

A new Part 700 is added to Title 14, NYCRR, to read as follows:

**Part 700 THE ADMINISTRATIVE ADJUDICATION PROCESS FOR
SUBSTANTIATED CASES OF ABUSE AND NEGLECT**

Sec.

700.1 Background and Intent

700.2 Applicability

700.3 Definitions

700.4 Initiation of Request for Amendment

700.5 Review Based Upon Request for Amendment

700.6 Right to a Hearing/Hearing Issues

700.7 Notice of the Pre-Hearing Conference

700.8 The Pre-Hearing Conference

700.9 Responsibilities of the Administrative Law Judge

700.10 Conduct of the Hearing

700.11 The Hearing Record

700.12 The Administrative Law Judge's Report and Recommendation

700.13 The Executive Director's Final Determination

700.14 Finality

§ 700.1 Background and Intent

(a) The Justice Center for the Protection of People with Special Needs was established in response to the recognized need to strengthen and standardize the safety net for vulnerable persons who receive care from New York State's human services agencies.

(b) The Justice Center is required to establish a process by which persons found to have a substantiated case of abuse or neglect may appeal such a finding. Pursuant to Social Services Law section 494(1)(a), such appeals process must include a process by which the subject of a substantiated report of abuse or neglect is notified of the right to appeal and the procedure by which he or she may challenge the determination that a report is substantiated, with a de novo standard of review.

§ 700.2 Applicability

This part shall apply to all adjudicatory proceedings conducted pursuant to Social Services Law section 494 to determine whether a preponderance of the evidence shows that the subject of a substantiated report of abuse or neglect has committed the act or acts of abuse or neglect giving rise to the substantiated report.

§ 700.3 Definitions

Whenever used in this Part:

- (a) “Executive Director” means the Executive Director of the Justice Center for the Protection of People with Special Needs (“Justice Center”) or the Executive Director’s designee.
- (b) “Justice Center” means the Justice Center for the Protection of People with Special Needs.
- (c) “Administrative Law Judge” means an attorney employed by the Justice Center who has been designated and authorized by the Executive Director to preside at hearings held under this Part.
- (d) “Subject” means a person named in a substantiated report of abuse or neglect as having committed an act or acts of abuse or neglect.
- (e) “Hearing” means an administrative proceeding held pursuant to this Part wherein the subject of a report of abuse or neglect is seeking relief from a determination denying a request to amend a substantiated report of abuse or neglect.
- (f) “Substantiated Report” means a report of abuse or neglect wherein a determination has been made as a result of an investigation that there is a preponderance of the evidence that the alleged act or acts of abuse or neglect occurred, that any such act or acts committed by the subject constitute abuse or neglect and, pursuant to Social Services Law section 493(4), a determination of the category level of such act or acts.
- (g) “Abuse or neglect” means all reportable incidents as defined in Social Services Law section 488(1)(a) through (h). It does not include significant incidents defined in Social Services Law section 488(1)(i).

§ 700.4 Initiation of Request for Amendment

- (a) The Justice Center shall provide the subject of a substantiated report of abuse or neglect with written notice of the findings of the report, and the subject has the right to request an amendment of the report.
- (b) The request for amendment of the substantiated report of abuse or neglect shall be a written statement signed by the subject or representative setting forth the basis for the request.
- (c) The request for amendment of the substantiated report of abuse or neglect shall be received by the Justice Center within 30 days of the subject of the report being notified that the report is substantiated.
- (d) The 30-day time period shall commence from the date of mailing of the notice of the substantiated report to the subject, provided that 10 days shall be excluded from the calculation of the time period to account for mailing.

(e) In his or her sole discretion, the executive director shall have the authority in extraordinary circumstances to accept a request for amendment after the expiration of the time period set forth in subdivision (c) of this section, when an injustice would result from the failure to permit the late filing of the request for amendment.

§ 700.5 Review Based Upon Request for Amendment

(a) The Justice Center shall maintain an administrative appeals unit to conduct reviews of substantiated reports that may be requested by subjects pursuant to Social Services Law section 494(1)(a). The administrative appeals unit shall conduct and complete such reviews of the substantiated report based upon the subject's request for amendment as expeditiously as possible after receipt of the record for review, which shall include the investigative file, the substantiated report, the subject's request for amendment and any additional evidence submitted by the subject.

(b) The administrative appeals unit shall determine after a review of all records, reports and information in its possession concerning the substantiated report whether there is a preponderance of the evidence to find that the subject committed an act or acts of abuse or neglect giving rise to the substantiated report, and if there is a preponderance of the evidence, the category level of abuse or neglect that such act or acts constitute.

(c) Following its review, the administrative appeals unit shall notify the subject of its findings, which may include: (1) upholding the report in its entirety; (2) modifying the report; or (3) finding that the report is unsubstantiated.

§ 700.6 Right to a Hearing/Hearing Issues

(a) After review by the administrative appeals unit, a subject of a substantiated report of abuse or neglect has a right to a hearing before an administrative law judge pursuant to Social Services Law section 494 to determine whether the findings of the report should be amended.

(b) The issues at the hearing are whether the subject has been shown by a preponderance of the evidence to have committed the act or acts giving rise to the substantiated report, and if there is a finding of a preponderance of the evidence, whether the substantiated allegations constitute abuse or neglect, and pursuant to Social Services Law section 493(4), the category level of abuse or neglect that such act or acts constitute.

(c) The subject of a substantiated report of abuse or neglect may retain counsel at his or her own expense and may be represented by such counsel at the pre-hearing conference and the hearing.

§ 700.7 Notice of the Pre-Hearing Conference

(a) A hearing shall be initiated by the administrative law judge scheduling a pre-hearing conference after a finding by the administrative appeals unit that a report is substantiated.

- (b) All pre-hearing conferences shall be scheduled by a written notice issued to the subject.
- (c) The notice of pre-hearing conference shall specify the date, time and place for the pre-hearing conference, and shall include a statement informing the subject of the procedures for requesting and granting adjournments and the consequence of failing to appear as directed at the pre-hearing conference.
- (d) The notice of pre-hearing conference shall further include a statement of the following: the right of the subject to retain counsel at his or her own expense and be represented by an attorney or representative, the right of the subject to present evidence on his or her behalf, to produce witnesses, to cross-examine witnesses and to review documents that the Justice Center intends to offer into evidence at the hearing.
- (e) The notice of pre-hearing conference shall be mailed at least 20 days prior to the date of the pre-hearing conference.
- (f) If the subject does not want to proceed to a hearing, he or she shall have the option to decline participation in the pre-hearing conference.

§ 700.8 The Pre-Hearing Conference

- (a) For the convenience of the administrative law judge or the parties, the administrative law judge may conduct the pre-hearing conference by telephone or video conference.
- (b) At the pre-hearing conference, the parties shall identify and exchange witness information and evidence that the parties intend to introduce at the hearing. The parties shall not be precluded from exchanging witness information and evidence after the pre-hearing conference, and, at the discretion of the administrative law judge upon a finding that no other party will be prejudiced by such delay, either side may call witnesses and present evidence at the hearing even if such evidence and such witnesses were not identified prior to the date of the hearing. If the pre-hearing conference is conducted by telephone or video conference, the parties shall exchange evidence by e-mail, regular mail or any other manner convenient and mutually agreeable to the parties, as long as the manner of exchange will not cause a delay in the hearing and is adequate to protect the confidentiality of such evidence.
- (c) At the pre-hearing conference, the parties should notify the administrative law judge that an interpreter is needed at the hearing; provided, however, that a failure to provide such notice shall not preclude a later request for an interpreter.
- (d) The administrative law judge shall address other administrative matters as deemed necessary to complete a timely hearing;
- (e) The date for the hearing shall be scheduled at the pre-hearing conference.

(f) The failure of the parties to appear at the pre-hearing conference shall result in a default order, except upon a showing of good cause.

§ 700.9 Responsibilities of the Administrative Law Judge

(a) The administrative law judge shall conduct all proceedings in a fair and impartial manner.

(b) The administrative law judge shall not communicate directly or indirectly in connection with any issue that relates in any way to the merits of a pending adjudicatory proceeding with any party except upon notice and opportunity for all parties to participate.

(c) The administrative law judge shall have the power to:

- (1) rule upon applications and requests, including requests for adjournments;
- (2) set the date, time and place of the hearing;
- (3) administer oaths and affirmations;
- (4) issue subpoenas requiring the attendance and testimony of witnesses and production of books, records, and other evidence;
- (5) examine witnesses;
- (6) admit and exclude evidence;
- (7) limit the number of times any witness may testify, repetitious examination or cross-examination, and the amount of corroborative or cumulative testimony;
- (8) request and/or hear oral arguments;
- (9) request written arguments; and
- (10) take necessary measures for the maintenance of order and the efficient conduct of the hearing, and conduct the hearing in accordance with the requirements of due process.

(d) Consolidation and Severance

(1) In proceedings that involve common questions of fact, the administrative law judge may, upon his or her own initiative or upon application of any party, order consolidation or a joint hearing of any or all issues to avoid unnecessary delay and cost; the parties shall have the opportunity to be heard prior to issuance of such order.

(2) The administrative law judge may order a severance of a part or parts of the hearing and hear separately any issue in the proceeding to avoid prejudice or inconvenience.

(e) Adjournments

- (1) A request for an adjournment of the hearing shall be made to the administrative law judge at least three days prior to the commencement of the hearing, except for good cause shown.
 - (2) Adjournments may be granted by the administrative law judge for good cause.
 - (3) All parties shall be notified of adjournments to a specified date, time and place.
- (f) The administrative law judge shall not be bound by the rules of evidence observed by courts, except the rules of privilege recognized by law.
- (g) The administrative law judge may take judicial notice of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency. When official notice is taken of a material fact not appearing in the evidence in the record and of which judicial notice could not be taken, every party shall be given notice thereof and shall on timely request be afforded an opportunity prior to decision to dispute the fact of its materiality.
- (h) No administrative law judge shall preside over a proceeding in which such judge has any interest in or bias with respect to the matters involved in the proceeding or a conflict of interest with respect to the parties.
- (1) If a party has a good faith basis to believe that an administrative law judge cannot render a fair and impartial decision in a particular case, such party may request that the administrative law judge recuse himself or herself. Such request must be in writing and include an affidavit indicating the specific grounds on which the party claims interest or bias.
 - (2) Grounds for recusal of an administrative law judge include that the administrative law judge has previously dealt with the substance of the matter which is the subject of the hearing except in the capacity of administrative law judge; or has any interest in the matter, financial or otherwise, direct or indirect, which may impair the independent judgment of the administrative law judge; or has displayed bias or partiality to any party to the hearing.
 - (3) The administrative law judge may independently determine to remove himself or herself from presiding at a hearing on the grounds set forth in paragraph two of this subdivision.
 - (4) Upon receipt of a request for recusal, the administrative law judge shall rule on the request. If the administrative law judge denies the request for recusal, a written decision shall be issued stating the reasons for his or her decision and a copy of the decision shall be provided to all parties.

(5) A ruling by the administrative law judge denying a request for recusal may be appealed to the executive director at the conclusion of the hearing.

§ 700.10 Conduct of the Hearing

(a) An administrative law judge shall preside at the hearing and make all procedural rulings. For the convenience of the administrative law judge or the parties, the administrative law judge may conduct the hearing by video conference. The parties shall be given notice thereof and shall on timely request be afforded an opportunity prior to a decision to conduct the hearing by video technology to be heard on their respective positions.

(b) Appearances

(1) A party may appear in person or by counsel.

(2) Any person appearing on behalf of a party in a representative capacity when that party is not present at the hearing shall be required to show his or her authority to act in such capacity and shall file a notice of appearance with the administrative law judge.

(3) If a party fails to appear at the hearing and no adjournment has been requested and granted for cause, the administrative law judge shall recommend a default order.

(4) At any time before a report and recommendation is submitted to the executive director, the administrative law judge may relieve any party of the consequences of a default upon good cause shown.

(c) An administrative law judge shall make an initial statement describing the nature of the proceedings, the manner in which the hearing will be conducted and the issues to be addressed.

(d) The burden of proof shall be on the Justice Center to show by a preponderance of the evidence that the subject committed the act or acts of abuse or neglect alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the category level of abuse and neglect set forth in the substantiated report. The Justice Center shall present its case first.

(e) The administrative law judge shall exclude testimony or other evidence that he or she finds is irrelevant or unduly repetitious.

(f) All testimony shall be given under oath or affirmation, unless the testimony is given by a young child or an individual who is unable to understand the meaning of an oath or affirmation.

(g) Each party may have witnesses give testimony, present relevant evidence, cross-examine opposing witnesses, offer rebuttal evidence and examine any document or item offered into evidence.

(h) Each party may make an opening and a closing statement.

(i) At the conclusion of the hearing, all parties shall be afforded an opportunity to provide written argument of issues of law. Such written arguments shall be provided to the administrative law judge and the other parties within 10 days of the conclusion of the hearing.

§ 700.11 The Hearing Record

(a) A verbatim recording shall be made of the hearing, in any manner that is capable of accurately recording the hearing.

(b) A transcript of the hearing shall be made available to any party upon request and payment of the cost of the transcript. If more than one party requests transcription of the hearing, then the cost of transcription shall be divided equally between those parties.

(c) The hearing record may include but is not limited to: all notices, including the notice of pre-hearing conference and the notice of hearing; any motions submitted and rulings thereon, including any request for recusal of an administrative law judge; the recording of the proceedings and testimony taken at the hearing; exhibits; matters officially noticed; stipulations and memoranda of law filed in connection with the hearing; and the administrative law judge's report and recommendation.

§ 700.12 The Administrative Law Judge's Report and Recommendations

(a) At the conclusion of the hearing, the administrative law judge shall issue a report and recommendation, which shall set forth his or her determination of the issues. The report and recommendation shall be based solely upon the evidence presented at the hearing and shall set forth the reasons and factual basis for the determination. The report shall include a description of the issues, a recitation of relevant facts, an assessment of the credibility of testifying witnesses, the applicable statutory and regulatory authority, findings of fact, conclusions of law and the administrative law judge's recommendation to the Executive Director.

(b) Findings of fact must be based exclusively on the record of the hearing.

(c) The administrative law judge shall attach to the report and recommendation a list identifying each exhibit admitted into evidence, including the exhibit number or letter and the number of pages.

(d) A copy of the written report and recommendation shall be provided to the Executive Director along with the hearing record.

§ 700.13 The Executive Director's Final Determination

(a) After receipt of the administrative law judge's report and recommendation and the hearing record, the executive director or his or her designee shall make a final determination. The final

determination of the executive director or designee shall be in writing and embodied in an order. The order shall be based exclusively upon the record of the hearing and shall contain findings of fact and conclusions of law. If the final determination of the executive director or designee conflicts with the administrative law judge's report and recommendation, the executive director or designee shall set forth the reasons in the order. A copy of the written order shall be mailed to each party, or at the option of the parties, an electronic copy of such order shall be transmitted to each party.

(b) The order shall contain notice of the right to seek review of the order pursuant to Article 78 of the Civil Practice Law and Rules.

§700.14 Finality

(a) The determination of the executive director or his or her designee shall be final and is not subject to further administrative review.