioning by the opposing party and is limited to the scope of the direct examination. The Hearing Officer has discretion to permit inquiry into additional matters as if on direct examination, particularly when it would obviate the need to recall the witness.

**Redirect testimony** is a follow-up on cross-examination questions.

**Recross testimony** is a follow-up on redirect examination questions.

**Closing arguments** should be utilized to summarize how the legal authorities apply to the evidence elicited at the hearing. The parties may request to waive closing arguments; however, the Hearing Officer may require closing arguments.

The Hearing Officer may ask questions of the witnesses at any time.

## **3. Hearings That Do Not Permit Testimony**

Generally, the Petitioner representative presents their arguments first, followed by the Respondent. Additionally, the representatives may elect to provide rebuttal argument.

### **G. Transcript**

The court reporter should be contacted directly for information on how to obtain a copy of the hearing transcript. The court reporter contact information may be obtained at the hearing.

### **H. Post-Hearing Submissions**

A post-hearing brief may be submitted at the Hearing Officer’s discretion. Post-hearing briefs should cite the key testimonial and documentary evidence presented, apply the controlling legal

authority and contain citations to the transcript and the exhibits. A post-hearing brief should not contain new evidence unless authorized by the Hearing Officer.

#### **VIII. EX PARTE COMMUNICATIONS**

All communications are expected to be filed within OH CDMS. However, limited circumstances may necessitate communication outside OH CDMS. While discussions regarding routine or logistical matters may be allowable, discussions with OH regarding substantive matters are not permitted unless all parties are included in the communication.

#### **IX. APPEAL RIGHTS**

Instructions for requesting CMS Administrator review (if permitted by hearing authority) of a Hearing Officer's decision will be conveyed within the cover letter accompanying the Hearing Officer's final decision.

**Appendix I: Record of Changes**

<u>Version Number</u>	<u>Effective Date</u>	<u>Description of Change</u>
1.0	4/25/2025	Issued Hearing Officer Appeal Procedures to provide efficiency, uniformity, and centralized references for case participants.