

SIS DEVELOPMENTAL DISABILITIES WAIVER REDUCTIONS: *PRO SE* FAIR HEARING GUIDE¹

Disability Rights New Mexico is aware that New Mexico is drastically cutting the services that many consumers can receive from the Home and Community Based Waiver. Most of these reductions are based on the evaluation process called the SIS (Supports Intensity Scale). There have also been significant reductions in therapies and other services based on the new waiver.

Disability Rights New Mexico does not have sufficient staff to represent all individuals that are affected by these cuts at individual fair hearings. We are working on other strategies to address some of the systems issues affecting everyone in the DD waiver program; but, we are unable to help everyone who is going to fair hearing.

In order to assist as many people as possible, we have prepared this information packet. This packet details the most common service reductions. It provides information concerning the agency conference and the H Service group application. It explains the individual's right to a hearing, the hearing process, and some of the legal and factual arguments that can be made. Please note that not every argument will apply to every case, and other arguments may be made as well. Individuals need to choose the arguments that are relevant to their specific case.

Please note that the Developmental Disabilities Services Division (DDSD) is part of the Department of Health (DOH). DDSD administers the DD Waiver program. DOH/DDSD sends out the SIS notices and provides the Summary of Evidence that you will receive prior to your fair hearing. The Human Services Department (HSD) is in charge of Medicaid fair hearings in New Mexico and is the Department where the Fair Hearings Bureau is located. HSD appoints the Hearing Officer, sends out the hearing notices and issues the hearing decision.

Good Luck.

BACKGROUND INFORMATION

Notice of the SIS Group Designation

Most beneficiaries on the DD waiver who were dissatisfied with their first SIS evaluation requested a second evaluation. You may also have done this. Those second evaluations are now mostly completed and the Department of Health has sent, or is in the process of sending the notice of SIS group designation to those who requested the second SIS. In some cases these notices are only sent to the case manager who then sends the notice to the beneficiary. The notice should include the SIS designation and also provide

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information about your fair hearing and other rights. You may not have requested a second SIS. You should, however, have received a notice of your SIS group designation after your first SIS evaluation. The notice will have told you about your right to request the fair hearing as well as the right to request a second SIS.

Requesting a Hearing

The address of the Fair Hearings Bureau is listed on the page entitled “Important Addresses and Numbers” at the end of this packet. It should also appear on the notice of SIS group designation. If you disagree with your SIS group designation you can request an administrative hearing. You have 90 days from the date on the notice to do this. If you request a hearing within thirteen days you are entitled to ask that services continue at the current rate until the hearing is decided. This is called “continuation of benefits.” It is important to know, however, that **if you lose the hearing, you may be liable to repay the state for the services.** DRNM has not seen a case of services having to be reimbursed after hearings that have been lost. At the present time, if the SIS designation you receive does not provide for residential services, you will still be able to get residential services under the DD waiver for a year. The Department considers the year of continued service as a transitional period to prepare for the loss of the residential service. Continuation of benefits can help you if you need to continue to receive *therapies* during the period that you are waiting for a fair hearing decision.

DRNM urges you to make your fair hearing request by fax. Use of a fax produces a written record that proves that you requested the fair hearing. If you must make the hearing request by telephone, please record the date and time of the message you left requesting the hearing. If you spoke to a person, keep a record of the name of the person you talked to as well as the date and time of your call.

Within a week from requesting the fair hearing you should receive an acknowledgement letter. You should also receive a hearing notice that will tell you the hearing officer’s name, the date and time of the hearing and the deadline you have for submitting documents you plan to use as proof or evidence during the hearing. You will need to submit this information before the hearing.

Hearings are usually conducted by telephone. You may request an “in-person” hearing if a disability or other circumstances prevent you from being able to participate by telephone. You will likely need to travel to Santa Fe for an in-person hearing. You may request that the hearing take place closer to your home. If you do not receive an acknowledgement letter and a hearing notice within 2 weeks of requesting the fair hearing, you should call the fair hearings bureau again to confirm that they have your request and to ask why the acknowledgment letter and notice have not arrived.

After your fair hearing request, you should also receive a Summary of Evidence. The Summary of Evidence is a large set of papers that are prepared by the Department of Health to bring to the hearing. The documents in the Summary of Evidence do not

necessarily include all the information that you want the hearing officer to consider. You will need to submit your own documentation, such as individual service plans, therapist reports, doctors' letters, etc. to have that information considered at the hearing. This information should be submitted before the hearing. The Department's Summary of Evidence provides the information that the Department believes will justify the SIS designation. The Summaries of Evidence DRNM has seen for SIS cases so far only provide information about how the evaluation was conducted. They have not been providing information about the individual's needs for services. It is very important that you become familiar with the information in the Summary of Evidence; and, that you submit information that you think the hearing officer should see. If you do not have the Summary of Evidence 15 days before the hearing date, you should call the hearings bureau.

How the SIS Score is Determined

Your SIS group determination is based on the information the SIS evaluator wrote down when he/she conducted the SIS interview with you and your team. The evaluator scored each question in the six SIS categories using a scale from 0-12. The higher the number is between one and twelve, the greater the need for the service for the activity in that question. The number chosen by the evaluator between one and twelve is based both on the frequency of the support you need as well as the type of support needed. The state adds the scores for each question and totals them for a raw score in each category in the SIS report. The state then converts the raw scores to a final score in each category. The state only adds the converted final scores from three of the categories on the evaluation (A, B, and E) for the total SIS score.

The total SIS score determines if you are placed in group A, B, D or E. If you receive a score of 0-24, then you are in group A; if the total is 25-30, you are in group B; if the total score is 31-36, you are in group D; and, if your total score is 37-55, you are in group E. Groups A and B are not eligible for residential services.

The evaluator also asks a set of questions about your medical and behavioral health needs. These questions are scored 0, 1 or 2. A score of 0 shows no support is needed; 1 shows that some support is needed; and, 2 shows that a significant level of support is needed. The score on the medical questions is totaled. If the total is 7 or above, then you are assigned to SIS group F. The score on the behavioral health section is also totaled. If it is 7-10, then you are assigned to group C; if it is 11-26, you are assigned to Group G.

The Agency Conference

You should receive a notice of an agency conference to discuss your case. **You do not have to accept an agency conference. It is optional.** You cannot have your SIS category changed during the agency conference. You should not prepare to argue at the agency conference that your SIS score should be changed. You may ask questions at the agency conference to get information about the SIS process that may help you prepare

your fair hearing arguments. For instance, you may want to ask if the process is purely mathematical with no individual review of your situation.

If you have a SIS score that places you in group A or B, the state will list the amount of your base budget in the SIS materials sent to you. This is the amount of money that will be available to you to pay for case management, day services and intermittent residential services. You may want to ask the state what non-24 hour residential services will be provided by the state and how many hours a day of that non-residential service will be provided. This information may be helpful to you at the fair hearing when you may want to argue that the level of service required by the SIS result is a threat to your health and safety.

You have the right to make an application for group H services. At this time, the state appears to take the position that if you believe the loss of a service due to your SIS score is a threat to your health and safety, you may apply for that service through the H category. Your case manager and team have information about this process. Even so, it can be helpful to ask questions about the H application process during the agency conference. It is also helpful to ask the DDS representatives at the conference what they believe will assist you to transition to the recommended level of service, what specific ideas do they suggest? What services does DDS offer you as an alternative to what you have received in the past? For example, if you stand to lose family living services, ask DDS to explain the alternative service it recommends. If you do accept the offer of an agency conference, we recommend that the case manager and other team members also participate in the meeting to ask questions and clarify what next steps make sense with regard to the H application.

THE HEARING PROCESS

Preparation

Most DD waiver SIS cases involve the denial of residential services due to SIS scores that place you in group A or B. Groups A and B do not provide for residential services. Groups A and B also reduce the number of therapies you may receive to one type of therapy. Behavioral consultant services are considered separately and may continue if you are in Group A or B in addition to one other service such as occupational therapy, speech and language therapy or physical therapy. You should note that the DD waiver program is limiting all therapies to 30 hours of service per year even if the therapy you need is allowed by your SIS designation.

You and your team members, especially the team members who attended the second SIS evaluation, should review the points totals from the A, B and E categories (do not confuse these categories with SIS group designations--they are not the same). There should be a document in the Summary of Evidence (usually the last exhibit) that shows how the points totals in each of these categories are converted and added together to

arrive at the total SIS score used for your SIS group designation. For example, if the total SIS score is 25, you would be assigned to SIS group B.

It is possible that the SIS score you are challenging is very close to the score you need to qualify for the services you need (for example, if you need residential services and you have a SIS score of 29 and are placed in Group B, you only need a score of 31 to be placed in Group D, which would qualify you for residential services). You may simply be arguing and showing evidence that there were just a few questions on the SIS evaluation that the evaluator did not score correctly. With the information you present, you can show what the evaluator should have written on your evaluation for those questions. This information will help to demonstrate that you qualify for the proper SIS designation. You can show this by asking your witnesses to talk about what they actually said during the SIS evaluation. You can also ask your witnesses what they believe is missing from the SIS evaluator's comments. You can testify for yourself on these points as well.

In short, at the fair hearing, you should be able to present information you believe was not correct or omitted in the SIS evaluation. You and your family can testify at the hearing. You should also ask team members to testify. It is especially helpful to ask the therapists whose services you still need to testify. You can also ask your medical professionals to testify, but it is usually very hard to get medical professionals to testify in a hearing.

If you have information that you need for a therapist or doctor to present at the hearing and they cannot attend, you can request that they write a letter with their information. The information of witnesses who cannot attend must be submitted by the deadline--**prior to the hearing**. Make sure you read the hearing notice to be clear about when you must submit your documents. It is best when a therapist can attend. It is most common that doctors will write letters rather than attend. If you stand to lose therapy services with your SIS designation, you need the therapist(s) to talk about what they are providing now and what will be the negative results if you lose that service.

If you have lost residential services because of A or B SIS designations and you believe it would put your health and safety at risk for you to lose 24-hour services, you want to tell the hearing officer about the most significant problems that would develop if you lost 24-hour care. You want to be accurate and not exaggerate; however, do not minimize your needs. The state may argue that they will provide services such as cooking and cleaning for a certain number of hours per day. You will have to explain to the hearing officer why the alternative services offered would not be enough service to meet your health and safety needs. You will need to give the Hearing Officer specific details about why you need 24-hour assistance for your health and safety. For examples, are you capable of calling 911 in an emergency? Are you at risk of abuse or exploitation without assistance?

Hearing

The Administrative Hearings Bureau of the Human Services Department conducts fair hearings. The process is designed so that a person can represent themselves without a lawyer. Usually no attorney will appear in the case for the state. The hearing is recorded so that if you lose, you can request the transcript. The Summary of Evidence and any documents you submit are also made an official part of the record.

At the hearing, the Hearing Officer will explain that he/she makes a recommendation to the director of the Medical Assistance Division of the Human Services Department. The hearing officer will swear in all the witnesses and usually allows each side to make an opening statement. The Department of Health will present its case first and will attempt to justify the action it has taken. You may ask the departmental representative questions and then you will be given an opportunity to explain why you should receive the services you need. The state can ask you questions. You may also present any witnesses that you believe will help you make your case.

Arguments to Make at the Hearing

A. As noted above, one of the major arguments to make at the hearing is that the SIS evaluation was not accurate—that it does not accurately reflect your needs for services. You will present at the hearing (through questions to your team member witnesses and through your own testimony and documents) any information that the SIS evaluator may have failed to write down and include in the SIS evaluation. Tell the Hearing Officer if you had problems with how the SIS evaluation was conducted, such as the evaluator lost documents you presented; or, the evaluator did not provide the interpreter services you needed if you speak another language or you are hard of hearing; or, the evaluator did not listen to information you or others provided during the evaluation. You will need to tell the Hearing Officer about anything that occurred during the SIS evaluation that you believe prevented the evaluator from accurately scoring your needs for services.

B. Describe the needs that you have for the services that are being cut. Provide detailed and accurate information about these needs. Provide information about what will happen if your services are cut. Use information from your therapists and your doctor or doctors to back up the statements that you are making about your needs and about what will happen if your services are cut because of the SIS result.

C. You may argue that the SIS should not take the place of a medical determination of your needs for services. If your team and your doctors say that it will threaten your health and safety to lose the services set to end because of your SIS designation, make sure to present this information fully with an emphasis on your health and safety needs for the services.

D. You may argue that your due process rights were violated because you did not receive proper notice of the reduction in your services, or that the notice of your SIS result did not describe the specific reductions of services that you would lose. If you did not receive a notice of your fair hearing, the lack of notice is also a due process violation. For

example, you may have learned about your fair hearing over the phone. You should have received written notice.

E. You may argue that it violates the Americans with Disabilities Act not to do an individual determination of your needs, but to only go by the total SIS score. You may argue that there must be reasonable accommodation to assign you the score you need to get the services you have been getting for some time, especially if your total SIS score is just short of the score needed to assign you the SIS designation that would provide you the needed level of service.

AFTER THE HEARING

After the hearing, the Hearing Officer will review the evidence presented during the hearing and will recommend a decision. He/she will then forward the recommended decision, the recording of the hearing and all the documents presented at the hearing to the Medical Assistance Director of the Human Services Department. The Director will make the final decision.

If you lose the hearing, you have a right to appeal to the appropriate District Court within 30 days. You will probably want to contact DRNM to see if we can take your case for the appeal or refer you to another attorney. After the appeal is filed, the Department will prepare a transcript of the fair hearing in thirty days; the parties are then required to submit the required legal briefs for the case. It is possible to take your case on appeal yourself as a *pro se* litigant. Even if you plan to do this, you may contact DRNM to inquire where you may get technical assistance for your appeal to District Court.

IMPORTANT TELEPHONE NUMBERS

Administrative Hearings Bureau
P.O. Box 2348
Santa Fe, NM 87504
(505) 476-6213
(800) 432-6217 Option 6
(505) 476-6215 Fax

Medical Assistance Division
P.O. Box 2348
Santa Fe, NM 87504
(505) 827-3100
(800) 997-2583

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1720 Louisiana Blvd. #204
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