

§ 412.102 Appeal and review process.

(a) A substantiated perpetrator at Tier I or Tier II may appeal the disposition made by ORR to an Administrative Law Judge (ALJ) of the HHS Departmental Appeals Board (DAB) pursuant to § 412.102(c).

(b) *Notice of Opportunity for an Appeal.* (1) After ORR substantiates an allegation of child abuse and neglect at Tier I or Tier II, it will send a written notice to the substantiated perpetrator at Tier I or Tier II, in accordance with § 412.100(g), with notification that the allegation has been substantiated and that, unless they appeal the disposition by ORR, a Tier I substantiated perpetrator will be placed on the ORR Central Registry as a Tier I sustained perpetrator and a Tier II substantiated perpetrator's information will be retained as a Tier II sustained perpetrator in agency records.

(2) The written notice shall:

(i) Clearly describe the basis for ORR's disposition that substantiates the relevant allegations at Tier I or Tier II and shall explain the Tier I or Tier II substantiated perpetrator's right to appeal the disposition and the steps required to initiate the appeal.

(ii) Inform the substantiated perpetrator that they may appeal the ORR disposition before an ALJ.

(iii) Provide the substantiated perpetrator at Tier I or Tier II and their attorney, if any, with written information and instructions describing the appeal process.

(iv) Inform the substantiated perpetrator at Tier I or Tier II that if they do not submit a notice of appeal within 30 days of receiving the notice of disposition, the DAB will consider the substantiated perpetrator to have waived their opportunity to appeal and any subsequent review. If the appeal is determined to be waived, a Tier I substantiated perpetrator will be identified as a Tier I sustained perpetrator on the ORR Central Registry and a Tier II substantiated perpetrator's information will be retained as a Tier II sustained perpetrator in agency records.

(c) *Notice of Appeal and Dismissal of an Appeal—(1) Notice of Appeal.* (i) If the substantiated perpetrator at Tier I or Tier II elects to appeal ORR's disposition that an allegation is substantiated at Tier I or Tier II, they must file a written notice of appeal with the DAB within 30 days of receipt of the written notice of ORR's disposition.

(ii) Within 30 days of receipt of the notice of appeal, ORR shall provide all evidence it used in making its disposition to the DAB.

(iii) ORR shall provide the substantiated perpetrator at Tier I or Tier II and their attorney, if any, all information used in making its disposition except any portion that ORR determines:

(A) Would compromise the safety and well-being of a child, the reporter, or any other person;

(B) Would reveal the identity of a child who furnished information with the understanding that their identity would be held in confidence;

(C) Would reveal the identity of any alleged perpetrator(s) involved in the same case who has an unfounded disposition; or,

(D) Is otherwise prohibited by State or Federal law or regulation. In the case of information being withheld, the substantiated perpetrator at Tier I or Tier II shall be advised of the general nature of the information and the reasons that it is being withheld.

(2) *Dismissal of appeal.* (i) The ALJ shall dismiss an appeal when the substantiated perpetrator waives appeal by not submitting a notice of appeal within 30 days of receiving written notice of ORR's disposition, pursuant to § 410.102(b)(2)(iv), and does not demonstrate good cause for the untimely submission; or when the substantiated perpetrator withdraws the appeal, abandons the appeal, or does not have a right to ALJ review. If the appeal of a Tier I substantiated perpetrator is dismissed, they will be placed on the ORR Central Registry as a Tier I sustained perpetrator. If the appeal of a Tier II substantiated perpetrator is dismissed, ORR will retain the information regarding the Tier II substantiated perpetrator as a Tier II sustained perpetrator in agency records.

(ii) Notwithstanding such dismissal, the DAB may in its discretion temporarily remove the designation of sustained perpetrator at Tier I or Tier II, which would result in ORR removing the individual who was designated as a sustained perpetrator at Tier I from the ORR Central Registry, for situations including, for example, where the ALJ determines that the sustained perpetrator at Tier I or Tier II has established good cause for exceeding the appeal timeframe.

(d) *Appeal of ORR's disposition.* (1) When a substantiated perpetrator at Tier I or Tier II appeals ORR's disposition to an ALJ pursuant to paragraph (c)(1)(i) of this section, ORR must transmit to the ALJ all of the evidence upon which the disposition was based.

(2) The evidentiary record must contain all documents and other materials, such as video or audio recordings, that were used by ORR in making its disposition. The ALJ may remand the case to ORR if the ALJ determines that the evidentiary record is insufficiently complete to decide whether ORR's disposition is supported by a preponderance of the evidence.

(3) The substantiated perpetrator at Tier I or Tier II may be represented by an attorney and may present the testimony of witnesses, documents, factual data, arguments, or other submissions of proof.

(4) The substantiated perpetrator shall have the burden to show that, considering the totality of the evidence, there is not a preponderance of the evidence to support the substantiated allegation at Tier I or Tier II, and to dispute whether any automatic Tier I substantiating circumstances existed (if applicable) or whether any aggravating factors or mitigating factors existed (if applicable). Both ORR and the substantiated perpetrator may present the testimony of witnesses, documents, factual data, arguments, or other submissions of proof. The testimony of care provider facility staff shall be voluntary and failure to offer such testimony will not be subject to disciplinary action.

(5) If the substantiated perpetrator submits a notice of appeal and the appeal is not dismissed by the ALJ pursuant to § 412.102(d)(7), ORR must notify the alleged victim and the alleged victim's parent(s), legal guardian(s) (as appropriate), or sponsor(s) that that an appeal of ORR's

disposition will be conducted by an ALJ. The alleged victim, other child witness(es), and family members of the alleged victim shall not be required to testify. Refusal to testify shall have no bearing on the determination as to whether abuse did or did not take place.

(6) The parties may direct and cross examine witnesses either during a live hearing or pursuant to a record review. The parties will be given an opportunity to file briefs or other written statements as to fact or law.

(7) The ALJ shall conduct a fair and impartial hearing and de novo review to determine whether the substantiated perpetrator met their burden of establishing that, considering the totality of the evidence, there is not a preponderance of the evidence to support the substantiated allegation. The ALJ may either dismiss the case for untimeliness, withdrawal of the appeal, abandonment of the appeal, or because the individual does not have the right to appeal or because of other procedural defects, or will issue a written decision to uphold, modify, or reverse ORR's disposition.

(8) The ALJ shall serve a copy of the decision upon the parties and the Assistant Secretary for ACF. The ALJ's decision shall provide the sustained perpetrator at Tier I or Tier II and their attorney, if any, with instructions for requesting review by the Assistant Secretary for ACF. The ALJ also shall provide a copy of the decision to the alleged victim and the alleged victim's parent(s), legal guardian(s) (as appropriate), or sponsor(s). The complete record upon which the decision is based shall be made available to the Assistant Secretary.

(e) *Review of the ALJ's Decision.* (1) A substantiated perpetrator at Tier I or Tier II may request a review of the ALJ's decision within 30 days of receipt of the ALJ's decision, by filing a request for review with the Office of the Assistant Secretary for ACF.

(2) The Assistant Secretary for ACF has discretion, within 30 days after receiving a timely submission by a substantiated perpetrator of a request for review of an ALJ's decision under § 412.102(e)(1) to review the ALJ's decision to dismiss a case for untimeliness or other procedural defects, and to affirm, modify, or reverse the ALJ's decision with regard to dismissal or ORR's disposition of the allegation. A review by the Assistant Secretary will determine whether the ALJ's decision was based on a material error of law or fact.

(3) If the Assistant Secretary affirms the ALJ's decision or does not modify or reverse the ALJ's decision within 30 days after receiving a timely review request pursuant to § 412.102(e)(1), the ALJ's decision becomes the final decision of the Assistant Secretary and is binding on the parties.

(4) If the Assistant Secretary modifies or reverses the ALJ's decision pursuant to § 412.102(e)(2), the Assistant Secretary's decision is final and binding.

(5) If at the end of the 30-day period in § 412.102(e)(1), no timely request for review has been made, the Assistant Secretary has 30 days from that point to exercise discretion to review the ALJ's decision. If the Assistant Secretary does not modify or reverse the ALJ's decision, then the ALJ's decision becomes the final decision of the Assistant Secretary and is binding on both parties.

(6) The Office of the Assistant Secretary for ACF shall serve a copy of the final decision upon the parties involved. The Office of the Assistant Secretary for ACF also shall provide a copy of the final decision issued by the Assistant Secretary, based on review of the ALJ's decision under this paragraph (e), to the alleged victim and the alleged victim's parent(s), legal guardian(s) (as appropriate), or sponsor(s).