

VIA E-MAIL

March 24, 2020

Michael P. Hein  
Commissioner  
New York State Office of Temporary and Disability Assistance  
40 N. Pearl St.  
Albany NY 11243

Dear Commissioner Hein:

We write to request that you use your authority to address the current COVID-19 crisis as it pertains to our clients' access to fair hearings administered by the Office of Temporary and Disability Assistance (OTDA).

We know that OTDA is working hard to try to meet the challenges presented by the COVID-19 crisis. We have reviewed the information provided in the March 12, 2020 Office of Administrative Hearings Transmittal regarding the implementation of telephone hearings.<sup>1</sup> On March 16, 2020 Roy Esnard, Deputy Commissioner of OTDA's Office of Administrative Hearings (OAH), provided information in an email about additional OTDA fair hearing policies that will apply during this emergency period. These include the following:

1. **No Defaults for Hearing No-shows** - If an appellant fails to show up to a hearing scheduled during the extant state of emergency, no default will be taken.
2. **Administrative Adjournments for No-shows** - Instead of defaulting people who do not appear at hearings scheduled during the state of emergency, OAH will administratively adjourn those hearings, and preserve aid to continue pending the outcome of the hearing, for those cases in which it is in place.
3. **New Requests for Fair Hearings and Hearings on the Calendar for Upcoming Dates; Option to Proceed by Telephone** - Persons who make new requests for a hearing during the state of emergency are given the option of a hearing by telephone. OTDA is affirmatively reaching out to appellants with scheduled hearings to offer them the option of a telephone hearing.

We appreciate that OTDA has committed to take these steps. On March 19, we emailed Mr. Esnard to ask additional questions and make additional requests for procedures. We write to memorialize

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<sup>1</sup> See General Information System Messages (GIS) 20/DC014 (hereinafter "the transmittal").

and clarify these requests. The requests listed here are intended only for this emergency situation which makes in-person hearings a public health hazard. It is our view that video or telephone hearings would not be a sufficient substitute for in-person hearings on an ongoing basis.

To protect our clients' due process rights to ensure that New Yorkers have access to and retain critical benefits we are requesting that OTDA take the following actions:

**1. Prioritize conducting non-aid-continuing appeals.**

Assuming OTDA's capacity to conduct hearings will be diminished during the pandemic, priority must be given to hearing those appeals for which aid-continuing has not been directed.

**2. Adjourn fair hearings where an appellant has aid continuing and where the ALJ cannot reach an appellant or representative by phone, unless the agency or Medicaid managed care plan has agreed to provide or continue the full relief requested.**

Where an appellant has aid continuing, OTDA should adjourn the fair hearing until after this crisis is over, unless the agency or plan has agreed to provide or continue the full relief requested.

Hearings with a representative that were requested before this crisis will include the representatives' office contact information. With many representatives working remotely, they will not receive a call at their office number and may not be receiving mail. In addition, disruptions of telephone service have been reported as a result of the vastly increased number of telecommuters. If the ALJ reaches an appellant who has a representative or who indicates s/he has a representative, the hearing should not be held without the representative, and should be adjourned, unless the agency or plan has agreed to provide or continue the full relief requested.

We also ask that no defaults be taken the first time a phone hearing is held in a case.

**3. Amend communication practices and forms with appellants and representatives.**

Given that many representatives' organizations are closed or have staff working remotely, it is not viable to rely on regular mail for all of the hearing correspondence and delivery of evidence packets. OTDA must provide electronic communications.

Many appellants do not have unlimited data plans on their cell phones and cannot stay on a long call. When OTDA reaches out to offer a telephone hearing, questions about this issue should be part of the script, and an appellant's acknowledgement that a long phone call is not feasible should not prejudice the appellant.

Forms for online, faxed or mailed fair hearing requests need to be adapted to ask the requester to identify numbers where representatives and appellants can be reached for phone hearings and how and where the notice of fair hearing and evidence packet can be delivered.

Notice of Fair Hearings should be adapted to indicate that a hearing is scheduled as a phone hearing and not an in-person hearing.

#### **4. Ensure timely and adequate evidence packets.**

The transmittal states that evidence packets must be received by appellants and OAH at least one business day prior to the hearing. This is not enough. Evidence packets must be received at least five business days before the scheduled hearing and must include the agency's Fair Hearing Summary, as defined in 18 NYCRR § 358-4.3(b). Additionally, in New York City, HRA often fails to include a summary, so it is not clear from the evidence packet whether the agency intends to withdraw or otherwise settle an appeal until the actual hearing. This Fair Hearing Summary requirement dates back to New York's original Fair Hearing regulations filed on February 15, 1968,<sup>2</sup> and have been enforced through litigation.<sup>3</sup> Failure to comply with pre-hearing disclosure requirements should result in exclusion of agency evidence, thereby necessitating summary reversals of actions in appeals where the agency bears the burden of proof.<sup>4</sup>

We recommend that OTDA personnel review Fair Hearing Summaries prior to hearings being scheduled, at least with respect to appeals in which the agency bears the burden of proof, and reverse the determinations through the issuance of Decisions without Hearings where the submitted packets and summaries fail to meet threshold standards.<sup>5</sup>

As stated above, plans and local districts must be directed to e-mail or e-fax evidence packets rather than mail or fax them where the representative or appellant has listed an email or e-fax address.

#### **5. Provide further guidance on and resources for appellant submission of documents for hearings.**

The transmittal states that documents must be submitted in advance of the hearing to OAH, but gives no instructions for doing so. If the same fax number is used by which hearing and adjournment requests are submitted, these documents will not likely be processed for days, given what we understand is the backlog in processing hearing requests that are faxed.

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<sup>2</sup> 18 NYCRR former § 358.5(g).

<sup>3</sup> See *Jackson v Wyman*, 36 A.D.2d 743 (2d Dept. 1971); *Bier v Wingate*, CV 98-2930, Stipulation of Settlement (E.D.N.Y. May 13, 1998).

<sup>4</sup> See 18 NYCRR §§ 358-3.7(b)(4) and 358-5.9(a)(2).

<sup>5</sup> See 18 NYCRR § 358-6.2.

A dedicated fax number is needed for submission of documents and included in all fair hearing notices and acknowledgments. An email address for electronic submission by email should be established and included in all fair hearing notices and acknowledgments.

Unrepresented appellants will likely use regular mail to submit documents, which may not arrive before the hearing. Hearings should be adjourned liberally in such cases.

All ALJs should be directed to hold the record of hearings open for submission of documents for a certain amount of time after the hearing, with the opposing party given an opportunity to respond to any documents submitted. ALJs should be reminded “that the lack of documentary evidence is not a per se basis for finding an appellant's testimony incredible. A hearing officer may find uncorroborated testimony to be uncontradicted or internally consistent.”<sup>6</sup> ALJs should also be reminded of their responsibility to ensure “the development of a completed record.”<sup>7</sup>

**6. Direct interim aid-continuing benefits for any appeal where a fair hearing decision is not timely issued.**

It is critical that New Yorkers who are currently receiving benefits continue to receive them without interruption and that all New Yorkers who need benefits – especially in times of increased need and unemployment resulting from COVID-19 – are able to receive adequate benefits to survive. In recent years OTDA has faced court enforcement of the 90-day deadline for issuance of Medicaid-related Fair Hearing Decisions and the 60-day deadline for issuance of SNAP-related decisions.<sup>8</sup> As these delays may continue or worsen, interim aid continuing, not only for reductions, restrictions and discontinuances, but also for denials and adequacy issues is needed to ensure the well-being of New Yorkers during this crisis. There is ample authority for directing interim aid-continuing benefits.<sup>9</sup>

Alternately, if OTDA will not direct these interim benefits in all cases described above, at a minimum OTDA must take extra care in screening appellants for homebound status under the Varshavsky injunction, as these individuals are entitled to this interim benefits under that injunction. Screening must be done at the time of the original request, by the ALJ during the phone hearing, and then, if the ALJ proposes to make a decision that is not fully favorable, OTDA should reach out to the appellant or their representative to screen for homebound status,

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<sup>6</sup> December 11, 1996 OAH Memorandum at p. 3; April 13, 2005 memorandum on “Fair Hearing Training; Meachem v Wing.” (at p. 3)(“When a decision adverse to the appellant turns on the credibility of the appellant, the basis for the determination should be included in the decision. Please note that the lack of documentary evidence is not a per se basis for finding an appellant's testimony incredible. A hearing officer may find uncorroborated testimony to be credible, especially when it is found to be uncontradicted or internally consistent.”)

<sup>7</sup> December 11, 1996 OAH Memorandum at p. 2.

<sup>8</sup> See Shakhes v Berlin, 689 F.3d 244 (2d Cir. 2012, and Declaratory Judgment and Order (S.D.N.Y. September 21, 2012); Espinosa v Shah, 2014 U.S. Dist. LEXIS 168875, 2014 WL 6865664 (S.D.N.Y. December 5, 2014); Richard C. v Proud, 12-CV-5942, Order (S.D.N.Y. June 19, 2013).

<sup>9</sup> See Varshavsky v Perales, Index No. 91-40767, Order Granting Intervention, Class Certification and Preliminary Injunctive Relief (Sup. Ct. New York Co. March 5, 1992), affd. 202 A.D.2d 155 (1st Dept. 1994).

so that the unfavorable decision will not be issued pending a home hearing which will be scheduled after the public health emergency ends. In the meantime, they are entitled to the interim benefits. Recently we have seen cases in which the appellant was not given Varshavsky rights and received an unfavorable decision improperly.

We assume counsel for the Varshavsky class is contacting OTDA separately.

**7. Waive aid-continuing overpayments, unless there is an affirmative finding of bad faith.**

**8. Address additional outstanding and ongoing logistical questions.**

We directed a number of additional logistical questions to Roy Esnard in our March 19 email. We urgently need answers to these questions in order to advise our clients and colleagues on how the State intends to implement phone hearings. We are looking forward to a quick response to the following questions.

- How does one redirect a scheduled hearing to be held by telephone?
- Are any in-person hearings being held going forward or only telephone hearings? If in-person hearing are being held, how long does OAH expect to be holding in-person hearings?
- If someone requests an in-person hearing, and is willing to wait until this lockdown period ends, will they put the hearing on hold?
- Will ALJs have capacity to conference in several numbers, so that a representative and the appellant and other witnesses will all be included on the call though at different locations?

We renew our request for ongoing communication between advocates and OTDA which we believe will help to address emerging issues to ensure that the due process rights of appellants continue to be maintained.

Please contact Belkys Garcia via email or at (646) 581-4869. We will follow-up with your office. Thank you again for your leadership during this difficult time.

Sincerely,

Belkys Garcia, Staff Attorney, The Legal Aid Society

Valerie Bogart, Director, Evelyn Frank Legal Resources Program

Alexia Mickles, Staff Attorney, Empire Justice Center

Claudia Wilner, Director of Litigation and Advocacy, National Center for Law and Economic Justice

Gene Doyle, LMSW, Executive Director, People Organized for Our Rights, Inc. (P.O.O.R.)

Paula Arboleda, Deputy Director, Public Benefits & LGBTQ Advocacy, Bronx Legal Services

Karen Nicolson, Chief Executive Officer, Center for Elder Law & Justice

Dennis A. Kaufman, Esq., Executive Director, Legal Services of Central New York

Urban Justice Center Mental Health Project

HIV Law Project, Inc.

Housing Works, Inc.

The Family Center

Cardozo Bet Tzedek Legal Services