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**Legal Issues Regarding
Wisconsin Child Protective Services Appeals Under
The Child Abuse Protection & Treatment Act (CAPTA)**

Notice, Timeliness and Motion Practice Outline

Beginning January 1, 2015, DCF 40, which sets the policy for Child Protective Services agency reviews and appeals, was implemented statewide. At that time, all 72 Wisconsin counties began to practice CPS appeals in a new way, which sometimes involved appeal hearings with the Division of Hearings and Appeals. While many corporation counsels have experienced DHA appeal hearings, they often related to other matters, such as economic support, rather than CPS substantiation decisions. Based on feedback from county agencies, legal personnel and in collaboration with the CPS Appeals Workgroup, the Department of Children and Families, Office of Legal Counsel has pulled together legal resources to address some of the challenges that have come up as DCF 40 has been implemented. The following guide is meant to be used by social workers and corporation counsel in working through the processes involved in DHA hearings, and includes general guidance/expectations, and legal citations. Additional legal topics have been identified and will be posted as they become available.

Please use this document in your consultation with corporation counsel and provide them a copy for their reference.

Notice

- Notice of Final Determination must be sent to subject within 5 days after the date of a final determination

- Notice shall include the determination, the person's right to a contested case hearing on the determination under Ch. 227, and the procedures under Wis. Stat. §48.981(3)(c)5p, by which the person may receive that hearing

- Notice sent by U.S. mail is presumed to be served when deposited in the U.S. mail
Wis. Admin Code § HA 1.03(2)/Wis. Stat. § 891.46
 - DHA will consider claim of non-receipt
 - If returned mail is tracked and documented within, an affidavit accompanying a motion to dismiss can contain statements that returned mailings are documented and the NFD to this Petitioner was not returned

- Must provide notice by 1st class mail
 - May provide other types of notice too but be sure to provide 1st class mail

- Consider dual notice for incarcerated persons to ensure receipt if released prior to receiving notice while incarcerated
 - May also work with local jail for best CPS notification procedures locally

Timeliness

- DHA hearing requirements
 - Petitioner must send a written request for a hearing within 10 days after the date of the notice of Final Determination (Wis. Stat. § 48.981(3)(c)5p)
 - Child Maltreatment Contested Case Hearing Request form informs petitioners that the form needs to be delivered to DHA via personal service, mail or fax within 10 days of the Date of Final Determination
 - If mailed, Petitioner's postmark date is used to calculate the 10 days since request must be sent within 10 days, not necessarily received
 - Hearings must be held within 90 days after DHA's receipt of the request. DHA typically notes the receipt date in their cover letter accompanying the appeal request.
 - Exceptions:
 - Petitioner request the hearing be re-scheduled
 - Hearing is held in abeyance (see below)
 - Neither Wis. Stat. § 48.981(3)(c)5p nor DCF 40 discusses the ability to go beyond 90 days by stipulation of the parties; however, ALJs have allowed it when the Petitioner waives the 90 day requirement
 - Judicial decisions shall be issued within 60 days after the close of the hearing (Wis. Stat. § 48.981(3)(c)5p & DCF 40)
- Counting considerations for 10 days for Petitioner to send written request
 - *Baker v. Department of Health Services* (2012 WI APP 71, 342 Wis. 2d 174, 816 N.W.2d 337). Available at: https://www.wicourts.gov/other/appeals/caopin.jsp?docket_number=2011AP001529
 - Baker argued that Wis. Stat. § 801.15(1)(b) applied to administrative hearings, which would exclude weekends and holidays from the counting period
 - Instead, court held that 801.15(1)(b) only applies to circuit court proceedings, not DHA hearings
 - Wis. Stat. § 990.001(4)(a) is applicable for Ch. 227 hearings, according to *Baker*
 - Computes days by excluding the first day and including the last day

- If last day is Saturday, Sunday or legal holiday, petitioner has until next secular day, assuming DHA does not have office hours on Saturdays or Sundays (Legal holiday as defined in Wis. Stat. § 995.20)
 - Example: 10th day falls on a Monday, which is Labor Day. An appeal postmarked or faxed on the following day, the 11th day, is timely.
- Expedited DHA appeals
 - Petitioner may request that DHA expedite their appeal in certain circumstances (see DCF 40.04(3)(b)3)
 - Petitioner must indicate the expedited request on hearing request form and provide documentation of his or her qualification
- Objecting to untimely appeals
 - Be proactive! Don't wait for DHA to catch untimely appeal. Unless the Petitioner sends a copy of the Notice of Final Determination, often the ALJs do not have a copy and are not even able to determine the timeliness of an appeal.
 - File a Motion to Dismiss for an untimely appeal
- Abeyance - Wis. Stat. § 48.981(3)(c)5p
 - Tolls 90 day time limit to begin hearing
 - Allowed in either of 2 situations:
 - Available for pending criminal proceedings or CHIPS (48.13) proceedings
 - Outcome of any investigation that may lead to criminal charges or a CHIPS petition
 - Proceeding or investigation must be based on the alleged abuse or neglect (e.g. can't hold in abeyance because parent is being criminally investigated for criminal activity unrelated to the abuse or neglect)
 - Some ALJs set periodic status dates during the abeyance period. If no status date is set, be sure to determine during the prehearing conference which party's responsibility it is to notify the ALJ when the basis for abeyance has ended.
 - Confidentiality considerations in consulting with law enforcement or prosecution on other cases
 - See various exceptions to confidentiality for law enforcement, district attorney or other government agencies in Wis. Stat. § 48.981(7).
 - Initial Determination Review may not be held in abeyance. Abeyance is only available for appeal of Final Determination. Wis. Stat. §48.981(3)(c)5p and DCF 40.03(2)(h)

Motion Practice

- Motion to Dismiss

- May be used for a failure to pursue appeal within time limits set by Wis. Stat. § 48.981(3)
 - Example motion
 - DCF mailed final determination on 5/7/15
 - Appeal request due 5/17/15 (But a Sunday so timely if sent by 5/18/15)
 - Petitioner faxed appeal request to DHA on 5/21/15 = late
 - Should be accompanied by an Affidavit of agency staff member that can affirm that Notice has been sent properly and not returned to the agency
 - Typically, DHA has only received hearing request form so any supporting documentation to motion should be attached as an exhibit
E.g. Notice of Final Determination, documentation showing date Petitioner sent hearing request (fax date stamp, postmark, etc.)
 - Dismissal order
 - No exceptions for submitting an appeal late or provision for DHA to waive time limit or grant “good cause”
 - Agency should use discretion in filing a Motion to Dismiss if notice to Petitioner was not sent correctly such as the agency sending notice (to the wrong address, typo, wrong zip code, etc.) that resulted in a delay
- Summary Judgment – Wis. Stat. § 802.08(2)
 - Summary Judgment available for DHA cases
The summary judgment procedure as provided in s. 802.08, Stats., shall be available to the parties upon approval by the division or the administrative law judge.
Wis. Adm. Code § HA 1.10(2)
 - Purpose of motion is to determine whether a dispute can be resolved without a trial/hearing
 - Argues that no genuine issues as to any material fact exist
 - Consider admissions or findings of guilt in corresponding criminal cases
(advantage to having DHA appeal held in abeyance during pendency of criminal case)
 - May be able to file for summary judgment based on admissions in CHIPS case but would need to use discretion as would be case and fact specific
E.g. An admission by the Petitioner to court jurisdiction under 48.13(3) might admit that the child was the victim of abuse, but the Petitioner may not be admitting to causing the injuries, which was the basis for the Final Determination
 - Summary Judgment requirements under Wis. Stat. § 802.08(2):
 - 20 days notice must be provided
 - Supporting affidavits must be based on personal knowledge
 - Affidavit should set forth evidentiary facts that would be admissible in evidence

- Example Summary Judgment Motion
 - Petitioner (mother) substantiated for abuse by DCF.
 - Mother also criminally charged with physical abuse of a child for same behavior as substantiation.
 - Mother's criminal charges amended to 3 counts of battery. She entered a guilty plea to the 3 counts of battery and was convicted and sentenced.
 - DCF argued that no material issue existed as to any material fact as mother admitted that she had intentionally caused bodily harm to the child. Factual basis for the plea was the criminal complaint, which was the same factual basis as DCF's substantiation.
 - DCF attached certified copies of the Criminal Complaint, Judgment of Conviction and Docket from criminal case. This allowed the ALJ to see that the Criminal Complaint was the factual basis for the guilty plea, that the criminal court had made a finding of guilty and entered judgments of conviction and also read the specific facts in the Criminal Complaint.
Note: ALJs typically do not have a copy of the Final Determination unless the Petitioner has included a copy with their appeal request so many appreciate a copy of the Notice of Final Determination being included, as well.
 - ALJ granted summary judgment finding no factual dispute existed as the Petitioner had, in the process of admitting guilt to criminal battery, admitted to facts that justified a substantiation for physical abuse.

- Need to ensure that definitions and factual basis of an admission/guilty finding in criminal case are sufficient to argue that no material issue exists as to the substantiation

E.g. A conviction for criminal battery (Wis. Stat. § 940.19(1)) only requires causation of bodily harm. Bodily harm can be as limited as physical pain or injury (see Wis. Stat. 939.22(4)). However, a substantiation for physical abuse must meet the definition of physical abuse in Wis. Stat. 48.02(1)(a)/(14g) and in the Access and Initial Assessment Standards (see Appendix 1).

Settlement Agreements Within County

There is no legal authority for the use of a settlement agreement that removes a CPS substantiation based on the maltreater meeting certain conditions required by the agency or the Corporation Counsel's or District Attorney's Office. The statutes and administrative rules require that if a CPS substantiation is made, and is not properly overturned during an initial review, a contested case proceeding or judicial review, the substantiation must be provided for caregiver background checks under Wis. Stats. §§ 48.685 and 50.065.