OTDA Fair Hearings

Presenters

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FAIR HEARINGS-GENERAL

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Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970)

"The fundamental requisite of due process of law is the opportunity to be heard….These principles require that a [welfare] recipient [on proposed termination of public assistance benefits] have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own argument and evidence orally." U.S.C.A.Const. Amend. 14.

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OTDA
Fair Hearing Administration

- **NYS Office of Temporary and Disability Assistance (OTDA)**
- **Office of Administrative Hearings (OAH)**
- **County Department of Social Services (DSS)**
- **NYC Human Resources Administration (HRA)**

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Statutes and Regulations

- **NYS Fair Hearing Regulations**: 18 NYCRR Part 358
- **NYS State Statute**: Social Services Law § 22
- **Medicaid Federal regulations:** 42 C.F.R. § 431.220-.246
- **SNAP Federal Regulations**: 7 C.F.R. § 273.15
  - Regulates SNAP

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Additional Sources
www.otda.ny.gov

NYS OTDA Fair Hearing Decisions

NYS OTDA Sub-regulatory Guidance

- NYS OTDA Administrative Directives (ADM)
- NYS OTDA Informational Letters (INF)
- Local Commissioner Memoranda (LCM)
- General Information System Messages (GIS)

NYC HRA Policy Bulletins

NYC HRA Policy Directives

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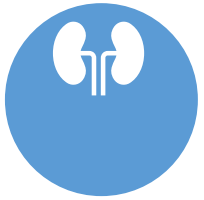
Alternative Appeal Procedures

INFORMAL ADVOCACY

CONFERENCES

(HRA ONLY) MANDATORY DISPUTE RESOLUTION



CONCILIATION/ RE-ENGAGEMENT (*SEE* N.Y. SOC. SERV. L. § 341-A)

CLASS ACTION LAWSUITS

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THE FAIR HEARING ("FH")

Live Content Slide

When playing as a slideshow, this slide will display live content

Poll: 1. Have you ever participated in an OTDA fair hearing?

Advocate Pre-Hearing Steps

Request	Request Fair Hearing. You must identify yourself as a requester or a representative.
Ensure	Ensure you receive Notice of Fair Hearing Acknowledgment.
Review	Review facts of case with Appellant (repeat as needed)
Request Evidence	Request file review and obtain all records you want

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Pre-Hearing Steps (cont'd)

Research	Research rules and regulations that govern your Fair Hearing issue(s)
Obtain	Obtain other records, affidavits, witnesses as needed
Prep	Prep client and witnesses by reviewing direct line of questions and what client should expect
Review	Review Evidence Packet
Create	Create short document that incl: client information, Fair Hearing issues and what you are asking for at the FH

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When to Request

18 NYCRR § 358-3.1; 18 NYCRR § 352.6-7; SSL § 22
To challenge the reduction, discontinuation, restriction, suspension, or denial of any public benefit
Request interpreter when you request the hearing

What to challenge

18 NYCRR § 358-3.1; 18 NYCRR § 352.6-7; SSL § 22

Examples:

Failure to send a notice or error on a notice

Removal of a person from the budget or failure of DSS/HRA to add a person to the budget

Case closing for failure to recertify

Drug treatment/work sanction

Denial of moving expenses or other emergency assistance

Inappropriate charge of overpayment or recoupment

Incorrect budgeting of income or resources

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How to Request (for both HRA and DSS)

MAIL:

OFF OF ADMIN HEARINGS
NYS OTDA, PO BOX 1930, ALBANY, NY 12201-1930

FAX: (518) 473-6735

WEB:
WWW.OTDA.STATE.NY.US/OAH

PHONE: 1-800-342-3334

IN PERSON:
40 NORTH PEARL STREET, ALBANY, NEW YORK 12243

IN PERSON (NYC): 14 BOERUM PLACE, BROOKLYN, NY 11201

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Timelines to Request

- **When to Request: 18 NYCRR § 358-3.5(b); 18 NYCRR § 385.2(d); SSL § 22(4)(b)**
- 10 days of the notice or before the effective date of the notice for Aid to Continue (ATC)
- 60 days of date of notice on a Public Assistance or Medicaid challenge
  - *10 days* on Notice of Work Requirement
- 90 days for SNAP
- 30 days to review the involuntary discharge from a Tier II facility after a hearing decision that the resident requested and participated in has been rendered by the facility or the social services district in which the facility is located

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Expedited Fair Hearing

- **18 NYCRR § 358-3.2; SSL § 22(6)**
- An expedited fair hearing may be requested to challenge the denial of an emergency benefit

- The request to expedite the hearing must be made at the time the hearing request is submitted so that it can be scheduled more quickly

Examples of expedited Fair Hearing issues

- Rent arrears where eviction is imminent
- Expedited food stamps
- Utility grant to prevent shut off
- Emergency housing issues
- See 18 NYCRR § 358-3.2 for additional examples

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Homebound Hearings aka Varshavsky Hearings

18 NYCRR § 358-5.2(a)
If Appellant is physically unable to attend a hearing in person, they can make a special request for a home hearing.
OTDA will send questionnaire and Appellant must provide proof of illness or disability that necessitates a home hearing.
Appellant will first be given a phone hearing in which the Appellant appears by phone from their home and their representative can appear in person at the hearing or via phone from the Appellant's home.
If Appellant loses the phone hearing, OTDA will schedule a second hearing at the Appellant's home.

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Requesting a Fair Hearing Adjournment

- Appellant can adjourn a Fair Hearing before hearing date for good cause. Reasons include, but not limited to:
  - Illness
  - Scheduling conflict for appellant or representative
  - More time to find a representative
  - Representative recently agreed to take the case and needs more time to prepare

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Requesting a Fair Hearing Adjournment

Ph: 877-209-1134

Online https://errswebnet.otda.ny.gov/errswebnet/eadjournment.aspx

Fax: 518-473-6735

In person NYC: 14 Boerum Place, Brooklyn, NY 11201

In person ROS: 40 North Pearl Street, Albany, New York 12243

Advocate Tip: Call the Judges, Liaison and Legal Representative Line at 518-408-3208 to request adjournment

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APPELLANT RIGHTS

Notices

<u>Applicants</u> must receive *adequate* notice of a denial of benefits (18 NYCRR § 358-2.2)

<u>Recipients</u> must receive *timely and adequate* notice when HRA/DSS intends to change an existing grant (18 NYCRR § 358-2.2)

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Aid Continuing Benefits (ATC)

18 NYCRR § 358– 3.6

Benefits will continue unchanged until receipt of hearing decision.

For aid continuing problems, legal representatives can call OTDA at (518) 408-3208.

The FH must be requested within 10 days of notice date or by notice effective date.

Put request for ATC in Fair Hearing Request.

Check Fair Hearing Acknowledgement letter to confirm ATC

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Special Interim Aid for Certain Medicaid Recipients

If homebound client requests a homebound hearing because client's request for an increase in home care services was denied, the client can get temporary increase in hours to their requested amount if client loses first fair hearing (done by phone or representative) and is waiting for 2nd fair hearing

This is known as "special interim aid" though OTDA calls it "aid continuing"

This interim aid ends if client loses the hearing

If interim aid not given, or if case was mistakenly adversely decided without being assigned for a home hearing, contact Nina Keilin, class counsel for Varshavsky (212) 302-7760

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Examination of Case Record and Evidence Packet

- **18 NYCRR § 358-3.7**
- Upon request, the Appellant has the right to examine, and receive copies, at no cost, of anything in their entire case file that will aid them for their hearing. This material need not be used as evidence at the hearing.
- HRA/DSS prepares "evidence packets" that will contain copies of what they will use to prove their case at the Fair Hearing.
- Evidence Packets must be mailed to client within a reasonable time before the hearing upon request. In the case of an ADH for an IPV, OTDA must send a copy of the Evidence Packet at least 30 days prior to the date of the ADH to the Appellant.
- If HRA/DSS has the burden of proof, they cannot win fair hearing if they do not have relevant evidence to put forth at hearing
- HRA/DSS must appear at the FH with the Appellant's complete relevant case record; failure to do so must result in a *Rodriguez* withdrawal by the Agency for Cash Assistance or an *Annunziata* withdrawal for Medicaid.

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Requesting Case Review from DSS

- Contact the local DSS to request a case review. Some DSS have their own legal division that handles all FH cases. In other counties, the worker who decided their case and/or their supervisor will be the one to arrange a case review, put together the FH packet, and represent DSS at the hearing.

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Requesting Case Review and Evidence Packet from HRA

- Request Evidence Packet by either:
  - Mail or in Person:

    The City of New York
    DSS/HRA
    Division of Fair Hearings
    14 Boerum Place
    New York, NY 11201

- Fax Evidence Packet Request Form:
  - 718-722-5018

Advocate tip: Call the Advocate Inquiry Line (518-408-3208) a few days after FH request to get the FH number in order to request evidence packet as soon as possible.

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Administrative Subpoena

- Pursuant to NY CPLR 2302 and 18 NYCRR 358-5.6(b)(8) either the Appellant's Attorney or the ALJ can issue a subpoena or subpoena duces tecum to compel attendance or obtain documents at the fair hearing.

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Appellant Rights at the Hearing

Be heard	Be heard in a meaningful manner and state their position orally (give testimony) [18 N.Y.C.R.R
Review Evidence	Review the evidence HRA/DSS submits at the hearing and may ask for copies of the evidence (the ALJ will allow copies to be made afterward)
Call witnesses	Call necessary witnesses and confront and cross-examine adverse witnesses (including the Agency's representative – often the Agency representative does not have personal knowledge of the situation)

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Appellant Rights at the Hearing

Be Represented	Be represented by counsel or a representative, or proceed unrepresented
Make Statements	Make opening or closing statements
Make Objections	Make objections to the relevance of evidence, hearsay, personal knowledge, or to procedures
Get A Decision	Have an impartial decision maker (the ALJ) make a conclusion resting solely on the evidence brought forth at the hearing

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Abandoned Fair Hearings

If Appellant or Appellant's representative fails to appear at fair hearing, OAH will consider the fair hearing abandoned and the right to aid continuing ends.

Fair Hearing will be restored to calendar and ATC will be restored retroactively if appellant can provide good cause reason for failing to appear.

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Aid to Continue in Abandoned Fair Hearings

If there was ATC on the case before the dismissal, it can be restored.

If the FH is restored to the calendar based upon a request to do so made within 60 days from the date of the default, aid-continuing will be restored retroactively.

If the fair hearing is restored to the calendar based upon a request to do so made 60 days or more from the date of the default, aid-continuing will be restored prospectively only from the date of the request to restore the fair hearing to the calendar.

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Appellant Withdrawals (of fair hearing request)

- **At any point before the hearing or even at the hearing, the Appellant can choose to withdraw the fair hearing request**
  - Online: http://otda.ny.gov/hearings
  - In person: NYC or Albany
  - By fax: 518-473-6735
  - By phone: 877-209-1134
  - Advocates can call Judges, Liaison, and Legal Representative Line to withdraw 518-408-3208;
  - By mail: the Appellant can sign off at the bottom of the hearing scheduling letter and mail it to OTDA

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HRA/DSS Withdrawals (of Notice)

- HRA/DSS can withdraw their notice before the hearing or during the hearing
  - If HRA/DSS withdraws, all lost benefits will be restored
- DSS: varies by county. Some want to withdraw on record at hearing; some will withdraw prior to hearing. Note: it is good practice to put any withdrawal or stipulation on the record to ensure that Appellant can enforce what DSS offers
- HRA: Prior to Fair Hearing, HRA will conclude that its determination was made in error or it cannot support its proposed action. HRA will then issue a "Pre-Hearing Determination" that serves as a Fair Hearing Decision

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Burden of Proof

Appellant has Burden of Proof when:

- Challenging denial of an application for or the adequacy of public assistance, medical assistance, HEAP, Supplemental Nutrition Assistance Program (SNAP) benefits or services,
- Generally, the burden is on the Appellant to prove that they are exempt from work activity requirements

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Burden of Proof

HRA/DSS has Burden of Proof when:

- hearing involves the discontinuance, reduction, or suspension of public assistance, medical assistance, or SNAP benefits or services, or
- the source of funding and the amount deducted from the initial payment of supplemental security income as reimbursement of public assistance (IAR)

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THE HEARING

The Hearing Demonstration Project

- Since March 20, 2020, OTDA has implemented a demonstration project to conduct hearings utilizing telephone, video, and other means of communication. OAH Transmittal 23-01 explains this demonstration project will continue until at least March 12, 2024.
- The FH notice identifies the "hearing location" but directly above the physical address are the words "TELEPHONE HEARING."
- ALJ calls may appear as 518.549.0500, 212.459.7801, Blocked Caller, Private, Unknown, or have other 212, 718, or 518 area codes.
- Hearings calendared 9:00 am to 1:00pm (morning) or 1:00pm-5:00pm (afternoon)

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Live Content Slide

When playing as a slideshow, this slide will display live content

Poll: 2. Have you ever participated in an OTDA telephone fair hearing?

Who May Be Present at Fair Hearing

- Appellant
- Appellant's Representative
- Appellant's Witnesses
- Social Services Agency Representative
- Administrative Law Judge (ALJ) or Hearing Officer
- Interpreter (when needed)

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ALJ Responsibilities

- Hearing Officer Responsibilities: 18 NYCRR § 358-5.6
- ALJ is required to:
  - Preside over FH and regulate conduct and course of FH
  - Make opening statement
  - Elicit documents and testimony
  - Adjourn the Fair Hearing, when necessary
  - Develop a complete evidentiary record

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ALJ Responsibilities
(outlined in OAH Transmittals)

- Hearing officers will conference all participants and may permit either party to conference other participants in order to develop the record.
- Hearing officers may adjourn or preclude the Agency's evidence.
- For adequacy and eligibility issues, where the Agency fails to participate or does not submit evidence, OAH may resolve in Appellant's favor if they have produced sufficient evidence to meet their burden.

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ALJ Responsibilities (outlined in OAH Transmittals)

- OAH will not share evidence with the Agency prior to the hearing unless expressly authorized.
- The ALJ may not consider evidence that is not submitted in advance of the hearing.

ALJ Responsibilities (outlined in OAH Transmittals)

- Hearing officer will make two attempts to reach Appellant during scheduled period, with at least ten minutes between calls and leave voicemails. If unable to reach Appellant or rep, hearing may be considered abandoned
- Administrative Disqualification Hearings (ADH) will proceed even if the Appellant or rep is not reached by phone. OAH Transmittal 23-01 and will only be reopened in accordance with 18 NYCRR § 359.7(g).

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Agency Responsibilities (OAH transmittals)

- Provide evidence packet to Appellants, authorized representatives and OAH at least two business days in advance of the hearing
- Provide telephone number for agency representative, regardless of whether Agency intends to waive personal appearance.
- OTDA prefers agencies include rebuttal documentary evidence in original evidence packet. (OAH Transmittal 23-01)
- OAH needs a compelling reason to adjourn a hearing in the event that the agency fails to submit evidence before the hearing. OAH also generally won't adjourn a hearing if the agency decides not to participate and there is enough evidence in the record to issue a decision. (OAH Transmittal 23-01)

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Appellant Responsibilities (OAH Transmittals)

- Appellants and representatives must ensure OTDA has up to date contact information prior to hearing
- If Appellant doesn't have access to a phone, OTDA must be notified prior to hearing or Appellant risks abandonment of the hearing

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Appellant Responsibilities (OAH Transmittals)

- Appellant must submit evidence at least two business days before the hearing to OAH with the hearing number included in the subject line. OAH will transmit it to the Agency during the hearing via encrypted email.
    - **Email**: intakemail.hearings@otda.ny.gov
    - **Fax**: (518) 473-6735
    - **Mail**: Office of Administrative Hearings, 40 North Pearl Street, Fl 15B, Albany, NY 12243 -or- PO Box 1930, Albany, NY 12201
    - **Secure Upload**: UpLoad.NY.gov
    - Appellants without access to these methods should contact OAH to identify a different method of submission

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POST-HEARING

Fair Hearing Decisions

- **Fair Hearing Decisions 18 NYCRR § 358-6.1**
- Decision must be based exclusively on the fair hearing record, or in case of decision without hearing, on documents submitted by Appellant and HRA/DSS
- Decision is final and binding on HRA/DSS (unless HRA/DSS asks for reopened/corrected fair hearing)
- OAH will mail copy of **Decision After the Fair Hearing** to Appellant and the Appellant's representative
- Redacted fair hearing decisions are available here: https://otda.ny.gov/hearings/search/

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Reopened and Corrected Fair Hearings

- If there is an error in law or fact, the ALJ, upon the Appellant's request, can issue a corrected Decision After Fair Hearing.
- For the purpose of completing a record, either before or after the DAFH is issued, the ALJ can re-open a fair hearing.
- Advocates can draft letter requesting a reopened or corrected decision (or both) and either:
  - **Mail**: New York State Office of TADA
    - 40 Pearl St.
    - Albany, New York 11243-0001
  - **Email:** litigationmail@otda.ny.gov

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Compliance

- **Compliance: 18 NYCRR § 358-6.4**
- Compliance required before 60 days (SNAP), 90 days (Cash and Medicaid).
- If HRA/DSS does not comply, you can:
  - **Write:** Office of Administrative Hearings
    Compliance Unit
    N.Y.S. OTDA
    P.O. Box 1930
    Albany, NY 12201-1930
  - **Fax:** (518) 486-7553
  - **Call the Compliance Unit:** (518) 474-5603

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Article 78

- An appeal in state court **must be filed within 4 months** of the date of the fair hearing decision [NY CPLR 217(1)].
- This appeal is called an Article 78 and can be filed if an agency or administrative officer (like the ALJ) failed to perform a duty; acted without authority; made a determination in violation of lawful procedure; made an error of law; made a determination that is "arbitrary and capricious" or an "abuse of discretion;" or, the determination was not supported by "substantial evidence." [NY CPLR 7801].

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QUESTIONS?

Thank you!

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