

## SUBCHAPTER 89B - PROCEDURE

### SECTION .0100 - RULE-MAKING PROCEDURES

#### 10A NCAC 89B .0101 PURPOSE AND SCOPE

- (a) The purpose of Rules .0101 through .0108 of this Section is to set forth the Division of Vocational Rehabilitation Services' procedures for rule-making hearings and declaratory rulings.
- (b) The procedures in these Rules shall be followed by persons wishing to submit comments, written or oral, at rule-making hearings, by persons requesting additional information regarding proposed or adopted rules, and by persons requesting declaratory rulings.
- (c) As used in these rules, the term "rule" has the meaning specified in G.S. 150B-2(8a) and includes the amendment or repeal of a prior rule as well as the adoption of a new rule.

*History Note: Authority G.S. 143-545; 143-546; 143B-10(j)(2); 150B-11; Eff. February 1, 1976; Amended Eff. April 1, 1988; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.*

#### 10A NCAC 89B .0102 PETITIONS

- (a) Any person wishing to submit a petition requesting the adoption, amendment, or repeal of a rule by the Division Director shall address the petition to: A.P.A. Coordinator, Division of Vocational Rehabilitation Services, 2801 Mail Service Center, Raleigh, North Carolina 27699-2801.
- (b) The petition shall contain the following information:
- (1) either a draft of the proposed rule or a summary of its contents and the statutory authority for the Division Director to promulgate the rule;
  - (2) reason for the proposal;
  - (3) effect of existing rules;
  - (4) any data supporting the proposal;
  - (5) the effect of the proposed rule on existing practices in the area involved, including cost factors;
  - (6) names and addresses, if known, of those most likely to be affected by the proposed rule; and
  - (7) name and address of the petitioner.
- (c) The Division Director shall determine, based on a study of the facts stated in the petition, whether the public interest will be served by granting the petition. The Division Director shall consider all the contents of the petition, plus any additional information deemed relevant.
- (d) The Division Director shall render a final decision on the petition within 30 days of submission of the petition. If the decision is to deny the petition, the petitioner shall be notified in writing and provided the reasons for the denial. Denial of the petition shall be considered a final agency decision as specified in G.S. 150B-16. If the decision is to approve the petition, rule-making proceedings shall be initiated in accordance with the rules in this Section.

*History Note: Authority G.S. 143-545; 143-546; 143B-10(j)(2); 150B-11; 150B-16; Eff. February 1, 1976; Amended Eff. April 1, 1988; October 20, 1979; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.*

#### 10A NCAC 89B .0103 NOTICE

- (a) When a rule-making hearing is scheduled, in response to a petition or otherwise, the Division shall give notice of a public hearing. The notice shall meet the requirements of G.S. 150B-12.
- (b) Persons desiring information in addition to that provided in a particular rule-making notice shall contact the Division's A.P.A. Coordinator or other person specified in the hearing notice according to the directions in the notice.

*History Note: Authority G.S. 143-545; 143-546; 143B-10(j)(2); 150B-11; 150B-12; Eff. February 1, 1976; Amended Eff. April 1, 1988; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.*

#### 10A NCAC 89B .0104 HEARINGS

- (a) Oral Presentations. Oral presentations shall not exceed ten minutes unless, upon request either before or at the hearing, the hearing officer grants an extension of time for good cause.
- (b) Written Submissions.
- (1) Any person may file a written submission containing data, comments, or arguments within the 30-day period that the hearing record is open for written comments. The deadline for written submissions shall be stated in the hearing notice.
  - (2) The written submission shall clearly state the proposed rule to which the comments are addressed and shall also include the name and address of the person submitting it. Written submissions shall be sent to the person and address specified in the hearing notice.
- (c) Management of Hearing. The hearing officer shall have complete control of the hearing, including:
- (1) the responsibility of having a record made of the hearing,
  - (2) extension of any time allotments,
  - (3) recognition of speakers,
  - (4) elimination of repetitious presentations, and
  - (5) general management of the hearing.
- (d) Fair Opportunity to Present Views. The hearing officer shall insure that each person participating in the hearing is given a fair opportunity to present views, data, and comments.

*History Note:* Authority G.S. 143-545; 143-546; 143B-10(j)(2); 150B-11; 150B-12;  
Eff. February 1, 1976;  
Amended Eff. April 1, 1990; April 1, 1988; October 20, 1979;  
Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.

#### **10A NCAC 89B .0105 JUSTIFICATION OF RULE-MAKING DECISION**

*History Note:* Authority G.S. 143-545; 143-546; 143B-10(j)(2); 150B-11; 150B-12;  
Eff. February 1, 1976;  
Amended Eff. April 1, 1990; April 1, 1988; October 20, 1979;  
Expired Eff. April 1, 2016 pursuant to G.S. 150B-21.3A.

#### **10A NCAC 89B .0106 RECORD OF RULE-MAKING HEARINGS**

A record of all rule-making hearings shall be maintained by the office of the Division's A.P.A. Coordinator. The record shall be available for public inspection during regular office hours and shall include:

- (1) any petitions related to the hearing,
- (2) the hearing notice,
- (3) all written memoranda and information submitted,
- (4) a tape recording or transcript of the oral hearing,
- (5) any statement of reasons issued to an interested person according to Rule .0105 of this Section, and
- (6) a final draft of the rule.

*History Note:* Authority G.S. 143-545; 143-546; 143B-10(j)(2); 150B-11;  
Eff. February 1, 1976;  
Amended Eff. April 1, 1990; April 1, 1988;  
Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.

#### **10A NCAC 89B .0107 FEES**

Except when a statute provides otherwise, the Division may charge a fee to cover the costs of meeting requests for information related to the rule-making hearing.

*History Note:* Authority G.S. 12-3.1(c); 143-545; 143-546; 143B-10(j)(2); 150B-11;  
Eff. February 1, 1976;  
Amended Eff. April 1, 1988; October 20, 1979;  
Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.

#### **10A NCAC 89B .0108 DECLARATORY RULINGS**

- (a) All requests for declaratory rulings shall be by written petition and shall be submitted to:

A.P.A. Coordinator  
Division of Vocational Rehabilitation Services  
805 Ruggles Drive  
2801 Mail Service Center  
Raleigh, North Carolina 27699-2801

- (b) Every request for a declaratory ruling shall include the following information:
- (1) the name, address, and telephone number of the petitioner;
  - (2) the statute, rule, or order to which the petition relates;
  - (3) a concise statement of the reasons why the petitioner is aggrieved by the rule, statute, or order, or its potential application to the petitioner; and
  - (4) the consequences of a failure to issue a declaratory ruling.
- (c) Whenever the Director believes for good cause that the issuance of a declaratory ruling is undesirable, the Director may decline to issue one. In such cases, the Director shall notify the petitioner in writing of the decision stating the reasons for the denial of a declaratory ruling. The Director may decline to issue a declaratory ruling in the following specific circumstances:
- (1) if the request for a declaratory ruling addresses a situation or facts similar to those specifically considered at the rule-making hearing and is found in the rule-making record;
  - (2) if the petitioner cannot show that the circumstances are so changed since adoption of the rule that such a ruling would be warranted; or
  - (3) if the circumstances stated in the request indicate that there is a factual dispute and a contested case hearing would be more appropriate.
- (d) When issuing a declaratory ruling is deemed appropriate, the Director shall issue the ruling within 60 days of receipt of the petition.
- (e) A declaratory ruling procedure may consist of written submissions, oral hearings, or such other procedures as may be deemed appropriate by the Director in a particular case.
- (f) The Director may notify persons who might be affected by the ruling that they may submit written comments or make oral presentations at a scheduled hearing.
- (g) A record of all declaratory ruling proceedings shall be maintained by the Division's A.P.A. Coordinator and shall be available for inspection during regular business hours. This record shall contain:
- (1) the original request,
  - (2) all written memoranda and information submitted,
  - (3) a tape recording or transcript of any oral hearing, and
  - (4) a statement of the ruling or the reasons for refusing to issue a ruling.

*History Note:* Authority G.S. 143-545; 143-546; 143B-10(j)(2); 150B-11; 150B-17;  
Eff. February 1, 1976;  
Amended Eff. April 1, 1990; April 1, 1988;  
Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.

## **SECTION .0200 - CONTESTED CASES: ADMINISTRATIVE REVIEWS: APPEALS HEARINGS**

### **10A NCAC 89B .0201 APPLICABILITY OF RULES**

Except for administrative reviews, mediation, and appeals to be conducted according to the provisions of Rules .0202 through .0228 of this Section, appeals concerning the administration of the rules in this Chapter shall be filed and conducted in accordance with G.S. 150B and 10A NCAC 01.

*History Note:* Authority G.S. 143-546.1; 150B-1; 34 C.F.R. 361.57; P.L. 105-220, s.102 (c);  
Eff. February 1, 1976;  
Amended Eff. July 1, 2000; September 1, 1989;  
Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.

### **10A NCAC 89B .0202 WRITTEN INFORMATION FOR APPLICANTS AND CLIENTS**

(a) All applicants for and clients receiving vocational rehabilitation services shall be informed of the opportunities for an administrative review, mediation and an appeal available under Section 102(c) of the Rehabilitation Act and Rules .0202 through .0228 of this Section.

(b) Written information shall be provided to all applicants and clients informing them:

- (1) of their right to an appeals hearing when they are dissatisfied with any determinations made by the division concerning the furnishing or denial of services;
  - (2) that they have the option of seeking resolution of the issue through an administrative review prior to an appeals hearing;
  - (3) that mediation may be available to resolve their problems if the Division agrees to it;
  - (4) that the rehabilitation counselor, rehabilitation coordinator or other designated staff of the division will assist them in preparation of the written request for an administrative review, mediation, or appeal;
  - (5) of the name and address of the appropriate regional director to whom the request shall be submitted; and
  - (6) that they may receive assistance with the resolution of their problems through the Client Assistance Program.
- (c) The notifications required in Paragraph (b) of this Rule shall be provided in writing:
- (1) at the time an individual applies for services;
  - (2) at the time the individualized plan for employment for the individual is developed; and
  - (3) upon reduction, suspension, or cessation of vocational rehabilitation services for the individual.

*History Note: Authority G.S. 143-546.1; 150B-1; 34 C.F.R. 361.57; P.L. 105-220, s.102 (c); Eff. February 1, 1976; Amended Eff. July 1, 2000; September 1, 1989; October 20, 1979; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.*

#### **10A NCAC 89B .0203 REQUEST FOR ADMINISTRATIVE REVIEW AND APPEALS HEARING**

- (a) When any applicant for or client receiving vocational rehabilitation services wishes to request an administrative review, mediation, and an appeals hearing or only an appeals hearing, the individual shall submit a written request to the appropriate regional director of the Division.
- (b) The request shall indicate if the individual is requesting:
- (1) an administrative review, mediation, and an appeals hearing to be scheduled concurrently;
  - (2) an administrative review and an appeals hearing to be scheduled concurrently; or
  - (3) only an appeals hearing.
- (c) The request shall contain the following information:
- (1) the name, address and telephone number of the applicant or client; and
  - (2) a concise statement of the determination(s) made by the rehabilitation staff for which an administrative review, mediation, and appeals hearing or only the appeals hearing is being requested and the manner in which the person's rights, duties or privileges have been affected by the determination(s).
- (d) The Division shall not suspend, reduce, or terminate services being provided to a client under a written individualized plan for employment (IPE) pending final resolution of the issue through mediation, an appeals hearing, or an administrative review unless the individual or the individual's representative so requests, or the Division has evidence that the services have been obtained through misrepresentation, fraud, collusion, or criminal conduct on the part of the individual.

*History Note: Authority G.S. 143-546.1; 150B-1; 34 C.F.R. 361.57; P.L. 105-220, s. 102(c); Eff. February 1, 1976; Amended Eff. July 1, 2000; October 1, 1994; September 1, 1989; October 20, 1979; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.*

#### **10A NCAC 89B .0204 DIVISION ACTIONS IN RESPONSE TO REQUEST**

- (a) Upon receipt of a request for an appeals hearing, the regional director shall immediately forward the original request to the Division's Chief of Operations who will arrange for the provision of information about the possibility of mediation to the individual and the appointment of a hearing officer to conduct the appeals hearing.
- (b) If the individual has requested an administrative review in addition to an appeals hearing, the regional director shall:
- (1) make a decision to conduct the administrative review himself or herself or appoint a designee to conduct the administrative review who:
    - (A) has had no previous involvement in the issues currently in controversy;
    - (B) can conduct the administrative review in an unbiased way; and

- (C) has a broad working knowledge of the Division's rules, federal regulations governing the program, and the State Plan for Vocational Rehabilitation Services or Independent Living Services (as appropriate); and
- (2) proceed with, or direct the designee to proceed with, an administrative review according to the provisions of Rules .0205, .0208, and .0209 of this Section.
- (c) The regional director shall send the applicant or client written acknowledgment of receipt of the request and inform the individual that additional information will be sent regarding the possibility of mediation and the administrative review and appeals hearing or only the appeals hearing.
- (d) The regional director shall provide the Chief of Operations and the Client Assistance Program (if the Client Assistance Program is assisting the individual with the case) with a copy of the request and the response to the request.

*History Note:* Authority G.S. 143-546.1; 150B-1; 34 C.F.R. 361.57; P.L. 105-220, s. 102(c); Eff. February 1, 1976; Amended Eff. July 1, 2000; April 1, 1997; September 1, 1989; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.

#### **10A NCAC 89B .0205 SCHEDULING AND NOTICE OF ADMINISTRATIVE REVIEW**

- (a) If an administrative review is to be conducted, the regional director or designee shall:
  - (1) set a date, time and place for the administrative review;
  - (2) send written notification by certified mail to the applicant or client and the individual's parent, guardian or representative, as appropriate, of the date, time and place for the administrative review at least five days prior to the administrative review;
  - (3) advise the applicant or client in the written notice that a hearing officer will be appointed by the Division to conduct a hearing if the matter is not resolved in the administrative review and that the applicant or client will also receive additional information regarding mediation if mediation has been requested and a written notice from the hearing officer regarding the formal appeals hearing which will be held after the administrative review and mediation; and
  - (4) notify the Director of the Client Assistance Program (CAP) and other individuals to be involved in the administrative review of the request and the date, time and place for the administrative review. This notification may be by phone or in writing.
- (b) Prior to the administrative review, the regional director or designee shall review all previous decisions and casework related to the applicant or client and seek whatever consultation, explanation, documentation, or other information that is deemed necessary, utilizing the Division's CAP Director as appropriate.

*History Note:* Authority G.S. 143-546.1; 150B-1; 34 C.F.R. 361.57; P.L. 105-220, s. 102(c); Eff. February 1, 1976; Amended Eff. July 1, 2000; April 1, 1997; September 1, 1989; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.

#### **10A NCAC 89B .0206 APPOINTMENT OF HEARING OFFICER AND MEDIATOR**

Upon receipt of the applicant's or client's request for mediation and an appeals hearing or only an appeals hearing from the regional director, the Chief of Operations shall arrange for the Coordinator of Rules and Policy Development to appoint a qualified mediator if mediation has been requested and an impartial hearing officer. The hearing officer shall be selected on a random basis without replacement from the pool of persons qualified as defined in Section 7 (16) of the Rehabilitation Act of 1973, 29 U.S.C. Section 720, et.seq., as amended.

*History Note:* Authority G. S. 143-546.1; 150B-1; 34 C.F.R. 361.57; P.L. 105-220, s. 102(c); Eff. February 1, 1976; Amended Eff. July 1, 2000; April 1, 1997; October 1, 1994; September 1, 1989; October 20, 1979; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.

#### **10A NCAC 89B .0207 SCHEDULING AND NOTICE OF MEDIATION AND APPEALS HEARING**

- (a) If mediation is agreed upon, the mediation shall take place prior to the appeals hearing and shall be conducted according to Rule .0210 of this Section.
- (b) The hearing officer shall schedule the formal appeals hearing, to be held within 45 days of receipt of the original request by the applicant or client as described in Rule .0203 of this Section unless the Coordinator of Rules and Policy

Development has extended the time for the hearing for a specific period of time upon written agreement of both parties or the hearing officer grants an extension under Subparagraph (d)(4) of this Rule.

(c) The hearing officer shall provide the applicant or client and the division written notice of the date, time and place of the hearing and the issue(s) to be considered at least 10 days prior to the hearing. A copy of the notice shall be sent to the Client Assistance Program if CAP is involved in the case.

(d) The notice shall inform the applicant or client and the division:

- (1) of the procedures to be followed in the hearing;
- (2) of the particular sections of the statutes, federal regulations, state rules, and state plan involved;
- (3) of the rights of the applicant or client as specified in 34 C.F.R. 361.57(b)(1) through (b)(4);
- (4) that the hearing officer shall extend the time for the hearing if the parties jointly agree to a specific extension of time and submit a written statement to that effect to the hearing officer; and
- (5) that the hearing may be cancelled if the matter is resolved in an administrative review or through mediation.

(e) Notice shall be given personally or by certified mail. If given by certified mail, it shall be deemed to have been given on the delivery date appearing on the return receipt.

*History Note: Authority G.S. 143-546.1; 150B-1; 34 C.F.R. 361.57; P.L. 105-220, s. 102(c); Eff. February 1, 1976; Amended Eff. July 1, 2000; September 1, 1989; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.*

#### **10A NCAC 89B .0208 ADMINISTRATIVE REVIEW**

(a) Within 15 days of the original request for an administrative review by the applicant or client, the regional director or designee shall hold the administrative review with the applicant or client; the individual's parent, guardian or representative, as appropriate; the CAP Director, as appropriate; and other individuals deemed necessary by the regional director or designee.

(b) Within five working days of the administrative review, the regional director or designee shall make a decision and notify the applicant or client and others using the following procedures:

- (1) compile a written report of the administrative review outlining the purposes of the administrative review, the participants, the decision that was reached, and the rationale for the decision;
- (2) send the written report containing the decision to the applicant or client by certified mail with return receipt requested, with a copy being placed in the individual's official case record, and copies being forwarded to the Chief of Operations and the CAP director if CAP is involved; and
- (3) provide instructions to the applicant or client of steps that may be taken in response to the decision and the deadline for the responses. A form indicating agreement with the decision and requesting that the hearing be cancelled shall be included for the applicant's or client's signature if the individual agrees with the decision.

(c) In situations where the issue currently in controversy involves action taken by the central office of the Division, the Chief of Operations or a designee of the Chief of Operations shall be responsible for the duties related to the administrative review that are prescribed for the regional director in these Rules.

*History Note: Authority G.S. 143-546.1; 150B-1; 34 C.F.R. 361.57; P.L. 105-220, s. 102(c); Eff. February 1, 1976; Amended Eff. July 1, 2000; April 1, 1997; September 1, 1989; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.*

#### **10A NCAC 89B .0209 RESPONSE TO ADMINISTRATIVE REVIEW DECISION**

(a) If the applicant or client is satisfied with the decision resulting from the administrative review, the individual shall sign the form described in Rule .0208(b)(3) of this Section and submit it to the regional director within five days of receipt of the decision. The regional director shall inform the Chief of Operations of the request to cancel the appeals hearing immediately and forward the form to the Chief of Operations who shall submit it to the hearing officer.

(b) If the hearing officer does not receive a written request from the applicant or client that the hearing be cancelled, the hearing shall be conducted as scheduled unless negotiations produce a settlement that is satisfactory to both parties prior to the hearing.

(c) If the hearing is cancelled, the hearing officer shall send the applicant or client and the Division written notice of the cancellation in the same manner as required for notice of the hearing in Rule .0207(e) of this Section. A copy of the notice of cancellation shall be sent to the Client Assistance Program if CAP is involved.

*History Note: Authority G.S. 143-546.1; 150B-1; 34 C.F.R. 361.57; P.L. 105-220, s. 102(c); Eff. February 1, 1976; Amended Eff. July 1, 2000; April 1, 1997; September 1, 1989; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.*

#### **10A NCAC 89B .0210 MEDIATION**

- (a) If both parties agree to mediation, the mediation shall take place prior to the appeals hearing.
- (b) Mediation shall not be used to deny or delay an individual's right to speedy complaint resolution. The mediation shall be completed in a period that also allows for convening of an appeals hearing after mediation within the 45-day time required under 34 C.F.R. 361.57(b) unless both parties sign a written agreement for a specific extension of time.
- (c) An individual to conduct the mediation shall be selected from a list of qualified and impartial mediators that is maintained by the Division. Individuals on the list of qualified mediators shall:
- (1) be certified by the N. C. Dispute Resolution Commission or approved by the Mediation Network of North Carolina; and
  - (2) be knowledgeable regarding the laws, Federal regulations and State rules governing the provision of vocational rehabilitation and independent living services.
- (d) Each mediation session shall be scheduled in a timely manner and held in a location that is convenient to the parties involved.
- (e) The Division shall bear the cost of the mediation.
- (f) Parties involved shall sign a confidentiality pledge prior to the process indicating that discussions which occur during the mediation process shall be confidential and may not be used as evidence in any subsequent appeals hearing or civil proceeding. No evidence that is otherwise discoverable shall be inadmissible merely because it is presented or discussed during mediation.
- (g) If an agreement is reached during mediation, it shall be in writing and signed by both parties.

*History Note: Authority G.S. 143-546.1; 150B-1; 34 C.F.R. 361.57; P.L. 105-220, s. 102(c); Eff. February 1, 1976; Amended Eff. July 1, 2000; April 1, 1997; September 1, 1989; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.*

#### **10A NCAC 89B .0211 PROCEDURES GOVERNING HEARING**

The appeals hearing shall be conducted according to the provisions of 34 C.F.R. 361.57(b)(1) through (b)(3) and (b)(12) and according to Rules .0212 through .0222 and Rule .0225 of this Section.

*History Note: Authority G.S. 143-546.1; 150B-1; 34 C.F.R. 361.57; P.L. 105-220, s. 102(c); Eff. February 1, 1976; Amended Eff. July 1, 2000; September 1, 1989; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.*

#### **10A NCAC 89B .0212 VENUE**

- (a) The appeals hearing shall be held in the county of residence in this State of the applicant or client.
- (b) Any party desiring a change of venue shall file a written motion for a change of venue with the hearing officer and serve copies of that motion on all other parties at least seven days prior to the date for which the hearing is set.
- (c) The motion shall include the following information:
- (1) the name, address, and telephone number of the movant;
  - (2) identification by the case name and docket number of the proceeding for which the change is sought;
  - (3) the time, date, and place for which the hearing is scheduled;
  - (4) the county in which the party requests that the hearing be held;
  - (5) a statement of the requested change, including the names and addresses of any witnesses whose convenience represents the basis for the request; and
  - (6) any other factors that should be considered in ruling on the request.

(d) Any party may object to a motion for a change of venue by filing a written notice of objection with the hearing officer within three days after receipt of the motion and serving copies of the notice of objection on all other parties. The notice of objection shall state clearly the grounds for the objection.

(e) The hearing officer shall determine whether a change of venue is appropriate and shall issue an order granting or denying the motion. The order shall state the reasons for the decision. Copies of the order shall be served on all parties.

*History Note:* Authority G.S. 143-546; 143B-10(j); 150B-11; 34 C.F.R. 361.48;  
Eff. February 1, 1976;  
Amended Eff. September 1, 1989;  
Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.

#### **10A NCAC 89B .0213 DISCOVERY**

(a) Parties in appeals hearings shall exchange information voluntarily, seek access to public documents as provided by law, and exhaust other informal means of obtaining discoverable material.

(b) Within 15 days after receipt of a request for discovery or within such other time limit as the hearing officer may set, the party from whom discovery is requested shall either:

- (1) provide the requested material or access to that material to the discovering party;
- (2) provide a schedule for compliance with the request for discovery; or
- (3) file a written motion with the hearing officer for relief from the request for discovery.

(c) Any dispute regarding discovery shall be referred to the hearing officer for resolution. The hearing officer shall issue an order resolving the dispute and containing the reasons for the ruling. Copies of the order shall be served on all parties.

*History Note:* Authority G.S. 143-546; 143B-10(j); 150B-11; 34 C.F.R. 361.48;  
Eff. February 1, 1976;  
Amended Eff. September 1, 1989;  
Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.

#### **10A NCAC 89B .0214 PRE-HEARING CONFERENCE**

(a) Upon notice to all parties, the hearing officer may instruct the parties to participate in a pre-hearing conference.

(b) The conference shall be informal in nature.

(c) The conference shall be noted in the notice of hearing or in a subsequent notice if a conference is later determined to be necessary by the hearing officer.

(d) The purpose of the conference will be to discuss:

- (1) the possibility of simplification of issues,
- (2) stipulation of facts or findings,
- (3) identification of areas where evidence will be needed,
- (4) Indication of discovery, and
- (5) any other matters which will reduce costs or save time or otherwise aid expeditious disposition of the case.

*History Note:* Authority G.S. 143-545A; 150B-1; 34 C.F.R. 361.48;  
Eff. February 1, 1976;  
Amended Eff. April 1, 1997; September 1, 1989;  
Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.

#### **10A NCAC 89B .0215 SIMPLIFICATION OF ISSUES**

The parties to the hearing may agree in advance to simplification of issues by:

- (1) eliminating issues to be contested at the hearing,
- (2) accepting the validity of certain proposed evidence,
- (3) accepting the findings in some other case with relevance to the case at hand, or
- (4) agreeing to such other matters as may expedite the hearing.

*History Note:* Authority G.S. 143-546; 143B-10(j); 150B-11; 34 C.F.R. 361.48;  
Eff. February 1, 1976;  
Amended Eff. September 1, 1989; October 20, 1979;



*Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.*

#### **10A NCAC 89B .0216 EVIDENCE**

- (a) Evidence to be admitted in the hearing shall be as specified in G.S. 150B-29, G.S. 150B-30, and G.S. 150B-31.
- (b) This adoption by reference is made under G.S. 150B-14(c).

*History Note: Authority G.S. 143-546; 143B-10(j); 150B-11; 150B-14(c); 150B-29; 150B-30; 150B-31; 34 C.F.R. 361.48; Eff. February 1, 1976; Amended Eff. September 1, 1989; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.*

#### **10A NCAC 89B .0217 DISQUALIFICATION OF HEARING OFFICER**

- (a) If at any time the hearing officer believes he or she cannot conduct the appeals hearing in a fair and impartial manner, the hearing officer shall submit to the Division staff member who appointed the hearing officer a written statement indicating why he or she should be disqualified from the case. Submission of the statement shall disqualify the hearing officer. The Division staff member who appointed the hearing officer shall inform all parties of the disqualification and the reasons therefor.
- (b) If a party to the case believes that the hearing officer of record cannot conduct the hearing in a fair and impartial manner, the party shall submit an affidavit to the hearing officer for consideration. The hearing officer shall determine the matter as part of the record in the case.
- (c) When a hearing officer is disqualified or it is impracticable for the hearing officer to proceed with the hearing, another hearing officer shall be assigned by the Division staff member who appointed the hearing officer to proceed with the case. However, if it is shown to the Division staff member who appointed the hearing officer or the newly assigned hearing officer that substantial prejudice to any party will result from continuation of the case then either:
  - (1) the case shall be dismissed without prejudice; or
  - (2) all or part of the case shall be repeated as necessary to substantially prevent or substantially remove the prejudice. The Division staff member who appointed the hearing officer shall promptly inform all parties of the decision to assign a new hearing officer, that the case has been dismissed without prejudice, or that all or part of the case is to be repeated. Such notification shall include a statement of the reasons for the decision.

*History Note: Authority G.S. 143-545A; 150B-1; 34 C.F.R. 361.48; Eff. September 1, 1989; Amended Eff. April 1, 1997; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.*

#### **10A NCAC 89B .0218 EX PARTE COMMUNICATIONS**

- (a) Ex parte communications in the appeals hearing shall be governed by G.S. 150B-35.
- (b) This adoption by reference is made under G.S. 150B-14(c).

*History Note: Authority G.S. 143-546; 143B-10(j); 150B-11; 150B-14(c); 150B-35; 34 C.F.R. 361.48; Eff. September 1, 1989; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.*

#### **10A NCAC 89B .0219 OATH**

No person may testify or present arguments, views, or data orally at the hearing before being put under oath or affirmation.

*History Note: Authority G.S. 143-546; 143B-10(j); 150B-11; 34 C.F.R. 361.48; Eff. September 1, 1989; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.*

#### **10A NCAC 89B .0220 CONDUCT OF HEARING**

- (a) The hearing officer shall have control over the hearing, including:
  - (1) the responsibility of having a record made of the hearing;

- (2) the administration of oaths and affirmations;
- (3) recognition of speakers;
- (4) prevention of repetitious presentations; and
- (5) general management of the hearing.

(b) The hearing officer shall conduct the hearing in a manner that will provide the applicant or client the rights required by 34 C.F.R. 361.57(b)(3).

(c) The hearing shall not be open to the public.

*History Note: Authority G.S. 143-546.1; 150B-1; 34 C.F.R. 361.57; P.L. 105-220, s. 102(c); Eff. September 1, 1989; Amended Eff. July 1, 2000; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.*

#### **10A NCAC 89B .0221 FAILURE TO APPEAR**

(a) If the applicant or client fails to appear at the hearing and does not have a representative present, the hearing officer shall cancel the hearing.

(b) The applicant or client may submit a written request for rescheduling of the hearing to the Division staff member who appointed the hearing officer. The request shall provide an explanation of the individual's failure to appear at the hearing or to have a representative present. The Division staff member who appointed the hearing officer may instruct the hearing officer to reschedule the hearing upon a showing of good cause by the applicant or client. "Good cause" may include death or incapacitating illness of the party or an immediate family member of the party, the party's representative, or the party's attorney; involvement in an accident that prevents timely notification of the hearing officer; or failure to receive proper notice of the hearing.

*History Note: Authority G.S. 143-545A; 150B-1; 34 C.F.R. 361.48; Eff. September 1, 1989; Amended Eff. April 1, 1997; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.*

#### **10A NCAC 89B .0222 HEARING OFFICER'S DECISION**

Following the hearing, the hearing officer shall make and issue a decision as specified in 34 C.F.R. 361.57(b)(4). The decision shall be given to the applicant or client personally or by certified mail. If given by certified mail, it shall be deemed to have been given on the delivery date appearing on the return receipt.

*History Note: Authority G.S. 143-546.1; 150B-1; 34 C.F.R. 361.57; P.L. 105-220, s. 102(c); Eff. September 1, 1989; Amended Eff. July 1, 2000; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.*

#### **10A NCAC 89B .0223 SECRETARY'S REVIEW AND FINAL DECISION**

(a) Either party may request an impartial review of the hearing officer's decision according to the standards in Paragraph (d) of this Rule by the Secretary of the Department of Health and Human Services within 20 days of the receipt of the decision.

(b) The Secretary may delegate the responsibility for reviewing the hearing officer's decision and making the final decision to another employee of the Department but shall not delegate the responsibility to any officer or employee of the Division.

(c) In conducting the review, the reviewing official shall send the written notification to both parties and allow the submission of additional evidence as required by Sec. 102 (c) of the Rehabilitation Act of 1973 (as amended by the Rehabilitation Act Amendments of 1998, P.L. 105-220). The written notification shall be given personally or by certified mail. If given by certified mail, it shall be deemed to have been given on the delivery date appearing on the return receipt.

(d) The reviewing official's review shall be based on the following standards of review:

- (1) Is the hearing officer's decision arbitrary, capricious, an abuse of discretion, or otherwise unreasonable?
- (2) Is the hearing officer's decision supported by substantial evidence and consistent with facts and applicable federal and state policy?

- (3) In reaching the decision, has the hearing officer given appropriate and adequate interpretation to such factors as:
- (A) the federal statute and regulations as they apply to specific issue(s) in question;
  - (B) the state plan as it applies to the specific issue(s) in question;
  - (C) division rules as they apply to the specific issue(s) in question;
  - (D) key portions of conflicting testimony;
  - (E) division options in the delivery of services where such options are permissible under the federal statute; and
  - (F) restrictions in the federal statute with regard to such supportive services as maintenance and transportation.

(e) The reviewing official shall make the final decision and provide such decision in writing to both parties within 30 days of the date the request for a review of the hearing officer's decision was received. The decision shall include a full report of the findings and the grounds for the decision. The reviewing official shall not overturn or modify a decision, or part of a decision, of an impartial hearing officer that supports the position of the individual except as allowed under Sec. 102 (c) of the Rehabilitation Act of 1973 (as amended by the Rehabilitation Act Amendments of 1998, P.L. 105-220). The final decision shall be given to both parties or client personally or by certified mail. If given by certified mail, it shall be deemed to have been given on the delivery date appearing on the return receipt.

(f) The hearing officer's decision shall be the final decision under the conditions specified in Sec. 102(c) of the Rehabilitation Act of 1973 (as amended by the Rehabilitation Act Amendments of 1998, P.L. 105-220).

(g) The division director shall forward a copy of the final decision, whether issued under Paragraph (e) or (f) of this Rule, to the Chief of Operations, the CAP director, the regional director, and the applicant's or client's representative, as appropriate. A copy shall also be included in the individual's official case record.

*History Note: Authority G.S. 143-545.1; 143-546.1; 150B-1; P.L. 105-220; Eff. September 1, 1989; Amended Eff. April 1, 1997; October 1, 1994; Temporary Amendment Eff. March 15, 1999; Amended Eff. July 1, 2000; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.*

#### **10A NCAC 89B .0224 EXTENSIONS OF TIME**

(a) Reasonable time extensions may be granted for the procedures in these Rules at the request of a party or at the request of both parties except for:

- (1) the time for continuation of services during mediation, an appeals hearing or an administrative review as specified in Rule .0203(d) of this Section;
- (2) the time for conducting the appeals hearing as specified in Rule .0207(b) of this Section which may be extended only as specified in Rule .0207(b) and (d)(4) of this Section;
- (3) the time for issuance of the written notice of the formal appeals hearing as specified in Rule .0207(c) of this Section;
- (4) the time to request a review of the hearing officer's decision as specified in Rule .0224(a) of this Section; and
- (5) the time for the reviewing official's issuance of a final decision as specified in Rule .0224(d) of this Section.

(b) When an extension of time is being granted by the person conducting the administrative review, mediation, or the hearing officer, consideration shall be given to the effect of the extension on deadlines for other steps in the administrative review, mediation, and appeals process.

*History Note: Authority G.S. 143-546.1; 150B-1; 34 C.F.R. 361.57; P.L. 105-220, s. 102(c); Eff. September 1, 1989; Amended Eff. July 1, 2000; Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.*

#### **10A NCAC 89B .0225 RECORD**

(a) The official records of appeals hearings shall be maintained in the central office of the Division.

(b) Any person wishing to examine a hearing record shall submit a written request to the Chief of Operations who shall have the record prepared for inspection, including the removal of any confidential material.

*History Note:* Authority G.S. 143-545A; 150B-1; 34 C.F.R. 361.48;  
Eff. September 1, 1989;  
Amended Eff. April 1, 1997;  
Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.

**10A NCAC 89B .0226 TRANSCRIPTS**

Any person desiring a transcript of all or part of an appeals hearing shall contact the office of the Chief of Operations. A fee to cover the cost of preparing the transcript shall be charged, and the party may be required to pay the fee in advance of receipt of the transcript. The transcript may be edited to remove confidential material.

*History Note:* Authority G.S. 143-545A; 150B-1; 34 C.F.R. 361.48;  
Eff. September 1, 1989;  
Amended Eff. April 1, 1997;  
Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.

**10A NCAC 89B .0227 CIVIL ACTION**

Judicial review of decisions issued pursuant to Rules .0202 through .0225 of this Section shall be as specified in Sec. 102(c) of the Rehabilitation Act of 1973 (as amended by the Rehabilitation Act Amendments of 1998, P.L. 105-220).

*History Note:* Authority G.S. 143-545.1; 143-546.1; 150B-1; P.L. 105-220;  
Eff. September 1, 1989;  
Temporary Amendment Eff. March 15, 1999;  
Amended Eff. July 1, 2000;  
Pursuant to G.S. 150B-21.3A rule is necessary without substantive public interest Eff. March 1, 2016.