

## Fact Sheet: OCFS Administrative Hearings

### ***What is an Administrative Hearing?***

Many state agencies have internal administrative procedures for appeals of county and state agency decisions regarding benefits, services and records. These procedures are governed by statutes and agency regulations. Of particular importance to kinship caregivers are “Special Hearings” held by the Office of Children and Family Services (OCFS) and “Fair Hearings” held by the Office of Temporary and Disability Assistance (OTDA). Other relevant administrative hearings are held by the Department of Education regarding school enrollment and educational decisions as well as hearings at the NYS Department of Health and for state employees related to retirement, disabilities and other benefits. All administrative hearings are governed by the NYS Administrative Procedure Act sections 301-308. There are also federal hearing procedures for federal benefits, like Social Security retirement.

This fact sheet-discusses OCFS hearings and describes key provisions of relevant statutes and regulations.

### ***Only Certain Circumstances Authorize Hearings***

Administrative hearings by OCFS must be authorized by a specific statute or regulation that creates describes the circumstance which has right to a hearing. This means that there must be a law or regulations identifying the benefit/service/record decision that can be appealed to an administrative judge.

Section 22 of the Social Services Law (SSL) is the most relevant statute. It addresses many of the hearing rights for both OCFS and OTDA (technically the two agencies are part of the Department of Family Assistance).

Social Services Law (SSL) 22 states: “[G]rounds for such appeals...shall include at least the following: (a) Denial of any application, (b) Failure to act upon any application within thirty days after filing... , (c) Inadequacy in amount or manner of payment of assistance, (d) Discontinuance in whole or in part of assistance, or termination of a service ...(e) Failure to permit a parent or guardian to visit the child or failure to provide supportive services,...f) Failure to provide adoption services or assistance to a prospective adoptive parent on behalf of a child freed for adoption....” This is not a full list of the grounds for hearings. More circumstances when there is a right to a hearing are found at [NYS REGS Hearings 18 NYCRR 358-3.1](#).

[The Adoption and Foster Family Coalition New York \(AFFCNY\) web site](#) also offers a breakdown of what types of hearings can be heard by OCFS and OTDA.

The following list of hearings includes references to each hearings' statutes and regulations.

### ***What are the Permitted Challenges Available at OCFS Special Hearings?***

*Objections to Determinations of "Indicated" Reports* – This hearing permits challenges to the Statewide Central Register of Child Abuse and Maltreatment (SCR) which contains all indicated reports when there is some credible evidence. SSL 422(8), SSL422(12), 18 NYCRR Part 434. Note that SSL 422(8) states that persons must first request the commissioner to amend a finding of an indicated report no later than 90 days after notification and then the commissioner has 90 days to amend the report, and only afterwards may the complainant file for a special hearing.

*Prohibiting Employment Data Base Checks from Accessing Indicated SCR Reports* – for person seeking certain positions related to care of children or disabled adults. SSL 424-a, 18 NYCRR Part 434.

*Challenges to Foster Care Removals* – SSL400; 18 NYCRR 443.5(c) and 443.7(i)(4).

*Challenges to Denials of Applications for Adoption Eligibility* – SSL 372-e, 18 NYCRR 421.15(g)(7).

*Challenges to Denials of Adoption Subsidies* – SSL 455, 18 NYCRR 421.24(g).

*Challenges to Denials of Kinship Guardianship Assistance* – SSL 458-f, 18 NYCRR 436.10.

*Challenges to Denials Based Upon Indicated Reports* – for Volunteers, Consultants, and Successor Guardians – if based upon a indicated SCR report, they can request a hearing, SSL 424-a(c).

The OCFS web site does not offer much guidance on special hearings. For instance, the local hearings offices are not listed. But they are listed at the AFFCNY website. The needed information related to challenging a decision and filing a hearing are available in the department notices to recipients. Additionally, OCFS now offers a "Video Hearing" via video conference that are facilitated by local departments and OCFS' special hearing offices. All OCFS special hearing offices are listed at [The Adoption and Foster Family Coalition New York \(AFFCNY\) website](#). This site provides contact information for special hearings offices.

### ***What are the OCFS Permitted Challenges Available at OTDA Fair Hearings?***

By agreement between OCFS and OTDA, OTDA hears:

*Challenges to Determinations Regarding Day Care Subsidies* – SSL 22, 18 NYCRRR parts 358 and 415.

*Challenges to Determinations Regarding Foster Care Payments* – SSL 22, 18 NYCRR 358.

*Challenges to Determinations regarding Homemaker Services for Adults or Children – SSL 22, 18 NYCRR 358.*

*Challenges to Determinations Regarding Protective/Preventive Services - SSL 22, 18 NYCRR 358.*

*Challenges to Determinations Regarding Transitional Child Care Payments – SSL 22, 18 NYCRR 358.*

OTDA also hears challenges related to its own services, when someone receiving benefits/services from the local department of social services believes that a “decision about your case made by a local social services agency is wrong.” See Kinship **Navigator’s OTDA Fairing Fact Sheet for more information on OTDA procedures.**

### ***Challenges Must be Filed Within Time Limits***

Most challenges must be submitted within thirty days of notice.

### **Appeals of OCFS Hearing Determinations – Article 78 Challenges**

Before bringing an Article 78 proceeding, a **petitioner must have exhausted all of his or her administrative remedies.** After exhausting administrative appeals, then a special civil action, an Article 78, may be started in the county Supreme Court (County Supreme Courts are the civil trial courts in New York State). The term “Article 78” refers to Section 7801 of the New York Civil Practice Law and Rules. For specific information on Article 78 challenges regarding relatives who were not notified or improperly notified of a child’s removal, see the Kinship Navigator’s Fact Sheet **When A Child is Removed and the Law is Not Followed.**

There is an Article 78 filing fee of \$305, which can be waived by applying for a poor person order, see Court administration rules for [Poor Person](#). Numerous web sites, including the Office of Court Administration, offer guidance regarding Article 78 special proceedings.

Attorneys who work with child welfare law and public assistance law often file Article 78’s for clients when hearing decisions appear to be in error. It is recommended that the party seek counsel or help from a legal assistance provider who specializes in child welfare law before filing an Article 78. See **Kinship Navigator Legal Resources.**

Article 78 challenges to OCFS special hearing administrative decisions occur frequently when the complainant challenges a State Central Registry (SCR) indicated report. In an Article 78 challenge to an indicated report, the procedural issues often involve findings of facts and in such cases Article 78 Supreme Court judges may refer cases to an appellate court. A recent case, *Gutierrez v. N.Y.S. Office of Children & Family Serv.* ([2021 NYLJ LEXIS 450 \\*](#)) (May 2021)

illustrates both an Article 78 challenge to an OCFS administrative special hearing decision and the potential for a referral to an appellate court.

In *Guitierrez*, the complainant father sought to expunge an “indicated” reports against him. The OCFS administrative law judge sided with ACS (New York City’s child welfare department) and Guitierrez filed the Article 78. The Supreme Court’s decision pursuant to CPLR 7803-7804, referred the case to the First Department’s Appellate Division because there was a dispute about the veracity of the evidence that supported the finding of “indicated” report. The case illustrates how an Article 78 challenge to OCFS’s decision does merit a full and thoughtful review by the Supreme Court, and also, how given the complexity of legal procedures and legal arguments, representation is really a necessity.

Less common but important to kinship foster parents are challenges to removals from the kinship foster homes. A pending case in the Buffalo area will soon provide a current example of an Article 78 challenge to a removal from a kinship foster parent’s home. At present, it is worth noting that kinship foster parents currently have the same protections from removals as non-kin foster parents. Attempts to claim more protection, based upon the special kinship relationship, have so far not produced a special kinship “right.”

Supreme Courts, in reaching their decisions in Article 78 cases must base conclusions on their review of the relevant statutes and regulations which the agency claimed supported its administrative decision. The standard for such court reviews is whether the administrative decision was “arbitrary and capricious.”

In a recent Article 78 OTDA case, *Yarde v. Roberts*, 60 Misc. 2d 686 (Albany County 2017), the court provided a good summary of the Article 78 standard of review. In part it says:

“The judicial standard of review of administrative determinations pursuant to CPLR Article 78 is whether the determination is arbitrary and capricious, and a reviewing court is therefore restricted to an assessment of whether the action in question was taken “without sound basis in reason and ... without regard to the facts.” *Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 N.E.2d 321 (1974). The test usually applied in deciding whether a determination is arbitrary and capricious or an abuse of discretion is whether the determination has a rational or adequate basis. *Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 883 N.Y.S.2d 751, 911 N.E.2d 813 (2009). The reviewing court in a proceeding pursuant to Article 78 will not substitute its judgment for that of the agency unless it clearly appears to be arbitrary, capricious or contrary to the law. *Paramount Communications Inc. v. Gibraltar Cas. Co.*, 90 N.Y.2d 507, 663

N.Y.S.2d 133, 685 N.E.2d 1214 (1997). However, “an agency determination arrived at in a manner inconsistent with its own regulations is not supported by a rational basis.” *Mid Island Therapy Associates, LLC v. New York State Educ. Dept.*, 129 A.D.3d 1173...”

What this means is that if there is no basis in the law for the decision, then upon review a court should find that the law wasn’t followed, and an Article 78 challenge is successful. For further information on Article 78’s, see [Legal Services of Western New York](#) and for an in depth review, see [Columbia Law](#).

### **Federal Civil Rights Challenges**

Even an Article 78 does not end the opportunity to challenge some administrative decision. In addition to pursuing review in state courts, there is also a civil rights action available in federal court pursuant to 42 U.S.C. § 1983, many decisions regarding “rights” of kinship foster parents have used a §1983. However, a brief review shows that most are not favorable, except for *Rivera v. Marcus*, 696 F.2d 1016 (1982). At the time of this Fact Sheet’s publication, the Buffalo case filed in January 2021 is still undecided.

### **Conclusion**

This Fact Sheet provides an overview of procedures related to OCFS administrative hearings. It is not uncommon for an administrative hearing to overrule the county department’s or commissioner’s decisions. So it is important to file for a hearing. However, as noted, hearings are only available in certain situations. After the hearing decision or if there is no hearing available, there is still an opportunity to challenge via an Article 78 and 42 U.S.C. § 1983.

What underpins the chances for a successful challenge, both at the administrative hearing or at the Article 78, are if the facts favor the challenger. If the facts show that the department did not have a statutory or regulatory basis for the decision then there are a good chance of success.

***Updated June, 2021. The above information is not legal advice. It is not a substitute for consulting an attorney. Up-to-date legal advice and legal information can only be obtained by consulting with an attorney. Any opinions, legal opinions, findings, conclusions or recommendations expressed in this publication or on the NYS Kinship Navigator website or by any person or entity to whom you may be referred are those of the Kinship Navigator, Catholic Family Center and/or the person or entity you are referred to and do not necessarily represent the official views, opinions, legal opinions or policy of the State of New York and/or the New York State Office of Children and Family Services (OCFS). NYS Kinship Navigator is a Catholic Family Center program, funded by the New York State Office of Children and Family Services. Catholic Family Center is the only agency authorized by New York State to provide a statewide information and referral service to kinship caregivers. The information herein is published by the NYS Kinship Navigator.***