NEW YORK STATE OF OPPORTUNITY.
Office of Temporary and Disability Assistance

ANDREW M. CUOMO
Governor

MICHAEL P. HEIN
Commissioner

BARBARA C. GUINN
Executive Deputy Commissioner

General Information System (GIS) Message

Transmittal:	Office of Administrative Hearings Transmittal 20-05 / 20 TA/DC097
Date:	October 16, 2020
To:	Office of Administrative Hearings, All Social Services Districts, Managed Care and Managed Long-Term Care Organizations, New York State Department of Health, New York State Office of Children and Family Services, Office for the People with Developmental Disabilities, State Supplement Program
Suggested Distribution:	All Fair Hearings Workers
From:	Roy A. Esnard, Deputy Commissioner Office of Administrative Hearings
Subject:	Allowing or Requiring Fair Hearing Appearances by Written, Telephonic, Video, or Other Electronic Means
Effective Date:	Immediately
Contact Information:	Deputy Commissioner Roy A. Esnard Roy.Esnard@otda.ny.gov; 718.923.4334 or Director Samuel Spitzberg Samuel.Spitzberg@otda.ny.gov; 518.486.9570

On March 12, 2020, in accordance with Social Services Law § 36-a and 18 N.Y.C.R.R. § 300.11, the OTDA Office of Administrative Hearings (OAH) began a demonstration project to evaluate whether holding hearings utilizing telephone, video, and other means will improve timeliness and reduce unnecessary travel while protecting due process rights. In addition, the demonstration project is also intended to reduce density at locations where hearings are held in-person. (*See*, 20-02/20 TA/DC014.)

Prior to March 12, 2020, OAH offices at 14 Boerum Place in Brooklyn averaged more than 600 non-governmental employees per day in the workspace. Holding hearings primarily by telephone reduced that number to an average of 20 to 40 per day, thus it achieves the goals of reducing unnecessary travel and reducing density at locations where hearings are held. Furthermore, with the adoption of telephonic hearings, the percentage of Appellants that participate in an initial assigned hearing has increased.

The demonstration is currently scheduled to expire on or about March 12, 2021. This transmittal (20-05) amends the requirements and expectations for OAH, Agencies, and Appellants and their authorized representatives since the demonstration project commenced on March 12, 2020, and supersedes transmittals 20-02/20 TA/DC014, 20-3 and 20-04/20 TA/DC 076, where the terms of those transmittals conflict with those of this transmittal (20-05/20 TA/DC097).

The demonstration project allows OAH to hold hearings by telephone, video, or other means, provided that an in-person hearing will still be held when: 1) the applicant or recipient makes a request for an in-person hearing; 2) when, in the judgment of OAH or the Hearing Officer, a party's due process rights would best be served by conducting a hearing in-person; or 3) when, in the judgment of OAH or the Hearing Officer, there are circumstances which make proceeding with the hearing by telephone, video, or other means inadvisable.

Generally, hearings will be conducted by telephone, video, or other means. Agencies may also appear by telephone, video, or other means. Interpreters will participate via telephone, video, or other means or be in the same physical location as the Hearing Officer as necessary. Authorized Appellant representatives should appear by telephone, video, or other means. Party witnesses should appear by telephone, video, or other means.

Evidentiary documents must be shared with OAH in advance of the hearing. See below for updated information on submitting evidence to other parties and OAH.

Agency Responsibility

Social Services Agencies (*see*, 18 N.Y.C.R.R. § 358-2.21) must provide evidence packets to Appellants, their authorized representatives, and OAH, as well as provide contact information to OAH. Information about the hearing (*i.e.*, in-person, telephonic, video, or other means) will be provided by OAH in the normal course of business.

Except as authorized under 18 N.Y.C.R.R. §§ 358-3.7 and 358-4.2(c), 18 N.Y.C.R.R. § 358-4.3 requires documentary evidence to be provided to Appellants and their authorized representatives at the scheduled hearing. However, under this demonstration, Appellants, their authorized representatives, and OAH must receive evidentiary packets at least one business day in advance of hearings scheduled by telephone, video, or other means. Agencies must ensure delivery processes meet this standard.

Agencies must provide a telephone number and designated representative to participate in fair hearings conducted by written, telephonic, video, or other means, regardless of whether the Agency intends to waive its personal appearance. Hearing Officers may require telephonic, video, or other means of participating even when an Agency submits documentary evidence in lieu of personally appearing.

Hearings will be scheduled between 9:00 am and 1:00 pm for morning calendars and 1:00 pm and 5:00 pm for afternoon calendars. Hearing Officers use blocked numbers; Agency representatives must ensure their phones accept blocked calls.

Agencies must submit evidentiary packets to OAH via hand delivery, mail, email, fax, or secure File Transfer Protocol (FTP). Agencies may email Assistance.Hearings@otda.ny.gov for more information about FTP. OAH can only accept .pdf, .wav, .jpg, .mp3, or .mp4 files once a hearing is scheduled. Please note, the Hearing Officer may require an offer of proof before considering such submissions.

Email: otda.sm.hearings.waivers@otda.ny.gov
Fax: 518-473-6735
Mail: Office of Administrative Hearings, 40 N. Pearl St, Fl 15B, Albany NY 12243 or
PO Box 1930 Albany NY 12201

Agencies must include the fair hearing number, designated representative, summary, and telephone number with the evidentiary packets delivered to OAH (*see*, Transmittal 19-01). Please include the fair hearing number in the subject line on email and fax or mail coversheet. If using FTP, Agencies must adhere to the FTP naming convention to ensure evidence is received, processed, and available for Hearing Officers.

Agencies must have systems in place to meet the deadlines for delivering documentary evidence consistent with confidentiality and security requirements. Agencies are reminded they will be unable to hand documentary evidence to Appellants and their authorized representatives at the hearing if the hearing is not in-person. Agencies are encouraged to include rebuttal documentary evidence in the original evidence packet to avoid adjournments and delays.

Agencies may request the waiver of their personal appearance at any hearing. OAH may draw a negative inference if an Agency representative is needed and not available to participate or contact information is not provided. Agencies planning to have a representative participate in the hearing should make specific reference thereto in the coversheet and summary. Failure to request contact specifically may result in a decision being issued based on documentary evidence alone.

Absent a compelling reason, OAH will not adjourn a hearing based on an Agency's failure to submit evidence in advance of the hearing. Similarly, OAH will generally not adjourn a hearing if the Agency fails to participate if there is enough evidence in the record to issue a decision.

Appellant Responsibility

Hearings will be scheduled for a morning or afternoon and Appellants and their authorized representatives must be available to participate between 9:00 am and 1:00 pm for morning calendars and 1:00 pm and 5:00 pm for afternoon calendars. Hearing Officers use blocked numbers; Appellants and their authorized representatives must ensure their respective phones accept blocked calls.

In addition to any contact information provided at the time a hearing is requested, Appellants and their authorized representatives must update their contact information if it changes prior to the date of their scheduled hearing(s). OAH accepts address, email, and telephone contact updates via phone, email, fax, and US mail. OAH cannot guarantee same day contact updates will be delivered to the Hearing Officer. Please submit updates prior to the hearing date. Failure to do so may result in the abandonment of the hearing request, (*see*, 18 N.Y.C.R.R. § 358-5.5).

OAH recognizes some individuals do not have telephone service. Appellants and their authorized representatives without access to a telephone or who lose access to a telephone should notify OAH at the earliest possible time so that alternate appearance methods can be coordinated. Failure to do so may result in the abandonment of the hearing request, (*see*, 18 N.Y.C.R.R. § 358-5.5).

Appellants and their authorized representatives are instructed to send copies of documentary evidence to OAH at least two business days before the hearing. OAH will provide all evidence electronically to the Hearing Officer. The Hearing Officer will transmit any documentary evidence received from the Appellant or the authorized representative to the Agency via encrypted email during the hearing. OAH accepts evidence via email, fax, or mail. If using mail, please take delivery time into account to ensure evidence is delivered timely.

Email: otda.sm.fhdocuments.submission@otda.ny.gov
Fax: 518-473-6735
Mail: Office of Administrative Hearings, 40 N. Pearl St, Fl 15B, Albany NY 12243 or
PO Box 1930 Albany NY 12201

Please include the fair hearing number in the subject line on emails and on a fax or mail coversheets.

Appellants and their authorized representatives who do not have access to a fax or other means of submitting such documentation should contact OAH to identify a different method of submitting documentation. Hearings are generally held at least three weeks after receiving a request. The time between the request and hearing date should be used to gather necessary evidence and submit it to OAH.

OAH will not share evidence with the Agency prior to the hearing, unless expressly authorized to do so by the Appellant or the Appellant's authorized representative. Failure to submit evidence in advance of the hearing may result in such evidence not being considered by the Hearing Officer.

For hearings conducted by telephone, Hearing Officers will leave voice messages when possible for Appellants and their authorized representatives who fail to answer their phones. Hearing Officers will call Appellants and their authorized representatives two times during the scheduled hearing period, with at least twenty minutes between calls. If the Appellant and their authorized representative fails to answer, the hearing request may be considered abandoned (*see*, 18 N.Y.C.R.R. § 358-5.5).

Notwithstanding the above, Administrative Disqualification Hearings (ADH) will proceed if the individual involved cannot be reached by telephone. OAH will reopen an ADH in accordance only with 18 N.Y.C.R.R. § 359.7(g).

For New York City Appellants and their authorized representatives, the OAH office at 14 Boerum Place can accommodate limited numbers of individuals who will be provided a private room in which they can participate telephonically. To the extent possible, OAH will accommodate Appellants and their authorized representatives in similar circumstances outside New York City on a case-by-case basis. OAH will work with District Offices to identify locations and methods for participation.

Hearing Officer and OAH Responsibility

OAH will confirm Appellant and authorized representative contact information when processing a request for a fair hearing. That information will be provided to the Hearing Officers. OAH will accept updated contact information and ensure Hearing Officers have updated information. OAH will try and provide same day contact updates to Hearing Officers.

OAH will direct Agencies to continue aid whenever authorized by regulation. Hearings will be scheduled in accordance with 18 N.Y.C.R.R. § 358-3.2. In addition, Appellants who are not receiving Aid to Continue will receive scheduling priority.

The Hearing Officer will contact the parties at the phone numbers provided to OAH in advance of the hearing. Hearing Officers will leave voice messages when possible for Appellants and their authorized representatives who fail to answer their phones. Hearing Officers will call Appellants and their authorized representatives two times , with at least twenty minutes between calls. If the Appellant and their authorized representative fails to answer, OAH may deem the request for a fair hearing abandoned in accordance with 18 N.Y.C.R.R. § 358-5.5.

Hearing Officers will conference all participants into the telephonic hearing but may permit parties to also conference in other participants to develop a complete record. All parties will be identified. The audio component of hearings will be recorded.

The Hearing Officer will generally inquire whether the Appellant and their authorized representative received a copy of the Agency's evidence and if the Appellant submitted evidence. OAH can accept Appellant evidence after scheduling in nearly all formats to include .pdf .wav, .jpg, .mp3, or .mp4 files. Please note, the Hearing Officer may require an offer of proof before considering such submissions.

Hearing Officers are empowered to adjourn or take other administrative action up to precluding the Agency's evidence depending on the facts and circumstances of an individual hearing, *see*, 18 N.Y.C.R.R. § 358-3.7. OAH may coordinate a specific date and time for adjourned hearings to allow for evidence packets to be delivered to Appellants and their authorized representatives. Hearing Officers may direct Agencies to submit evidence to the Appellant.

For discontinuances and reductions, the burden of proof rests with the Agency. If the Agency fails to participate and/or does not submit sufficient evidence to OAH and the Appellant, OAH may resolve issues in Appellant's favor if Appellant appears for their hearing.

For adequacy and eligibility issues, the burden of proof rests with the Appellant. Therefore, the Appellant must present sufficient evidence to meet that burden. If the Appellant and/or the authorized representative appears for their hearing and produces sufficient evidence to meet their burden, and the Agency fails to participate or does not submit sufficient evidence to rebut the appellant's evidence, OAH may resolve issues in Appellant's favor.

Questions about this should be directed to OAH Deputy Commissioner Roy A. Esnard at Roy.Esnard@otda.ny.gov and 718.923.4334 or Director Samuel Spitzberg at Samuel.Spitzberg@otda.ny.gov and 518.486.9570.