

**DEPARTMENT OF SOCIAL SERVICES
OFFICE OF ADMINISTRATIVE HEARINGS**

**GUIDE TO
ADMINISTRATIVE HEARINGS
PROCEDURE**

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Office of Administrative Hearings
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1. General Provisions

1.1 Purpose

This publication is a guide to procedures used in contested cases before the South Dakota Department of Social Services Office of Administrative Hearings (OAH). It is intended to provide general information on procedures for both the individuals who have requested a hearing and the Department representatives.

OAH holds hearings involving a wide range of programs including:

- Food Stamps
- Temporary Assistance for Needy Families (TANF)
- Medicaid Medical Assistance
- Medicaid Long-Term Care Assistance
- Child Care Assistance
- Low Income Energy Assistance (LIEAP)
- Central Registry for Child Abuse and Neglect
- Sales Tax on Food Refund Program
- Child Care Licensing
- Foster Care Licensing
- Adoption Approval
- Child Support Enforcement

1.2 Legal Authority

Administrative law judges (ALJs) with the DSS Office of Administrative Hearings conduct hearings under authority of SDCL chapter 1-26, specific agency statutes and ARSD articles 67:10 through 67:57. South Dakota statutes and regulations on contested hearings are found in ARSD 67:17:02 and SDCL chapter 1-26. Many programs, such as food stamps and Medicaid, have additional procedural requirements found in federal statutes and regulations, as well as in court decisions.

The South Dakota Codified Laws and Administrative Rules of South Dakota are found at state libraries and on the state website at <http://legis.state.sd.us/index.aspx>.

1.3 Legal Representation

Each party has a right to be represented by an attorney at his or her own cost. The ALJ does not have authority to appoint an attorney or to order payment for the cost of an attorney.

Free or lower cost legal assistance may be available from legal aid services. Options include programs offered through the following agencies:

Dakota Plains Legal Services, Main Office, Mission – 1-800-658-2297 or 856-4444.
East River Legal Services, Main Office, Sioux Falls – 1-800-952-3015 or 336-9230.
South Dakota Advocacy Services (disability-related issues) – 1-800-658-4782 (in-state).

Many South Dakota attorneys volunteer to provide free legal advice for those eligible through the Access to Justice program. Contact Dakota Plains Legal Services and East River Legal Services to apply.

An attorney representing a party gives written notice of appearance to the ALJ and the other party. If an attorney is licensed in another state, SDCL § 16-18-2 states the requirements for temporary practice in South Dakota. Corporations must be represented by an attorney in South Dakota administrative hearings.

1.4 Contacting the ALJ and Filing Papers

No party may communicate with the ALJ about the facts or merits of a pending case before or after the hearing unless the other party has notice and a fair opportunity to participate. If a party wants to discuss specific issues before the hearing, contact the Office of Administrative Hearings and request a pre-hearing conference that will include all parties and the ALJ.

If a party has a question about scheduling a hearing, contact the administrative assistant. Do not communicate other facts about a pending case to the administrative assistant. OAH cannot give legal advice about a specific case, but will answer questions about the general administrative hearing process.

Sign and date all letters or other documents sent to the ALJ and include a current return address. A document may be faxed if it will transmit legibly. Faxed documents received after 5 p.m. are considered to be received on the next business day.

1.5 Accessibility

Those who need special arrangements to participate in a hearing as a party or as a witness should inform the OAH administrative assistant when requesting a hearing. OAH will make sure the hearing room is accessible to wheelchairs and other equipment, arrange for and pay an interpreter, and make other requested accommodations.

2. Beginning the Hearing Process

2.1 Right to a Hearing

When the Department issues a formal notice of action that affects the amount of a person's benefits, that individual has the right to a hearing to contest the Department's decision. When required by statute or administrative rule, an individual may also have the right to contest other Department actions such as license denial or revocation, placement on the central registry, child support collection, payment for medical services and more.

A guardian or other legal representative requesting a hearing on behalf of another person must provide OAH with a copy of the power of attorney or other legal document granting the authority.

Any Department employee who receives a hearing request is to forward it to the Department's Office of Administrative Hearings within 24 hours.

2.2 Notice of Hearing

The Notice of Hearing will include important information about the time and place of the hearing, the Department action that is being contested, the parties' rights and pre-hearing procedures.

The ALJ's administrative assistant schedules hearings to be held in person, by telephone, or by video conference (DDN). Parties may request an in-person hearing. Hearings are generally held in the community where the parties are located, but may be held in a different location if requested.

3. Pre-hearing Preparation

3.1 In General

As soon as possible after receiving the Notice of Hearing, each party should carefully think about what facts they must prove at the hearing. Statutes and regulations are a guide for relevant facts the party must prove. Bring to the hearing the documents and witnesses who can testify to those facts.

3.2 Agreements

The parties may agree to undisputed facts, evidence to be provided (discovery), scheduling or continuances, corrective action and settlement, or other matters, except as otherwise provided by law or ordered by the ALJ. If one party is represented by an attorney, the other side may not contact that person directly and must contact the attorney instead.

Parties can informally settle a case before the hearing is held. If the parties reach an agreement or the Department reverses the decision that is being contested, the Department representative must promptly inform the ALJ in writing, as required by ARSD 67:17:02:16.

3.3 Exhibits

If the hearing will be held by telephone, all parties must provide copies of exhibits to OAH and the other party no later than five days before the hearing. If the hearing is held in person, it is preferred that exhibits also be provided to the other parties and OAH before the hearing.

At any time, the Appellant can informally ask the Department for copies of the exhibits it will introduce at hearing and the Department must provide free copies as soon as possible. A party may choose to proceed more formally and file a motion (request) for discovery and the ALJ will consider whether to issue an Order to the other party to provide documents. The ALJ may exclude exhibits that are not provided on time or if the exhibit is unreadable.

With the proposed exhibits, provide a cover sheet that lists each exhibit in the order in which it will be offered and states that copies were provided to the other party. Number each exhibit in the lower right hand corner. Do not alter exhibits with highlighting or other writing. Do not submit two-sided copies, when possible.

3.4. Notice and Pre-Filing of Expert Testimony

An expert witness is a witness such as a nurse, physician, accountant or psychologist who has specialized education or knowledge and is qualified to state an opinion relevant to the case based upon that knowledge. If a party intends to present the testimony of an expert witness, the party shall notify the ALJ and the other party in writing of his or her name, address and field of expertise.

3.5. Subpoenas

A party can simply ask witnesses to appear at the hearing or to provide documents, but if the person will not do so voluntarily, the party can request the ALJ to issue a subpoena or subpoena duces tecum. A subpoena is an order issued by the ALJ or an attorney requiring the witness to be at the hearing. A subpoena duces tecum orders the person to turn over certain documents or to bring them to the hearing.

Submit any subpoena request to the ALJ in writing. State the name and street address of the witness and provide a brief explanation of the expected subject of the witness's testimony.

The party requesting the subpoena is responsible to have it served on the witness according to the South Dakota Rules of Civil Procedure and pay any required witness fees, mileage, and costs of service. See SDCL § 15-6-4 and chapter 15-6 for those requirements, or contact an attorney for legal advice.

3.6 Pre-hearing Requests and Proceedings

A party may bring pre-hearing disagreements or other requests to the attention of the ALJ by filing a motion. This can be a formal document or a letter. Examples include a request for discovery of evidence, request for dismissal, request to limit testimony, and a request to reschedule the hearing.

A party should submit the request to the ALJ in writing and provide a copy to the other party. The ALJ will give the other party a deadline to respond in writing or schedule a pre-hearing conference to hear from both parties before making a decision.

3.7 Postponement or Withdrawal

Either party may make one request to change a hearing if made at least 10 days before the scheduled hearing. In all other cases, a postponement of the hearing may be granted for good cause or by agreement of the parties. State the reason for the request and submit it to OAH as soon as possible after learning a delay is necessary. The decision to postpone a hearing is within the ALJ's discretion.

A party may voluntarily withdraw a hearing request or waive the right to a hearing. If a party wants to withdraw a hearing request, submit a written statement to the ALJ that includes the reason for the withdrawal, the date, and signature. Only food stamp hearings can be withdrawn orally. If the written withdrawal does not include a reason for the withdrawal, the hearing will be held as scheduled.

4. Conduct of Hearings

4.1 The ALJ Will Preside

The ALJ presides at the hearing and all pre-hearing proceedings. The ALJ is always a South Dakota licensed attorney who is subject to the South Dakota Rules of Professional Conduct for attorneys and also the American Bar Association Model Code of Ethics of State Administrative Law Judges. The ALJ decides all questions of fact, law and procedure.

4.2. Attendance and Conduct of Parties

Each party must appear, either personally or through an attorney, guardian, or other authorized person, at the time and place directed in the notice of hearing. The ALJ may dismiss the case if the party who requested the hearing does not appear at the hearing.

4.3 The Hearing

The ALJ will call the hearing to order, explain the hearing procedures, and state the Department action that is being contested. The Department will generally present testimony and exhibits first, and then the other party will present its evidence.

The parties have the right to testify, call witnesses and present other relevant evidence necessary to prove disputed facts. After each witness is finished, the other party asks witnesses any questions about their testimony in cross-examination. The ALJ may also ask questions.

Both parties must ask that their documents be accepted and made part of the record. The other side then has a chance to object. The ALJ decides whether the law allows admission of the documents. The person introducing the document, at a minimum, must show that the document is authentic and relevant. For example, to introduce a letter, show that it really was that person's letter and that the document helps to prove facts that are contested. The parties may agree that documents are authentic and relevant without additional proof.

The ALJ will ask for a final statement from the parties and then close the record. In final statements, the parties may summarize the evidence that is important to prove facts in dispute and also explain what statutes and regulations they believe support a decision in their favor.

After all testimony is presented and final statements are made, the ALJ will close the record. The ALJ will not consider information received after the record is closed unless,

at the hearing, the ALJ specifically ordered or authorized the post-hearing submission of evidence.

The parties shall be respectful of the ALJ, of the other party and of witnesses. Disruptive persons may be excluded from the hearing. It is preferred that parties address each other by last names during this legal proceeding unless agreed otherwise at the hearing. Parties may address the ALJ as the “judge” or by last name.

4.4 Expert Witnesses

When presenting an expert to testify, begin by asking the person to state his or her education, training, experience and the factual basis of the opinion before asking the witness to express an opinion relevant to the case. The ALJ needs this information to determine the witness’ qualifications and the weight to be given the testimony.

5. Evidence and the Case Record

5.1. Competent Types of Evidence

The ALJ must rely on relevant, competent evidence in reaching a decision. Here are some requirements:

- Witnesses testify under oath and have the same duty to tell the truth that applies when a witness testifies in a court of law.
- A party or witness must testify only about things or events he or she personally saw or experienced. Hearsay, though sometimes admissible under certain exceptions, can be relatively weak evidence.
- A party’s conduct on other occasions and character evidence in general, is not usually relevant EXCEPT when a person’s state of mind or intent is an issue in the hearing. Evidence of a party’s act or conduct on another occasion may be admissible to prove intent, plan, knowledge, or absence of mistake or accident.
- A witness’ prior statements about a fact in issue at the hearing may be relevant to determine credibility.
- A non-expert witness may give an opinion about matters that are generally known or understood, but not about matters requiring specialized education or expertise.
- Unless the other party has agreed to the admissibility of an exhibit, the exhibit should be introduced through a witness who has direct knowledge of the exhibit and can confirm its authenticity.
- The parties shall avoid cumulative, repetitious or inflammatory presentations of evidence.
- If a witness does not understand a question or does not know the answer, say so. Do not guess or speculate.

5.2 The Rules of Evidence

The South Dakota Rules of Evidence (SDCL Title 19) apply to state administrative hearings. A party who wants to oppose the admission of evidence must state a legal objection at the time the evidence is offered. Examples of legal objections are that the

testimony is inadmissible hearsay or that the information is not relevant. The ALJ will then make a ruling on the objection.

5.3 Privileges Against Giving Evidence

A witness may refuse to testify only if an answer would tend to incriminate the witness in a crime or if an answer is privileged information.

5.4 The Official Case Record

The official record in a case includes accepted exhibits, the recorded hearing and other documents filed such as notices, motions and legal memoranda. The ALJ's decision must be based solely upon the evidence in the official record. The ALJ will not consider any information submitted after the record is closed at the end of the hearing.

6. The Decision

The ALJ will issue a written Pending Decision and deliver a copy to both parties. The decision shall at a minimum contain a statement of the legal issue, specific findings of fact, and specific conclusions of law. The parties have 10 days to mail written objections to specific findings of fact and conclusions of law. The ALJ will respond and issue a Final Decision. The ALJ's decision is final and is not subject to Department review or approval.

Final decisions in food stamp cases must be issued within 60 days after the request for hearing. Final decisions in all other cases must be issued within 90 days after the request for hearing, not including delays requested by or agreed to by the person who requested the hearing.

Parties who want to appeal a final decision or order to the circuit court must do so within 30 days after the date of the Notice of Final Decision under the procedures found in SDCL chapter 1-26. Those appealing the administrative hearing Final Decision to circuit court are responsible for paying costs to transcribe the administrative hearing recording.

Definitions/Legal Terms

Administrative Hearing – An informal, orderly, and readily available proceeding held before an impartial administrative law judge (ALJ). At the hearing, the person who requested the hearing presents evidence to prove that any Department action or inaction affecting his or her case should be changed. An administrative hearing is also called a Fair Hearing under federal law.

Administrative Law Judge (ALJ) – An ALJ is an attorney specially trained and designated by the Secretary of the Department of Social Services to conduct hearings and make final decisions. ALJs are not involved in the investigation or implementation of the action that led to the hearing request. An ALJ is not a judge that is part of the judicial branch of government.

ARSD - Administrative Rules of South Dakota – These are the state regulations or administrative rules. They can be found in public libraries or on the internet at <http://legis.state.sd.us/rules/index>.

Circuit Court – These are the courts within the judicial branch of state government. South Dakota's 66 counties are divided into seven circuits that include one or more counties.

Closing Statement – An explanation of why the party believes the law and evidence require a decision in that party's favor.

Contested Case – A proceeding in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.

Department – The South Dakota Department of Social Services (DSS).

Date of Request For Hearing – The date of the request for hearing is the date on which any DSS employee receives the written or verbal request for hearing.

Department Representative – The person who represents DSS at a hearing. A social worker, eligibility specialist, case manager, supervisor, attorney or contracted agency employee may represent the Department at a hearing.

Discovery – A legal process used by a party to obtain facts known by other parties or witnesses.

Due Process – A course of proceedings that enforce and protect private rights. Elements of due process include required notice of the adverse action, and the opportunity to be heard and to defend in an orderly proceeding.

Evidence – Proof presented through witnesses (testimony), documents, and tangible objects (photographs).

Exhibits – Documents or tangible objects that a party offers as evidence during a hearing.

Law – State and federal statutes, regulations and judicial decisions.

Opening Statement – An outline of what the party thinks the evidence will show. Opening statements are not evidence.

Request For Hearing – Any clear expression that the appellant wants to contest a DSS action, inaction, or decision and to present the case to an authority higher than the local department representative. The appellant or the appellant's representative may make the request.

Service of Process – Legal methods of delivering the papers to the other side in a lawsuit and proving to the court that they were received.

Subpoena – A written order requiring a person to appear at the hearing and testify.

Subpoena duces tecum - A written order requiring a person to provide certain documents or to bring them to the hearing.

SDCL – South Dakota Codified Laws – These are the laws of South Dakota. Copies can be found in public libraries or on the internet at <http://legis.state.sd.us/statutes/index>.