



**ADMINISTRATIVE DIRECTIVE MEMORANDUM**

<b>Transmittal:</b>	ADM-2016-04
<b>To:</b>	Executive Directors of Voluntary Provider Agencies Developmental Disabilities Regional Office Directors State Operations Office Directors
<b>Issuing OPWDD Office:</b>	Office of Counsel
<b>Date:</b>	July 19, 2016
<b>Subject:</b>	Placement and Hearing Procedures Under 14 NYCRR 633.21
<b>Suggested Distribution:</b>	Executive Directors of Voluntary Provider Agencies Developmental Disabilities Regional Office Directors State Operations Office Directors Central Office Leadership Team
<b>Contact:</b>	Office of Counsel, Bureau of Service Delivery
<b>Attachments:</b>	Notice of Hearing Notice of Proposed Placement or Plan of Services Response Form

<b>Related ADMs</b>	<b>Releases Cancelled</b>	<b>Regulatory Authority</b>	<b>MHL &amp; Other Statutory Authority</b>	<b>Records Retention</b>
None	None	14 NYCRR 633.21	MHL § 13.37-a MHL § 13.38	6 Years from Date of Service: 18 NYCRR 504.3(a)

## **Purpose**

This Administrative Directive Memorandum (ADM) outlines the administrative process to be used in providing due process to individuals receiving transitional care or care through emergency funding pursuant to Mental Hygiene Law (MHL) § 13.38 and who are offered a residential placement or other services in OPWDD's provider system. In the event the individual objects to such placement or services, the process also provides for an administrative hearing pursuant to 14 NYCRR § 633.21.

## **Background**

Chapter 478 of the Laws of 2014 and Chapter 106 of the Laws of 2015 amended MHL §§ 13.37-a and 13.38 to extend certain due process protections afforded individuals receiving transitional care to individuals receiving care through emergency funding. OPWDD adopted emergency regulations effective March 1, 2016, to conform OPWDD's regulations to these statutory changes and add due process protections for such individuals. The regulations were adopted permanently on May 25, 2016.

OPWDD Regional Office (DDRO) staff work collaboratively with OPWDD service providers to develop residential and other service opportunities for these individuals. OPWDD service providers attempt to seek input from the individual and his/her family or guardian, or other individual who has been actively involved in the individual's care (hereinafter "family"), to develop a proposed placement and/or plan of services that meets the needs of the individual. After OPWDD has reviewed the provider's proposed placement/plan and has determined that it provides an appropriate placement and/or plan of services for the individual at an available placement providing residential care and/or other appropriate service(s), OPWDD will send a written Notice of Proposed Placement or Plan of Services (the "Notice") to the individual as set forth below. It is OPWDD's responsibility to provide the Notice; the Notice does not come from the provider(s). *NY MHL §13.38(e)*.

The regulations require that notice be provided to an individual for whom a placement or plan of services is being proposed and that the Notice include the right to object to the proposed placement or plan of services. The regulations further provide for the designation of a hearing officer to conduct a hearing on such an objection. The regulations also permit the Notice to be sent by ordinary mail, and outline requirements for the content of the Notice and the timeframes for sending the Notice and scheduling the hearing. The regulations further provide the process for requesting a hearing, and provide that if a hearing is not requested timely then OPWDD will discontinue transitional care funding or emergency funding for the individual as of a date certain.

If a hearing is requested, a hearing officer will conduct the hearing and send a written report and recommendation to the Commissioner of OPWDD, after which the Commissioner or the Commissioner's designee will make a determination and notify the objecting party of the determination.

## **Notice of Proposed Placement or Plan of Services**

After determining that the plan provides an appropriate placement or plan of services for the individual at an available placement providing residential care and/or other appropriate service(s), and that the individual's removal from a child care facility or residential school is not

required on an expedited basis, OPWDD shall notify the individual of OPWDD's determination. The Notice shall be provided to the individual, to the individual's guardian if one has been appointed, or another individual who has been actively involved in the care of the individual and who can represent the individual's interests.

The Notice shall be issued by the DDRO Director in writing and shall notify the individual that OPWDD has determined that the individual can be cared for appropriately at an available placement providing residential care and/or by receiving appropriate services(s) certified and/or funded by OPWDD. The Notice also shall include a description of the proposed placement or services.

A proposed placement or plan of services shall be deemed appropriate for the individual if it is in writing and sets forth the services necessary to meet the individual's essential needs. Educational, child care, or other services received by the individual in his/her current placement may be considered, but shall not be deemed to constitute the standard by which a proposed placement or plan of services is determined to be appropriate.

A proposed placement or plan of services shall be deemed available if the placement or plan of services can be provided to the individual within ninety (90) days of OPWDD's service of the Notice. If the placement or plan of services cannot be provided to the individual within ninety (90) days, the placement or plan of services shall be deemed available if the hearing officer determines that the placement or plan of services can be provided on a specific date.

The Notice shall be served at least thirty (30) days prior to the date on which the proposed placement or services will be available. Service by ordinary mail will be deemed effective on the fifth day after mailing. As such, the Notice should be postmarked at least thirty-five (35) days before the date on which the proposed placement or services will be available. The Notice shall include information about how to accept the proposed placement or services. The Notice also shall include information about the availability of an administrative appeal to review the determination if the individual or his/her family do not agree with OPWDD's determination, and of the need to request the appeal in writing by the deadline stated in the Notice.

### **Acceptance of the Proposed Placement or Services**

If the individual or his/her family accept the proposed placement or services, OPWDD shall discontinue transitional care funding or emergency funding for the individual as of a date certain and proceed to implement the proposed placement or services.

If the individual or his/her family do not respond to the Notice or do not request an administrative appeal, OPWDD shall discontinue transitional care funding or emergency funding for the individual as of a date certain.

### **Requesting an Administrative Appeal of OPWDD's Determination**

If the individual or his/her family does not agree with OPWDD's determination and does not wish to accept the proposed placement or services, s/he may request a hearing to appeal OPWDD's determination. The request must be in writing and state the reason(s) for the appeal. The request must be sent to the address noted on the Response Form by the deadline stated in the Notice. If the request is received timely, OPWDD will schedule a hearing to take place before a

Hearing Officer designated by the Commissioner. The hearing will be scheduled with at least ten (10) days' notice to the objecting party.

### **The Notice of Hearing**

The Notice of Hearing shall be served at least ten (10) days prior to the date of the hearing. Service of the Notice of Hearing may be served by ordinary mail and if so will be deemed effective on the fifth day after mailing. As such, the Notice of Hearing should be postmarked at least fifteen (15) days before the date of the hearing.

The Notice of Hearing shall inform the individual of the following:

- a) the date, time, and place of the hearing;
- b) the name and contact information of the Hearing Officer;
- c) the name and contact information for the OPWDD employee who will be OPWDD's representative at the hearing;
- d) a statement of the legal authority and jurisdiction under which the proceeding is to be held;
- e) that the individual may be assisted by an attorney or any other representative;
- f) that the individual may make any statement, or provide the hearing officer with any document, evidence, or other information in support of his/her objection to the proposed placement or services;
- g) that his/her failure to appear at a hearing or to participate in the appeal as directed may result in a recommendation of default by the Hearing Officer;
- h) that interpreter services are available for deaf or non-English speaking witnesses or parties, at OPWDD's expense, upon written request to the DDRO Director at least five (5) business days prior to the hearing.

### **The Hearing Officer**

The Hearing Officer shall be designated by the Commissioner, or his/her designee, to conduct the hearing and submit his/her report and recommendation to the Commissioner.

The Hearing Officer shall:

- a) be an individual admitted to the practice of law in the State of New York who is currently in good standing, and who has a minimum of five (5) years of experience as a trial lawyer, a litigator in contested administrative proceedings, and/or as a hearing officer or administrative law judge;
- b) have access to the support and equipment necessary to perform the duties of a hearing officer;
- c) be an independent contractor of OPWDD, and shall not be deemed to be an employee of OPWDD solely because s/he has been paid or shall be paid by OPWDD to serve as a hearing officer;
- d) shall not be an officer, employee, or agent of an entity licensed or certified by OPWDD;

- e) shall not have a personal or professional interest which would conflict with his/her objectivity in conducting the hearing or providing a report or recommendation;
- f) shall not have participated in any manner in the formulation of the matter under review.

Prior to designation, the hearing officer shall submit, in a format required by OPWDD, a certification that the hearing officer meets these requirements.

### **Pre-Hearing Activities**

There is no pre-hearing discovery.

There is no pre-hearing motion practice.

No later than five (5) business days prior to the hearing date, each party shall provide to the hearing officer and to the other party all documents and evidence, or information that it intends to present at the hearing.

No later than five (5) business days prior to the hearing date, each party shall provide to the hearing officer and to the other party a list of the witnesses whom it intends to present at the hearing.

No later than five (5) business days prior to the hearing date, the objecting party shall notify the hearing officer and the other party of the name and contact information of his/her attorney or representative at the hearing, if any.

OPWDD shall not incur any costs associated with the objecting party's legal representation or appearance at the hearing.

### **The Hearing**

The hearing shall be located at the DDRO offices, or at another location determined by the DDRO Director. The location of the hearing must ensure that it is closed to the public and that the hearing is conducted with the individual's confidentiality protected and without unnecessary interruptions.

The Hearing Officer shall determine whether the proposed placement or services are:

- a) appropriate to the needs of the individual; and
- b) available or will become available on a specific date.

The Hearing Officer may conduct the hearing as s/he deems appropriate, consistent with these principles:

The Hearing Officer shall:

- a) open and close the hearing record, and ensure the hearing record contains all relevant and material testimony and documents offered by the parties;

- b) rule upon requests, including requests for adjournments; and may schedule adjourned hearing date(s) at a time and location determined by the hearing officer;
- c) directly examine witnesses if deemed necessary;
- d) accept into the hearing record any testimony, documents and other forms of evidence offered by the parties, limited to that necessary to determine whether the placement or services are appropriate to the needs of the individual and whether the proposed placement or services are available or will become available on a specific date;
- e) take testimony from witnesses, and admit and exclude evidence and witnesses as s/he deems necessary, noting that examination of whether the proposed placement or services are appropriate does not involve examination of whether the proposed placement or services are better or the same as the placement or services currently provided to the individual;
- f) prohibit the introduction of any evidence, the substance of which has not been disclosed to the other party at least five (5) business days before the hearing, at the objection of a party and/or at the discretion of the Hearing Officer;
- g) adjourn the hearing date in order to provide additional time for the DDRO Director to provide the individual and his/her family with access to the individual's records possessed by the DDRO at least five business days before the hearing date, if requested by either party;
- h) limit the number of times any witness may testify, repetitious examination or cross-examination, and the amount of corroborative or cumulative testimony;
- i) conduct the hearing closed to the public;
- j) implement any measures reasonably necessary for the maintenance of order and the efficient conduct of the hearing and consideration of the matter;
- k) have a single, official stenographic record of the hearing produced;
- l) permit the parties to submit memoranda after the hearing date if requested, and close the hearing record after the period of time provided for receipt of such submissions;
- m) implement such other actions as s/he deems necessary to ensure the assembly of a full and complete record for consideration.

OPWDD shall present its case first. The burden of proof shall be on OPWDD to establish that the proposed placement or services are appropriate to the needs of the individual; and that the proposed placement or services are available or will become available on a specific date.

Each party may make an opening statement and a closing statement, present evidence and witnesses, and cross-examine witnesses.

The Hearing Officer shall not be bound by formal rules of evidence.

The hearing shall not be deemed to be subject to the requirements of the State Administrative Procedure Act.

The Hearing Officer may administer oaths.

The Hearing Officer is not authorized to issue subpoenas.

The Hearing Officer is not authorized to request an independent evaluation.

There is no motion practice.

OPWDD shall arrange for and bear the cost of the single, official stenographic record of the hearing; if the individual or his/her family wish to receive a copy of the record, s/he shall be required to pay OPWDD for one half of the cost incurred by OPWDD.

OPWDD shall arrange for and bear the cost of interpreter services for deaf or non-English speaking witnesses or parties, at OPWDD's expense, upon written request to the DDRO Director at least five (5) business days prior to the hearing.

### **Hearing Officer's Report and Recommendation to the Commissioner**

After closing the hearing record, the Hearing Officer will review the record and prepare his/her report and recommendation to the Commissioner.

The Hearing Officer's recommendation must be based solely upon the record of the hearing and must set forth the reasons and the factual basis for the recommendation. The recommendation must be supported by substantial evidence in the record.

The Hearing Officer will then send the hearing record and his/her report and recommendation to the Commissioner for consideration.

### **Commissioner's Determination**

The Commissioner or his/her designee shall issue a written determination within thirty (30) days after the close of the hearing record, or as soon thereafter as practicable, setting forth whether the proposed placement or services are:

- a) appropriate to the needs of the individual; and
- b) available or will become available on a specific date.

The Commissioner or his/her designee may exercise discretion and send the matter back to the Hearing Officer for further review.

The Commissioner's determination shall be the final administrative remedy available and may be appealed pursuant to Article 78 of the Civil Practice Law and Rules.

A copy of the Commissioner's determination shall be served on all parties. Service shall be by ordinary mail and shall be deemed effective on the fifth day after mailing.

## **Implementation of the Commissioner's Determination**

If the hearing results in a determination that the proposed placement or services are appropriate to meet the needs of the individual, and that the proposed placement or services are available or will become available on a specific date, OPWDD shall discontinue transitional care funding or emergency funding for the individual as of a date certain.

If the hearing results in a determination that the proposed placement or services are not appropriate to meet the needs of the individual, and/or that the proposed placement or services are not available and will not become available on a specific date, OPWDD shall continue transitional care funding or emergency funding for the individual and may continue to develop proposed residential and service opportunities for the individual.