

OMHA Case Processing Manual

Chapter 10 PARTY AND NON-PARTY PARTICIPANT REQUESTS AND SUBMISSIONS

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10.0 Chapter overview

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This chapter explains how to address contacts from parties and non-party participants; provide language or communication assistance services to individuals with limited English proficiency (LEP) or a disability; process requests for a stay of proceedings, discovery, or subpoena; and review submissions of evidence and other case-related materials. Timely responses to party and non-party participant requests and submissions help ensure a high level of customer service, efficient and accurate adjudication, and meaningful access to OMHA programs and activities.

Many types of requests and submissions that generally occur at a specific stage in the adjudication process are covered in detail in other OCPM chapters. OCPM 10.8 contains a list of these requests and submissions, along with cross-references to the specific OCPM provisions where they are discussed. For general operational instructions on where parties and non-party participants should file requests and case-related submissions, see [OCPM 9.1](#).

Caution: When taking the actions described in this chapter, ensure that all PII, PHI, and Federal Tax Information is secured and only disclosed to authorized individuals (internally, those who need to know).

10.1 Responding to a party or non-party participant, in general

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10.1.1 Who responds to general (not case-specific) contacts?

General contacts that are not specific to an appeal must be brought to the attention of the field office **Hearing Office Director** or the appropriate **Headquarters division director** (for example, the Director of Central Operations), or a designee. If a response is required, the Hearing Office Director or division director, or a designee, will:

- Prepare the response if the contact raises a question or issue about the field office or division;
- Refer the inquiry to the appropriate Headquarters division for response if the contact raises a question or issue about another OMHA component or the OMHA program generally; or
- Forward to the appropriate entity if the contact is a misrouted inquiry, such as correspondence related to a case that is pending at another level of appeal (see [OCPM 9.2.2](#) for further information on how to direct misrouted filings).

Any documents received concerning a general contact should be stored in accordance with applicable Federal records retention policies.

Example: A congressional inquiry concerning an aspect of OMHA operations, such as a question regarding the scope of the appeals process, must be forwarded to the Appeals Policy and Operations Division.

10.1.2 Who responds to case-specific contacts?

Assigned Appeals

Except for congressional inquiries, the **adjudication team** responds to case-specific contacts that are received in a field office regarding appeals that are assigned to an adjudicator in that field office.

If the appeals are assigned to an adjudicator in another field office, forward the inquiry in accordance with [OCPM 9.2.2.1](#).

Unassigned Appeals

The **Director of Central Operations**, or a designee, responds to case-specific contacts regarding unassigned appeals.

10.1.3 How does OMHA respond to case-specific contacts?

For all case-specific contacts, complete a Report of Contact (OMHA-101) for oral contacts, and add the Report of Contact (OMHA-101) and any other documentation received as part of the contact, to the administrative record of the subject appeal(s).

For multiple contacts involving the same appeal, complete a Report of Contact (OMHA-101) and then use the accompanying Report of Contact – Multiple Contact Attachment (OMHA-101A) to document additional contacts. Add these documents to the administrative record.

If a case-specific contact also includes a general inquiry or request, follow the process for responding to general contacts in OCPM 10.1.1.

10.1.4 How does OMHA respond to contacts from a representative?

Generally, contacts from an authorized or appointed representative are processed in the same manner as contacts from the party or non-party participant. See [OCPM 5.5](#) for guidance on communicating with representatives and represented parties.

10.1.5 Must requests and submissions take a specific form?

Unless a specific form is required by a regulation or agency manual, OMHA does not require a specific form for a case-related request or submission. Where OMHA and CMS have published public-use forms to help ensure that the request or submission contains all required information and can be efficiently processed, parties and non-party participants can be encouraged to use the form.

Note: Public-use forms (including large-print and Spanish versions) are available on the OMHA website.

Example: The Request for Administrative Law Judge (ALJ) Hearing or Review of Dismissal (OMHA-100) is an optional public-use form. The OMHA-100 contains fields for all information required to request a hearing or review of a dismissal; appellants are encouraged to use the form but may request a hearing or review of a dismissal via a letter or other formats (see [OCPM 11.5](#)).

Example: The Transfer of Appeal Rights (CMS-20031) is a mandatory CMS public-use form. The CMS-20031 form must be used to assign a beneficiary's appeal

rights to a provider or supplier in a **Part A or Part B** appeal. Equivalent writings are not permitted (see [OCPM 4.7.2.2](#)).¹

¹ 42 C.F.R. § 405.912(c)(1).

10.2 Language and communication assistance services

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10.2.1 What are the general requirements for language and communication assistance?

Upon request, language assistance services are available free of charge to people with LEP, and free communication assistance services are available for people with disabilities. Requests for language or communication assistance services, made orally or in writing, need to be documented for the administrative record, with a Report of Contact (OMHA-101) when a request is made orally, and is tracked centrally within OMHA field offices and Headquarters divisions (*see* OCPM 10.2.14).

10.2.2 What if I think I have a language or communication assistance request, and I don't know what to do?

All OMHA staff should be prepared to handle requests for language and communication assistance services to help ensure people with LEP have meaningful access to OMHA's programs and activities and that people with disabilities are not excluded from participation in, denied the benefits of, or subject to discrimination under OMHA's programs and activities on the basis of their disability. If you are unsure how to process a request, do not turn the person away. Take down the person's name and contact information and forward the request to the office's designated point of contact for language access and accessibility issues (*see* OCPM 10.2.13).

10.2.3 Is specific documentation needed to support or verify the existence of the condition or conditions that would necessitate language or communication assistance services?

No. Specific documentation is not needed to support or verify the existence of the condition(s) that would necessitate language or communication assistance services. The request, on its face, is sufficient to support the need for the services.

10.2.4 What happens if OMHA does not provide language or communication assistance?

OMHA complies with applicable Federal civil rights laws and does not discriminate on the basis of race, color, national origin, age, disability, or sex. OMHA is committed to providing meaningful access to its programs to people with limited English proficiency (LEP) and people with disabilities. Any person who believes OMHA failed to provide required language or communication assistance services, or discriminated in another

way on the basis of race, color, national origin, age, disability, or sex, may file a civil rights complaint with the HHS Office for Civil Rights.

10.2.5 What is limited English proficiency (LEP)?

Individuals with LEP are individuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English.²

10.2.5.1 What language assistance services does OMHA offer to people with LEP?

Upon request, OMHA offers free language assistance services to individuals with LEP, including:

- Oral language assistance services, including direct (in-person), VTC, or telephonic interpretation by a qualified interpreter; and
- Translations of written material into non-English languages.

Note: Oral interpretation and written translation services are provided by outside vendors that employ qualified interpreters and translators, and may not be provided by OMHA staff, even if that staff is bilingual (see OCPM 10.2.9).

10.2.5.2 What if a party requests oral interpreter services?

If oral, over-the-phone interpretation services are requested, contact the office's designated point of contact for language access and accessibility issues (see OCPM 10.2.13). If necessary, the point of contact coordinates with the **Budget and Financial Management Division** for assistance setting up an account for vendor interpretation services.

An individual may also provide his or her own interpreter.

Note: Oral interpreter services are provided by outside vendors that employ qualified interpreters and translators, and may not be provided by OMHA staff, even if that staff is bilingual (see OCPM 10.2.9).

Note: Where all hearing participants and the ALJ are able to communicate in a non-English language, a hearing may be held in that language without the need for oral interpreter services from outside vendors. The ALJ

² [HHS Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons.](#)

must be able to communicate fluently in the non-English language and cannot rely on OMHA staff for any interpretation.

10.2.5.3 What if a party requests written materials in a language other than English?

If a party requests written materials in **Spanish**, and the materials are available in pre-translated form, provide the party with the translated materials, or tell the party where the materials may be accessed (for example, on the OMHA website's forms page). If the materials are not available in a pre-translated form, contact the office's designated point of contact for language access and accessibility issues (*see* OCPM 10.2.13) to arrange for translation.

If a party requests written materials in **another non-English language**, contact the office's designated point of contact for language access and accessibility issues (*see* OCPM 10.2.13) to arrange for translation. If necessary, the point of contact coordinates with the **Budget and Financial Management Division** for assistance setting up an account for vendor translation services.

Example: A beneficiary with LEP whose primary language is Spanish contacts OMHA and requests information on how to appoint a representative. Provide the individual with an Appointment of Representative (CMS-1696), which is [available in Spanish](#), or direct the party to the CMS or OMHA website to download the form.

Example: A beneficiary with LEP whose primary language is Spanish is required to be sent a copy of the decision in a case, and requests the decision in Spanish. After the decision has been drafted in English, contact the field office point of contact for language access and accessibility issues to arrange for vendor translation services.

Example: A beneficiary with LEP whose primary language is German is required to be sent a copy of the decision in a case, and requests the decision in German. After the decision has been drafted in English, contact the field office point of contact for language access and accessibility issues to arrange for vendor translation services.

Note: Translation services are provided by outside vendors that employ qualified translators, and may not be provided by OMHA staff, even if that staff is bilingual (*see* OCPM 10.2.9).

10.2.5.4 When does OMHA provide a translation of portions of the record (including audio recordings) that are in another language?

Where the administrative record contains documents or audio recordings in a language other than English, an official English translation/transcript is not needed if the adjudicator is able to read and fully understand these portions of the record. In this case, the adjudicator must clearly identify in the decision, dismissal, or remand which portions of the administrative record are in another language, and that he or she is able to read and fully understand those portions.

If the adjudicator is **unable** to read and understand any portion of the administrative record that is in a non-English language, obtain an official translation of the document or audio recording into English (see OCPM 10.2.5.3).

Caution: The determining factor as to whether an official translation must be obtained depends on whether the **adjudicator**, not staff, is able to read and understand any portions of the record that are in a language other than English. Translation services are provided by outside vendors that employ qualified interpreters and translators, and may not be provided by OMHA staff, even if that staff is bilingual (see OCPM 10.2.9).

10.2.6 What qualifies as a disability?

For the purpose of providing communication assistance services, an individual with a disability includes an individual with any physical or mental impairment that substantially limits one or more major life activities of the individual; an individual with a record of such an impairment; or an individual who is regarded as having such an impairment.³

10.2.6.1 What communication assistance services are available to people with disabilities?

Upon request, OMHA offers free aids and services to people with disabilities to enable them to communicate effectively with OMHA, including:

- Qualified sign language interpreters, Text Telephone Yoke/teletypewriter (TTY) services at a VTC hearing site or that are initiated by the caller through a

³ See 45 C.F.R. § 92.4; 29 U.S.C. § 705(9).

- public relay service, or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;
- Telephone hearings, written materials in large print or braille, or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;
 - Tele-braille relay services for the deaf-blind;
 - Permitted presence of a support animal at in-person hearings or conferences;
 - Access to digital information for individuals in need of accommodations or assistance; and
 - Written information in other media formats, such as large print, audio, and accessible electronic formats (OMHA staff may create large-print versions of forms (see OCPM 10.2.6.2)).

Note: Sign language interpreter services are provided by outside vendors that employ qualified interpreters, and may not be provided by OMHA staff, even if that staff is able to communicate fluently in sign language and spoken English (see OCPM 10.2.9).

10.2.6.2 What if a party requests materials in large print?

All **OMHA public-use forms** (forms with an OMHA form number and available on the OMHA website) are also available in a large-print (18-point) format. Provide the party with the large-print version of the form, or tell the party where to access the form on the OMHA website.

Example: When sending a notice of hearing to a beneficiary who requests large print, include the large-print version of the Response to Notice of Hearing (OMHA-102) with the notice of hearing (which is also provided in large print), or direct the beneficiary to the forms page on the OMHA website.

For **other materials** that are not readily available in a large-print format, create a large-text version of the document, using a sans serif font (for example, Calibri or Arial) and increasing the font size to at least 18 points.

10.2.6.3 What if a party requests written materials in braille?

Contact the office's designated point of contact for language access and accessibility issues (*see* OCPM 10.2.13). If necessary, the point of contact coordinates with the **Budget and Financial Management Division** for assistance setting up an account for vendor translation services.

10.2.6.4 What if a party requests sign language interpreter services?

Contact the office's designated point of contact for language access and accessibility issues (*see* OCPM 10.2.13). If necessary, the point of contact coordinates with the **Budget and Financial Management Division** for assistance setting up an account for vendor interpretation services.

Note: Sign language interpreter services are provided by outside vendors that employ qualified interpreters, and may not be provided by OMHA staff, even if that staff is able to communicate fluently in sign language and spoken English (*see* OCPM 10.2.9).

10.2.6.5 What if a party requests Text Telephone Yoke/teletypewriter (TTY) or relay services?

Individuals who request TTY services or relay services will generally have access to any required equipment and/or will initiate the relay service when calling OMHA.

10.2.7 What is a qualified interpreter or a qualified translator?

A qualified interpreter or translator, suitable for OMHA proceedings, is an individual who:⁴

- Adheres to generally accepted interpreter/translator ethics principles, including client confidentiality and agrees to comply with OMHA's disclosure and confidentiality of information requirements;
- For interpreters for individuals with LEP, has demonstrated proficiency in speaking and understanding both English and at least one other spoken non-English language;
- For interpreters for individuals with a disability, has demonstrated proficiency in speaking and understanding English and proficiency in sign language, oral

⁴ 45 C.F.R. § 92.4.

transliteration (representing or spelling in characters of another alphabet), or cued language transliteration (representing or spelling by using a small number of handshapes);

- For translators, has demonstrated proficiency in writing and understanding both written English and at least one other written non-English language;
- Is able to interpret/translate effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary, terminology, and phraseology (for example, legal or medical terminology used in an OMHA appeal);
- Has no personal stake in the outcome of the case or other association with the case that would create a conflict of interest; and
- Agrees to provide an accurate interpretation of both the questions and the responses, and agrees not to assume or infer facts or dates not actually provided.

10.2.8 How do individuals request language or communication assistance services?

The OMHA Notice of Nondiscrimination (OMHA-001) instructs individuals to contact (866) 207-4466 to arrange for language or communication assistance services, but requests may be made at any time and in any format, oral or written. Requests, made orally or in writing, need to be documented in the administrative record, with a Report of Contact (OMHA-101) for oral requests.

See [OCPM 14](#) and [OCPM 15](#) for guidance on how to address requests for language or communication assistance services that arise before or during a hearing, including:

- How OMHA accommodates known and suspected language barriers (see [OCPM 14.4.6](#));
- How OMHA provides special accommodations for individuals with physical or mental impairments (see [OCPM 14.4.7](#));
- Whether interpreter services or other accommodations are available during a hearing (see [OCPM 15.2.4](#)); and
- Whether interpreters are required to be sworn in (see [OCPM 15.3.1.4](#)).

10.2.9 Who provides language or communication assistance services?

Except as provided in OCPM 10.2.6.2 for materials in large-print, language and communication assistance services are provided by outside vendors that employ qualified interpreters and translators, and may not be provided by OMHA staff, even if that staff is bilingual.

Note: Bilingual OMHA staff may communicate in another language to identify an issue or provide direction, such as collecting contact information or providing information on where a Spanish language form may be found.

Note: The fact that an individual has above average familiarity with speaking or understanding a language other than English does not suffice to make that individual a qualified interpreter for an individual with LEP. Further, even if an individual meets the definition of “qualified interpreter for an individual with LEP,” that individual does not necessarily possess the knowledge, skills, or abilities to translate written content in paper or electronic form. Even an individual who meets the definition of “qualified bilingual/multilingual staff” does not necessarily qualify to interpret or translate for individuals with LEP.

10.2.10 What if a written decision, dismissal, or remand cannot be translated or converted to an alternate media format before the adjudication deadline?

Make every effort to issue the decision, dismissal, or remand to all parties in the requested format by the end of any applicable adjudication time frame.

If a decision, dismissal, or remand has been written, but it is not possible to have it translated into a non-English language or braille within an applicable adjudication time frame, issue the decision, dismissal, or remand in English, but include a Notice of Pending Translation (OMHA-192T). This notice is available in English and Spanish. This approach helps ensure that the decision is not delayed for other parties to the appeal and, in cases involving pre-service requests for coverage, the outcome is available to the parties as quickly as possible.

When the translated version of the decision, dismissal, or remand is available, date it with the current date and send it to the party with a Notice of Translation (OMHA-193T).

The time needed to translate the decision, dismissal, or remand does not stay or extend any applicable time frame to request an appeal or review.

10.2.11 Does OMHA send copies of translated or accessible versions of documents to other entities?

No. Do not send copies of translated or accessible versions of documents to anyone other than the individual with LEP or a disability who requested the translated or accessible version. The individual with LEP or a disability who requested the translated or accessible version should receive both the original document and the translated or accessible version of the document.

10.2.12 When documentation is translated or provided in an alternate media format, what does OMHA include in the administrative record?

When a written document is translated or provided in an alternate media format, such as large-print or braille, include both the original and the translated or accessible version in the administrative record. See [OCPM 20.2](#) for guidance on how to add documents received post-adjudication to the administrative record.

10.2.13 Who is the designated point of contact for language access and accessibility issues?

The designated point of contact for language access and accessibility issues is the Program Analyst (Budget) in field offices and the Budget Analyst in Headquarters.

10.2.14 How does OMHA track requests for language or communication assistance services?

Each office **point of contact for language access and accessibility issues** (see OCPM 10.2.13) is required to track requests for language and communication assistance services using an approved data-collection template, which is available in the support material to this chapter. This information is provided on a quarterly basis to the **Appeals Policy and Operations Division** for aggregation of individual office data.

10.3 Requests to stay the proceedings

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10.3.1 Who may request a stay of proceedings?

Only an **appellant** may request a stay of proceedings on an appeal.⁵

Note: A court or other tribunal of competent jurisdiction may also **order** a stay of action on adjudicating the claims or matters at issue at the OMHA level.⁶ An automatic stay order issued by a bankruptcy court does not stay an OMHA administrative proceeding (see [OCPM 7.2.2](#)).

Note: “Litigation holds” require the retention of potentially responsive documentation, but generally do not require a stay of administrative proceedings. As such, any pending appeals should continue as normal in the hearing process.

10.3.2 How does an appellant request a stay of proceedings?

Requests to stay the proceedings must be in writing or documented in a Report of Contact (OMHA-101), and must provide the reason(s) the appellant is requesting a stay. Appellants may, but are not required to, use a Request for Stay of Proceedings form (OMHA-136T).

10.3.3 How does OMHA respond to requests to stay proceedings when . . .

10.3.3.1 Only one party filed a request for hearing or review?

An adjudicator has the authority to grant a stay of proceedings on motion by an appellant.⁷ An adjudicator should respond to a motion to stay proceedings within five calendar days in a standard appeal or two calendar days in an expedited Part D appeal.

An adjudicator may grant or deny a motion to stay proceedings with a Stay of Proceedings Order (OMHA-165T). The order is accompanied by a general Notice (OMHA-120) and is sent to the appellant and any other parties who were copied on the request for hearing or review.

⁵ 42 C.F.R. §§ 405.1016(d)(2)(ii), 423.2016(c)(2)(ii).

⁶ 42 C.F.R. §§ 405.1016(d)(2)(i), 423.2016(c)(2)(i).

⁷ 42 C.F.R. §§ 405.1016(d)(2)(ii), 423.2016(c)(2)(ii).

10.3.3.2 More than one party filed a request for hearing or review?

If an appellant requests a stay of proceedings, but more than one party filed a request for hearing or review, notify the other appellants of the request for a stay within five calendar days using Notice of Request for Stay of Proceedings (OMHA-137T). The notice informs the parties that they may respond to the request in writing within five calendar days of receiving the notice, using Request for Stay of Proceedings (OMHA-136T). The notice also informs the parties that they may respond to the request by telephone, which will need to be documented in the administrative record, with a Report of Contact (OMHA-101). **All parties** who filed a request for hearing or review must agree to the stay.⁸

Other appellants agree

If all appellants who filed a request for hearing or review agree to the stay of proceedings, an adjudicator may grant the request using a Stay of Proceedings Order (OMHA-165T). The order is accompanied by a general Notice (OMHA-120) and is sent to the appellant(s) and any other parties who were copied on the request for hearing or review.

Other appellants do not agree

If one or more appellants do not agree to the stay of proceedings, or do not respond within five days, the adjudicator must deny the request using a Stay of Proceedings Order (OMHA-165T). The order is accompanied by a general Notice (OMHA-120) and is sent to the appellant(s) and any other parties who were copied on the request for hearing or review.

Note: If one or more appellants are unavailable for the scheduled hearing, the ALJ may reschedule the hearing (see [OCPM 14.7.1](#)).

10.3.4 What does an adjudicator consider when granting or denying a request for a stay of proceedings?

Even if all parties who filed a request for hearing or review have agreed to the stay, an adjudicator has discretion to grant or deny the request for a stay of proceedings. The adjudicator may consider, among other factors, any applicable adjudication time frames, potential impact on the beneficiary's health or well-being, the use of

⁸ 42 C.F.R. §§ 405.1016(d)(2)(ii), 423.2016(c)(2)(ii).

adjudication resources, whether a hearing has already been held, and any other information specific to the case.

Examples of situations where an adjudicator may grant a request for a stay of proceedings include:

- An alternative appeal resolution initiative has been announced, and the appellant has requested additional time to determine whether the claims at issue in the appeal are eligible for the initiative.
- A beneficiary-appellant filed an LCD challenge that is pending before the DAB's Civil Remedies Division or the Board, or an NCD challenge that is pending before the Board, and the challenged provisions apply to the appeal pending before OMHA.⁹

Stays of proceedings resulting from discovery requests are addressed in OCPM 10.6.13. Stays of proceedings resulting from subpoena requests are addressed in OCPM 10.7.9.

10.3.5 What effect does a stay of proceedings have on an applicable adjudication time frame?

If an adjudication time frame applies to the appeal, it is tolled for the duration of the stay granted by the adjudicator (see [OCPM 7.2.2](#)).

⁹ See 42 C.F.R. part 426, subparts D, E.

10.4 Party and non-party participant submissions

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10.4.1 Who may submit briefs, memoranda, or position papers?

An ALJ may request, but may not require, the submission of briefs, memoranda, or position papers (see [OCPM 13](#)). A party may submit a brief, memorandum, position paper, or written testimony to present an argument or clarify the issues on appeal.¹⁰

CMS, a CMS contractor, or a Part D plan sponsor that is participating in the proceedings on a request for hearing as a non-party participant may also submit position papers and written testimony (see [OCPM 6.7.3](#)).

10.4.2 When may briefs, memoranda, or position papers be submitted?

A party at the OMHA level (*except* CMS or a CMS contractor that is a party to the appeal) may submit position papers or written testimony *at any time* before a decision, dismissal, or remand is issued. CMS or a CMS contractor that is a party to the appeal may submit position papers or written testimony no later than 5 calendar days prior to the hearing, unless the ALJ grants additional time.¹¹ If the record is kept open following the hearing, the adjudicator should set a time frame for submission of any written statements after the hearing (see [OCPM 15.7.3](#)).

See [OCPM 6.7.3](#) for the time frames for submissions of position papers and written testimony by CMS, a CMS contractor, or a Part D plan sponsor that is a party or non-party participant to the proceedings on a request for hearing.

10.4.3 Do briefs, memoranda, or position papers have to be sent to the parties?

If there are other parties to the proceedings, a copy of any written statements should be provided by the submitting party to the other parties at the same time they are submitted to the adjudicator.¹²

- If the written statements were submitted by an **unrepresented beneficiary** and there is no indication that the other parties were copied, the adjudication team provides copies of the submission to the other parties to the appeal using a Notice of Submission (OMHA-129T).

¹⁰ 42 C.F.R. § 405.1036(c).

¹¹ 42 C.F.R. § 405.1012(c)(2)(i).

¹² 42 C.F.R. § 405.1036(c).

- If **CMS, a CMS contractor, or a Part D plan sponsor** that is a party or non-party participant to the proceedings on a request for hearing submits a position paper or written testimony, and there is no indication that the other parties were copied, the adjudicator will not consider the position paper or written testimony in deciding the appeal (see [OCPM 6.7.4](#)).¹³
- If **any other party** submitted the written statements and there is no indication that the other parties were copied, verify (creating a Report of Contact (OMHA-101) where necessary) whether the submitter sent copies to the other parties and, if not, provide copies to the other parties using a Notice of Submission (OMHA-129T).

Note: Good cause is not required to admit briefs or position papers that summarize the evidence in the record. However, in order to be considered, any new evidence submitted with a brief or position paper in an appeal of a **Part A or Part B QIC reconsideration** by a provider or supplier, or beneficiary represented by a provider or supplier, must be submitted with a statement of good cause explaining why the evidence was not submitted to the QIC or other lower level of review (see [OCPM 10.5.6](#)).¹⁴ This requirement does not apply to beneficiaries (unless the beneficiary is represented by a provider or supplier), CMS or any of its contractors, a Medicaid State agency, or an applicable plan.¹⁵

10.4.4 How does OMHA respond to submissions of prior decisions?

If an appellant or other party provides a copy of a prior decision for a similar case decided by an OMHA adjudicator or the Council as evidence to support its position in the appeal at issue, the decision is not precedential, *unless* it is a Council decision that has been specifically designated as precedential by the DAB Chair.

Precedential Council Decisions

The DAB Chair may designate a final decision of the Secretary issued by the Council as precedential.¹⁶ Precedential decisions are binding on all HHS components that adjudicate matters under the jurisdiction of CMS, including OMHA adjudicators.¹⁷

¹³ 42 C.F.R. §§ 405.1010(c)(3)(iii), 405.1012(c)(2)(iii), 423.2010(d)(3)(iii).

¹⁴ 42 C.F.R. §§ 405.1018(c), 405.1028.

¹⁵ 42 C.F.R. § 405.1018(d)(2).

¹⁶ 42 C.F.R. § 401.109(a).

¹⁷ 42 C.F.R. § 401.109(c).

Precedential decisions will be made available to the public on the HHS website and will have precedential effect from the date they are made available to the public. Notice of precedential decisions is published in the Federal Register.¹⁸

Precedential effect means that the Council's:

- Legal analysis and interpretation of a Medicare authority or provision is binding and must be followed in future determinations and appeals in which the same authority or provision applies and is still in effect; and
- Factual findings are binding and must be applied to future determinations and appeals involving the same parties if the relevant facts are the same and evidence is presented that the underlying factual circumstances have not changed since the issuance of the precedential final decision.¹⁹

10.4.5 How does OMHA respond to submissions from an OMHA expert?

An expert retained by OMHA may submit documentation to support or explain the expert's interpretation of evidence in a case (for example, an independent medical expert's written report concerning a review of the medical documentation of record). Send a copy of the documentation along with a Notice of Submission (OMHA-129T) to all parties and non-party participants who were or would be sent a notice of hearing. Notice of the submission must be sent as soon as possible, but no later than five calendar days after receiving the submission from the OMHA expert.

¹⁸ 42 C.F.R. § 401.109(b).; 82 Fed. Reg. 4974, 4977 (Jan. 17, 2017).

¹⁹ 42 C.F.R. § 401.109(d).

10.5 Submission of evidence

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10.5.1 What is evidence?

Evidence generally includes testimony made under oath or affirmation and documentation submitted to the adjudicator, or contained in the administrative record, tending to prove or disprove alleged facts material to the outcome of the case.²⁰ For OMHA's purposes, evidence does not generally include position papers, other written argument, or oral argument.

10.5.2 Who may submit written evidence?

In general, a party may submit written evidence.²¹ In Part A and B appeals, if CMS or a CMS contractor joins the proceedings as a party, it may submit written evidence. In Part C appeals, when CMS or the Part C IRE joins the proceedings as a party, it may submit written evidence. Because the MAO is always a party to a Part C appeal, it may submit written evidence. The enrollee is the only party to a Part D appeal; therefore, only the enrollee (or the enrollee's duly appointed representative) may submit written evidence.

For more information about submission of evidence, position papers, and written testimony, see [OCPM 6.7](#).

A non-party participant's scope of participation in an appeal before OMHA is limited to filing position papers and providing testimony to clarify factual or policy issues (*see* [OCPM 6.2.3.1](#)).

10.5.3 Is there a time frame for submitting evidence?

Unless the party is an unrepresented beneficiary or an ALJ admits evidence at a hearing, parties must submit any written evidence they wish to have considered:

- 1) With the request for hearing;
- 2) By a future date specified in the request for hearing; or

<p><i>Note:</i> The request for hearing must include a statement of the additional evidence and the date the evidence will be submitted.²²</p>

²⁰ See *Evidence*, Black's Law Dictionary (11th ed. 2019).

²¹ [42 C.F.R. §§ 405.1018, 405.1028, 423.2018](#).

²² [42 C.F.R. §§ 405.1014\(a\)\(2\), 423.2014\(a\)\(2\)](#).

- 3) If a hearing is scheduled, within 10 calendar days of the date the party receives the notice of hearing (or 2 calendar days for an expedited Part D hearing).²³

If a party who is **not an unrepresented beneficiary**²⁴ submits evidence more than 10 calendar days (or 2 calendar days in an expedited Part D appeal) after receiving a notice of hearing, and an adjudication time frame applies to the appeal, the adjudication time frame is extended by the number of calendar days in the period from 10 calendar days (or 2 calendar days in an expedited Part D appeal) after receipt of the notice of hearing until the date the evidence is received (see [OCPM 7.2.2](#)).²⁵

Unrepresented beneficiaries may submit evidence at any time, *except* in expedited Part D appeals.²⁶

At a hearing, an ALJ may accept evidence that is material to the issues consistent with [42 C.F.R. sections 405.1018](#) and [405.1028](#) or [423.2018](#).²⁷ In addition, if the ALJ believes material evidence is missing, the ALJ may stop the hearing temporarily and continue it to a later date.²⁸ Evidence submitted at the hearing, or the submission of evidence the ALJ determined was missing, is subject to the same rules described above regarding extension of applicable adjudication time frames.²⁹

Note: In a **Part A or Part B appeal of a QIC reconsideration**, providers, suppliers, and beneficiaries who are represented by a provider or supplier must show good cause to introduce new evidence at the OMHA level that was not submitted to the QIC or a prior decision-maker (see [OCPM 10.5.6](#)).

Note: If an appellant submits additional evidence with its request for hearing or review, the appellant must either send a copy of the submitted evidence to the other parties, or briefly describe the evidence pertinent to the other parties and offer to provide copies of the evidence upon request (see [OCPM 11.6.5](#)).³⁰

²³ [42 C.F.R. §§ 405.1018\(a\), 423.2018\(b\)](#).

²⁴ [42 C.F.R. § 423.2018\(c\)](#) does not exempt unrepresented beneficiaries; thus, this provision applies to unrepresented beneficiaries in expedited Part D appeals.

²⁵ [42 C.F.R. §§ 405.1018\(b\), \(d\), 423.2018\(b\)\(2\), \(b\)\(3\), \(c\)\(2\)](#).

²⁶ [42 C.F.R. §§ 405.1018\(d\)\(1\), 423.2018\(b\)\(3\), \(c\)\(1\), \(c\)\(2\)](#).

²⁷ [42 C.F.R. §§ 405.1030\(b\)\(1\), 423.2030\(b\)\(1\)](#).

²⁸ [42 C.F.R. §§ 405.1030\(c\), 423.2030\(c\)](#).

²⁹ [42 C.F.R. § 405.1030\(d\)](#).

³⁰ [42 C.F.R. § 405.1014\(d\)\(1\)](#).

10.5.4 When must parties send evidence to other parties?

Evidence submitted with the request for hearing or review

If additional evidence is submitted with the request for hearing, the appellant must send a copy of the evidence, or briefly describe the evidence pertinent to the party and offer to provide copies of the evidence to the party at the party's request.³¹

- If an appellant, **other than an unrepresented beneficiary**, fails to send a copy of evidence or a summary thereof to the other parties, the appellant will be provided an additional opportunity to do so (see [OCPM 11.6.7](#)). If the appellant fails to do so, the request for hearing or review will be dismissed (see [OCPM 17.1.10](#)).
- If an **unrepresented beneficiary** fails to send a copy of the evidence or a summary thereof to the other parties, send the evidence or a summary thereof to the other parties using a Notice of Request for Hearing or Review Filed by an Unrepresented Beneficiary (OMHA-310).

Evidence submitted after the request for hearing or review was filed

If additional evidence is submitted after the request for hearing is filed, and there are other parties to the proceedings, a copy of any evidence, or written summary thereof, should be provided to the other parties at the same time they are submitted to the adjudicator, as follows.

- If the evidence, or written summary thereof, was submitted by an **unrepresented beneficiary** and there is no indication that the other parties were copied, the adjudication team will provide copies of the submission to the other parties to the appeal using a Notice of Submission (OMHA-129T).
- If the evidence, or written summary thereof, was submitted by **CMS or a CMS contractor**, that is a party to the proceedings on a request for hearing, and there is no indication that the other parties were copied, the adjudicator will not consider the evidence in deciding the appeal (see [OCPM 6.7.4](#)).
- If the evidence, or written summary thereof, was submitted by **any other party** and there is no indication that the other parties were copied, verify (creating a Report of Contact (OMHA-101) where necessary) whether the submitter sent

³¹ 42 C.F.R. § 405.1014(d)(1).

copies to the other parties, and if not, the adjudication team will provide copies to the other parties using a Notice of Submission (OMHA-129T)

If the evidence was produced at the direction of the ALJ (for example, evidence produced by an OMHA expert), the adjudication team will send a copy of the evidence to the parties (*see* OCPM 10.4.5).

10.5.5 What if a party submits duplicative evidence?

An OMHA adjudicator may exclude from consideration any evidence submitted by a party at the OMHA level that is duplicative of evidence already in the record.³²

Note: Even though an OMHA adjudicator may exclude duplicative evidence from consideration, duplicative evidence submitted by a party must be retained in the administrative record, pursuant to [42 C.F.R. section 405.1042\(a\)\(2\)](#). Accordingly, the duplicative evidence is retained in the non-exhibited (or non-indexed) portion of the administrative record, and may not be discarded or deleted from the administrative record.

10.5.6 When must an appellant show good cause to have new evidence considered?

Good cause is required for new evidence to be considered when:

- 1) The appellant is a provider, supplier, or a beneficiary represented by a provider or supplier;
- 2) The appellant is appealing a **Part A or Part B QIC reconsideration**; and
- 3) The evidence was not previously submitted to the QIC or a prior decision-maker.³³

If a statement explaining why the evidence was not previously submitted to the QIC or a prior decision maker is not included with the evidence, the evidence will not be considered.³⁴

Note: This requirement does not apply to new evidence submitted by:

³² [42 C.F.R. § 405.1028\(b\)](#).

³³ [42 C.F.R. § 405.1018\(c\)\(1\)](#).

³⁴ [42 C.F.R. § 405.1018\(c\)\(2\)](#).

- A beneficiary (unless the beneficiary is represented by a provider or supplier);
- CMS or any of its contractors;
- A Medicaid State agency; or
- An applicable plan.³⁵

This requirement also does not apply to:

- Appeals of Part A QIO reconsiderations;³⁶
- Part C appeals;³⁷
- Part D appeals;³⁸ or
- Appeals of SSA reconsiderations.

10.5.6.1 What does an adjudicator consider when determining whether good cause exists?

An OMHA adjudicator may find good cause for the submission of new evidence for the first time at the OMHA level when any of the following circumstances apply:

- The new evidence is, in the opinion of the ALJ or attorney adjudicator, material to an issue addressed in the QIC's reconsideration, and that issue was not identified as a material issue prior to the QIC's reconsideration;
- The new evidence is, in the opinion of the ALJ, material to a new issue identified for the first time at the OMHA level, in accordance with [42 C.F.R. section 405.1032\(b\)\(1\)](#);

Example: The QIC issued a reconsideration denying a claim for diabetic testing supplies because there was a claim for duplicate supplies submitted by another supplier. The ALJ notes that the record is also lacking a valid written order that is required for Medicare payment to be made and notifies the parties of the new issue prior to the start of the scheduled hearing. The ALJ may find good cause for the submission of the new evidence that is, in the opinion of the ALJ, material to the new issue.

³⁵ 42 C.F.R. § 405.1018(d)(2).

³⁶ 42 C.F.R. § 478.40(c)(2)(vi).

³⁷ 42 C.F.R. § 422.562(d)(2)(vi).

³⁸ 42 C.F.R. § 423.2018.

- The party was unable to obtain the evidence before the QIC issued its reconsideration and submits evidence that, in the opinion of the ALJ or attorney adjudicator, demonstrates the party made reasonable attempts to obtain the evidence before the QIC issued its reconsideration;

Example: A supplier submits new evidence for the first time at the OMHA level, along with an explanation and evidence of unsuccessful attempts to obtain the evidence from another health care professional prior to the QIC issuing its reconsideration. If the ALJ or attorney adjudicator determines that the evidence demonstrates the supplier made reasonable attempts to obtain the new evidence before the QIC issued its reconsideration, the ALJ or attorney adjudicator may find good cause for the submission of the new evidence for the first time at the OMHA level.

- The party asserts that the evidence was submitted to the QIC or another contractor and submits evidence that, in the opinion of the ALJ or attorney adjudicator, demonstrates the new evidence was submitted to the QIC or another contractor before the QIC issued the reconsideration; or

Example: A provider submits new evidence, consisting of a physician's order that was not part of the case file OMHA received from the QIC, for the first time at the OMHA level. In a letter accompanying the new evidence, the provider explains that the evidence was previously submitted to the QIC, and includes a copy of the request for reconsideration, which lists the physician's order as an enclosure. If the ALJ or attorney adjudicator determines that the evidence demonstrates the physician's order was submitted to the QIC before the QIC issued the reconsideration, the ALJ or attorney adjudicator may find good cause for the submission of the new evidence for the first time at the OMHA level.

- In circumstances not addressed in paragraphs (a)(2)(i) through (iv) of [42 C.F.R. section 405.1028](#), the ALJ or attorney adjudicator determines that the party has demonstrated that it could not have obtained the evidence before the QIC issued its reconsideration.³⁹

³⁹ [42 C.F.R. § 405.1028\(a\)\(2\)](#).

10.5.6.2 When does an OMHA adjudicator review new evidence to determine whether there is good cause?

After a hearing is requested but before a hearing is held, the ALJ must examine any new evidence for which good cause is required to be shown and make a good cause determination before the hearing is held.⁴⁰ If a hearing is conducted, as soon as possible, but no later than the start of the hearing, the ALJ must notify all parties and non-party participants who responded to the notice of hearing whether the evidence will be considered or excluded from consideration.⁴¹

If a hearing will not be held, the ALJ or attorney adjudicator must examine any new evidence for which good cause is required to be shown and make a good cause determination.⁴²

Caution: If an enrollee in a **Part D** appeal wishes to have evidence of a change in condition after the coverage determination or at-risk determination considered, the OMHA adjudicator must remand the case to the Part D IRE.⁴³

10.5.6.3 How does OMHA document a good cause determination?

Regardless of whether a hearing is held, the decision must include a discussion of any new evidence submitted for the first time at OMHA and subject to a good cause determination, and the outcome of the adjudicator's determination of good cause. The discussion must include the reason(s) the adjudicator did or did not find good cause for the submission of the new evidence (see [OCPM 16.3.6](#)).⁴⁴

If the OMHA adjudicator determines that there was not good cause for submitting the evidence for the first time at the OMHA level, the adjudicator must exclude the evidence from the proceeding and may not consider it in reaching a decision.⁴⁵

Note: The excluded evidence must be retained and identified in the non-exhibited portion of the administrative record and may not be discarded.

⁴⁰ 42 C.F.R. § 405.1028(a)(1) and (4).

⁴¹ 42 C.F.R. § 405.1028(a)(4).

⁴² 42 C.F.R. §§ 405.1028(a)(1), 405.1000(e).

⁴³ 42 C.F.R. § 423.2018(a)(2).

⁴⁴ 42 C.F.R. § 405.1046(a)(2)(ii).

⁴⁵ 42 C.F.R. § 405.1028(a)(3).

10.6 Discovery requests

(Issued: 02-19-20, Effective: 02-19-20)

10.6.1 What is discovery?

In general, discovery is the required disclosure by a party to a litigation dispute, at the request of another party, of information that relates to the dispute.⁴⁶ For purposes of appeals before OMHA, discovery is only permissible under limited circumstances (see OCPM 10.6.2) and for limited purposes (see OCPM 10.6.4).⁴⁷ Subpoenas, which may be part of the discovery process, are covered under OCPM 10.7.

10.6.2 When is discovery permitted . . .

10.6.2.1 In Part A/B appeals?

Discovery is permitted only when CMS or a CMS contractor elects to be a party to an ALJ hearing, in accordance with [42 C.F.R. section 405.1012](#) (see [OCPM 6.7.5](#)).⁴⁸

Discovery is not permissible when the appellant is an unrepresented beneficiary.⁴⁹

10.6.2.2 In Part C appeals?

Because the MAO is always a party to the hearing, discovery is permissible in **Part C** appeals.

10.6.2.3 In Part D appeals?

Discovery is not permissible in Part D appeals because CMS, the Part D IRE, and the Part D plan sponsor can never be a party to the proceedings at OMHA (see [OCPM 6.7.5](#)).⁵⁰ Because the enrollee is the only party to a **Part D** hearing, discovery is not permissible.⁵¹

10.6.2.4 In SSA appeals?

Because CMS and SSA are not parties in appeals of SSA reconsiderations, discovery is not permissible.⁵²

⁴⁶ *Discovery*, Black's Law Dictionary (11th ed. 2019).

⁴⁷ [42 C.F.R. § 405.1037](#).

⁴⁸ [42 C.F.R. § 405.1037\(a\)](#).

⁴⁹ [42 C.F.R. § 405.1012\(a\)](#).

⁵⁰ [74 Fed. Reg. 65339, 65353 \(Dec. 9, 2009\)](#).

⁵¹ *See* [74 Fed. Reg. 65340, 65353 \(Dec. 9, 2009\)](#).

⁵² *See* [70 Fed. Reg. 11420, 11433 \(Mar. 8, 2005\)](#).

10.6.3 Who may request discovery?

Only a **party** may request discovery.

10.6.4 What forms of discovery are permitted?

When discovery is available (*see* OCPM 10.6.2), a party **may**:

- Request the reasonable production of documents by another party for purposes of inspection and copying;⁵³ and/or
- Take an oral or written deposition of another party, but *only if*:
 - The proposed deponent agrees to the deposition, or
 - The ALJ finds that the proposed deposition is necessary and appropriate in order to secure the deponent's testimony for an ALJ hearing.⁵⁴

Note: If a party wants to introduce evidence that it obtained during discovery, any new documentary evidence could be subject to a good cause determination in Part A and Part B appeals (*see* OCPM 10.5.6).

A party **may not**:

- Request admissions (such as a request for CMS or a CMS contractor to admit the truth of facts, or application of law to facts);
- Send interrogatories; or
- Take any other form of discovery not permitted under [42 C.F.R. section 405.1037](#).⁵⁵

10.6.5 How can a party initiate discovery?

A party may initiate discovery by requesting specific documents or information from another party and copying the ALJ, or by requesting the ALJ's permission to submit a discovery request to another party. Any discovery initiated by a party must comply with all requirements and limitations of [42 C.F.R. section 405.1037](#), along with any further requirements or limitations ordered by the ALJ.⁵⁶ The ALJ considers the discovery

⁵³ [42 C.F.R. § 405.1037\(b\)\(1\)](#).

⁵⁴ [42 C.F.R. § 405.1037\(b\)\(2\)](#).

⁵⁵ [42 C.F.R. § 405.1037\(b\)\(3\)](#).

⁵⁶ [42 C.F.R. § 405.1037\(a\)\(3\)](#).

request, and grants or denies the request and establishes the scope of and time frame for the discovery.

Note: Until the ALJ makes a determination granting a discovery request, the receiving party has no obligation to respond to the discovery request.

If the request does not specify the scope of discovery requested, including the form of discovery and any documents the party wants produced or issues for which the party intends to take a deposition, the ALJ team contacts the requestor to clarify the scope of discovery requested. If the ALJ has not already granted a request to initiate discovery, the ALJ will consider the matter for which discovery is sought (*see* OCPM 10.6.6) and issue an order granting or denying the party's request (*see* OCPM 10.6.7).

10.6.6 What does an ALJ consider in determining whether to grant a discovery request?

If discovery is available (*see* OCPM 10.6.2), an ALJ **may permit** discovery of a matter only if the matter is relevant to the specific subject matter of the hearing.

An ALJ **may not permit** discovery:

- If the matter for which discovery is sought is privileged or otherwise protected from disclosure; or
- If the ALJ determines that the discovery request is unreasonable, unduly burdensome or expensive, or otherwise inappropriate.⁵⁷

10.6.7 How does an ALJ respond to discovery requests?

Request granted

If the ALJ **grants** a discovery request, the ALJ issues an Order on Discovery Request (OMHA-158T). The order is accompanied by a Notice (OMHA-120) and is sent to the appellant(s) and any other parties who were copied on the request for hearing or review. The order:

- Specifies the matters for which discovery has been granted;

⁵⁷ 42 C.F.R. § 405.1037(a)(2).

Note: If the ALJ grants the request with respect to one or more, but not all, of the matters for which the party requested discovery, the order must also specify the matters for which discovery was not granted.

- Specifies the types of discovery permitted (*see* OCPM 10.6.4);⁵⁸
- Sets a specific date by which discovery will end;⁵⁹
- Outlines the procedures that apply in the event of a motion to compel or motion for protective order, including the option for the other party to respond, and the time frame in which to do so (*see* OCPM 10.6.11);⁶⁰ and
- Advises the parties that if an adjudication period applies to the appeal, the adjudication period is extended from the date the discovery request is granted until the date specified for ending discovery (*see* OCPM 7.2.2).⁶¹

Note: Generally, unless the parties agree in writing to an earlier hearing date, the hearing may be scheduled no sooner than 45 calendar days after discovery ends.⁶²

Request denied

If the ALJ **denies** a discovery request, the ALJ issues an Order on Discovery Request (OMHA-158T). The order is accompanied by a Notice (OMHA-120) and is sent to the appellant(s) and any other parties who were copied on the request for hearing or review. The order states the ALJ's reasons for denying the request (for example, if discovery is not permitted (*see* OCPM 10.6.2), or if additional information is required before the request can be granted).

10.6.8 How does a party make discovery requests of another party?

After an ALJ has granted a party's discovery request, the party, if it has not done so already, may send a request that is within the scope of discovery granted by the ALJ directly to another party. The parties must copy the ALJ and any other party that received a notice of hearing on all discovery requests and responses.

⁵⁸ 42 C.F.R. § 405.1037(b).

⁵⁹ 42 C.F.R. § 405.1037(c).

⁶⁰ 42 C.F.R. § 405.1037(d).

⁶¹ 42 C.F.R. § 405.1037(f).

⁶² *Cf.* 42 C.F.R. § 405.1037(c)(5).

If the party sends a discovery request to the ALJ without copying the other party, the adjudication team forwards the request with a Notice of Discovery Request (OMHA-157T) to all parties involved in the discovery request.

10.6.9 How long does a party have to make discovery requests?

Parties must request discovery from other parties by the date specified by the ALJ in the Order on Discovery Request (OMHA-158T). A party's discovery request is considered timely if it is received by another party on or before the date specified by the ALJ. A party may not conduct discovery any later than the date specified by the ALJ, *unless* the time to conduct discovery is extended (see OCPM 10.6.10).⁶³

10.6.10 How does an ALJ respond to a request for extension of discovery?

The ALJ may extend the time by which to request or conduct discovery only if the party requesting the extension establishes that it was not at fault in not meeting the original discovery deadline.⁶⁴

Before ruling on a request to extend the time for requesting discovery or for conducting discovery, the ALJ must give the other parties to the appeal a reasonable period, which is generally 5 calendar days from receipt of the notice (presumed to be 5 calendar days from the date the notice is mailed), to respond to the extension request using a Notice of Request to Extend Discovery (OMHA-160T).⁶⁵ The parties may also respond to the extension request in writing or by telephone, which will need to be documented in the administrative record, with a Report of Contact (OMHA-101) for oral responses.

- If the ALJ **grants** the extension request, the ALJ issues an Order on Request to Extend Discovery (OMHA-161T). The order is accompanied by a Notice (OMHA-120) and is sent to the appellant(s) and any other parties who received a copy of the discovery request. The ALJ must impose a new discovery deadline and, if necessary, reschedule the hearing date so that all discoveries end no later than 45 calendar days before the hearing.⁶⁶
- If the ALJ **denies** the extension request, the ALJ issues an Order on Request to Extend Discovery (OMHA-161T). The order is accompanied by a Notice (OMHA-

⁶³ 42 C.F.R. § 405.1037(c)(1), (2).

⁶⁴ 42 C.F.R. § 405.1037(c)(4).

⁶⁵ 42 C.F.R. § 405.1037(c)(3).

⁶⁶ 42 C.F.R. § 405.1037(c)(5).

120) and is sent to the appellant(s) and any other parties who received a copy of the discovery request.

10.6.11 What do the parties do in the event of a discovery dispute?

Each party is required to make a good faith effort to resolve or narrow any discovery dispute.⁶⁷ In the event of a dispute that the parties are unable to resolve themselves:

- The party requesting discovery may submit to the ALJ a motion to compel discovery that is permitted by [42 C.F.R. section 405.1037](#) or pursuant to an ALJ order (*see* OCPM 10.6.4); and/or
- The party from whom discovery is sought may submit to the ALJ a motion for a protective order (*see* OCPM 10.6.11.1).⁶⁸

10.6.11.1 What are the required elements of a motion to compel discovery or a motion for a protective order?

A motion to compel discovery or for a protective order must include a sworn declaration describing the efforts of the party filing the motion to resolve or narrow the discovery dispute.⁶⁹

10.6.11.2 To whom do parties send a motion to compel discovery or a motion for a protective order?

Parties must send the motion to the ALJ, with a copy to the party requesting discovery or from whom discovery is sought, as applicable.

10.6.11.3 How can parties respond to a motion to compel discovery or a motion for a protective order?

Parties who wish to object or otherwise respond to a motion to compel discovery or a motion for a protective order must send their response to the ALJ, with a copy to the party who filed the motion. The response must include a sworn declaration describing the efforts of the party filing the response to resolve or narrow the discovery dispute.⁷⁰ A copy of the motion must be sent to any other party involved in the discovery dispute, and any response must be submitted to the ALJ within five calendar days after receipt.

⁶⁷ [42 C.F.R. § 405.1037\(d\)\(1\)](#).

⁶⁸ [42 C.F.R. § 405.1037\(d\)\(2\)](#).

⁶⁹ [42 C.F.R. § 405.1037\(d\)\(3\)](#).

⁷⁰ [42 C.F.R. § 405.1037\(d\)\(3\)](#).

10.6.11.4 How does an ALJ respond to a motion to compel discovery or a motion for a protective order?

After considering the motion, and any objections or other responses filed by the other party, the ALJ decides the motion in accordance with the provisions of [42 C.F.R. section 405.1037](#) and any prior discovery ruling(s) issued in the appeal,⁷¹ and issues a Discovery Ruling (OMHA-163T). The ruling, accompanied by a Notice (OMHA-120), is mailed to each party and:

- Grants or denies the motion to compel or the motion for protective order in whole or in part;
- If applicable, specifically identifies any part of the disputed discovery request upheld and any part rejected; and
- Imposes any limits on discovery the ALJ finds necessary and appropriate.⁷²

10.6.12 Can a party object to an ALJ's discovery or disclosure ruling?

An ALJ discovery or disclosure ruling is subject to Council review, though the timing of review varies.

General rule

An ALJ discovery ruling, or an ALJ disclosure ruling, such as one issued at a hearing, is not subject to immediate review by the Council. The ruling may be reviewed solely during the course of the Council's normal review of the claim or matter at issue, as applicable.⁷³

Exception

The Council may immediately review any portion of an ALJ's discovery or disclosure ruling to the extent that portion of the ruling authorizes discovery or disclosure of a matter for which an objection based on privilege, or other protection from disclosure such as case preparation, confidentiality, or undue burden, was made before the ALJ.⁷⁴

If CMS objects to a discovery ruling, the Council must take review, and the discovery ruling at issue is automatically stayed pending the Council's order.⁷⁵ If a request for

⁷¹ [42 C.F.R. § 405.1037\(d\)\(4\)](#).

⁷² [42 C.F.R. § 405.1037\(d\)\(5\)](#).

⁷³ [42 C.F.R. § 405.1037\(e\)\(1\)](#).

⁷⁴ [42 C.F.R. § 405.1037\(e\)\(2\)](#).

⁷⁵ [42 C.F.R. § 405.1037\(e\)\(2\)\(i\)](#).

immediate review is filed by a party other than CMS, the Council may grant or deny the request to review the discovery or disclosure ruling.

10.6.13 What is the effect of a request for immediate Council review on the OMHA proceedings?

Upon notice to the ALJ that a party intends to seek Council review of a discovery or disclosure ruling after objecting to the ruling based on privilege or other protection from disclosure, the ALJ must stay all proceedings affected by the ruling.⁷⁶

10.6.13.1 How long does this stay of proceedings last?

Requests filed by CMS

Because the Council must take review when CMS objects to a discovery ruling, the OMHA proceedings and the ALJ's ruling are stayed until the time the Council issues a written decision that affirms, reverses, modifies, or remands the ALJ's ruling.⁷⁷

*Requests filed by a party **other than CMS***

The ALJ determines the length of the stay under the circumstances of a given case, but in no event is the stay fewer than 15 calendar days from the day on which the ALJ received notice of the party's or non-party's intent to seek Council review.⁷⁸ The ALJ issues a Stay of Proceedings Order (OMHA-165T), with a Notice (OMHA-120), to all parties who were sent a copy of the notice of hearing.

If the Council subsequently **grants** the request for immediate review of a discovery ruling, the OMHA proceedings and the ALJ's ruling are stayed until the time the Council issues a written decision that affirms, reverses, modifies, or remands the ALJ's ruling.⁷⁹

If the Council **does not grant** the request for immediate review or take own-motion review within the time allotted for the stay, the stay is lifted, the ALJ's ruling stands, and the proceedings continue.⁸⁰

See [OCPM 7.2.2](#) for guidance on adjudication time frames during a discovery period and any stay of proceedings.

⁷⁶ 42 C.F.R. § 405.1037(e)(2)(ii).

⁷⁷ 42 C.F.R. § 405.1037(e)(2)(ii), (iv).

⁷⁸ 42 C.F.R. § 405.1037(e)(2)(iii).

⁷⁹ 42 C.F.R. § 405.1037(e)(2)(ii), (iv).

⁸⁰ 42 C.F.R. § 405.1037(e)(2)(v).

10.7 Subpoena requests

(Issued: 02-19-20, Effective: 02-19-20)

10.7.1 What is a subpoena?

A subpoena is an order commanding a person to appear, or to give testimony or provide information to an administrative agency, subject to a penalty for failing to comply.⁸¹ For purposes of appeals before OMHA, subpoenas may be issued by an ALJ on his or her own initiative, and may also be issued by an ALJ at the request of a party in a case where discovery has been initiated (*see* OCPM 10.6.5).⁸²

10.7.2 Who may request a subpoena?

Only a **party** may request that an ALJ issue a subpoena.

Note: An ALJ may also issue a subpoena on his or her own motion (*see* OCPM 10.7.5).

10.7.3 Under what circumstances may a party request a subpoena?

Part A, B, or C appeals

An ALJ will only issue a subpoena at the request of a party when:

- 1) CMS, a CMS contractor, or the MAO is a party to the proceedings;
- 2) Discovery has been sought⁸³ (*see* OCPM 10.6);
- 3) The party requesting the subpoena filed a motion to compel that was granted by the ALJ (*see* OCPM 10.6.11); and
- 4) Despite the motion to compel, the party requesting the subpoena did not receive the requested discovery.⁸⁴

Part D appeals, appeals of SSA reconsiderations

Subpoenas may only be issued on the ALJ's own initiative. Parties may not request a subpoena.⁸⁵

⁸¹ *Subpoena*, Black's Law Dictionary (11th ed. 2019).

⁸² 42 C.F.R. § 405.1036(f)(1), (f)(4)(i).

⁸³ Discovery is not permissible in Part A and Part B appeals when the appellant is an unrepresented beneficiary, pursuant to 42 C.F.R. § 405.1012(a).

⁸⁴ 42 C.F.R. § 405.1036(f)(4).

⁸⁵ 42 C.F.R. § 423.2036(f)(1).

10.7.4 What information can be subpoenaed?

An ALJ may, on his or her own motion in all appeals, or at the request of a party in a **Part A, B, or C appeal**, issue a subpoena for the following when reasonably necessary for the full presentation of a case:

- A subpoena for the appearance and testimony of witnesses; and
- A subpoena for the production of documents by a party or the Part D plan sponsor (that is, to make books, records, correspondence, papers, or other documents that are material to an issue at the hearing available for inspection and copying).⁸⁶

10.7.5 To whom may a subpoena be issued?

Part A, B, and C appeals

A **subpoena for the appearance and testimony of witnesses** may be issued to any witness whose appearance or testimony the ALJ believes is reasonably necessary for the full presentation of a case, but may not be issued to CMS or a CMS contractor.

A **subpoena for the production of documents** may only be issued to a **party**, but may not be issued to CMS or a CMS contractor, even if CMS or the CMS contractor is a party to the appeal (see [OCPM 6.4.2](#)).⁸⁷

Note: An **MAO** is not considered a CMS contractor, as the term is defined for 42 C.F.R. part 405, subpart I, and a subpoena for the appearance and testimony of witnesses or the production of documents may be issued to an MAO as a party to the appeal.

Part D appeals

Because the enrollee is the only party to a Part D appeal (and, therefore, CMS, the IRE, or the Part D plan sponsor may never be a party), discovery is not available, and the enrollee may not request a subpoena.

However, an **ALJ, on his or her own initiative**, may issue:

- A **subpoena for the appearance and testimony of witnesses** to any witness whose appearance or testimony the ALJ believes is reasonably necessary for the

⁸⁶ 42 C.F.R. §§ 405.1036(f)(1), 423.2036(f)(1).

⁸⁷ 42 C.F.R. § 405.1036(f)(1).

full presentation of a case, but not to CMS, the IRE, or the Part D plan sponsor;
and

- A **subpoena for the production of documents** to the enrollee or the Part D plan sponsor, but not to CMS or the IRE (see [OCPM 6.4.2](#)).⁸⁸

Appeals of SSA reconsiderations and appeals filed by an unrepresented beneficiary

As CMS, CMS contractors, and SSA are not parties to these appeals, discovery is not available, and parties may not request a subpoena.

However, an **ALJ, on his or her own initiative**, may issue:

- A **subpoena for the appearance and testimony of witnesses** to any witness whose appearance or testimony the ALJ believes is reasonably necessary for the full presentation of a case, but not to CMS, a CMS contractor, or SSA; and
- A **subpoena for the production of documents** to the beneficiary, but not to CMS, a CMS contractor, or SSA (see [OCPM 6.2.1](#), [6.4.2](#)).

10.7.6 How does a party request a subpoena?

Parties to a hearing who wish to subpoena documents or witnesses must file a written request for the issuance of a subpoena with the ALJ. The request must be filed no later than the end of the discovery period established by the ALJ (see [OCPM 10.6.9](#)),⁸⁹ and must contain:

- The names of the witnesses or documents to be produced;
- A description of the address or location of the witnesses or documents, with sufficient detail to find them;
- A statement of the important facts that the witness or document is expected to prove; and
- The reasons why these facts cannot be proven without issuing a subpoena.⁹⁰

10.7.7 How does an ALJ respond to a party's request for a subpoena?

An ALJ will rule on a party's subpoena request within 20 calendar days of receipt of the request. If a party's request for a subpoena is permitted (see [OCPM 10.7.3](#)) and the ALJ

⁸⁸ [42 C.F.R. § 423.2036\(f\)\(1\)](#).

⁸⁹ [42 C.F.R. § 405.1036\(f\)\(3\)](#).

⁹⁰ [42 C.F.R. § 405.1036\(f\)\(2\)](#).

decides to **grant** the request, the ALJ will issue a Subpoena (OMHA-140). Send the subpoena with a Notice of Subpoena (OMHA-172) to the party or non-party subject to the subpoena, with a copy to the requestor and any other parties who were sent a copy of the notice of hearing. A subpoena must be sent by certified mail, and evidence of its receipt by the party or non-party subject to the subpoena must be maintained.⁹¹

Note: Neither the statute nor regulations require that OMHA or the requestor pay the production costs for subpoenaed records.

Where a party requested a subpoena and the ALJ **denies** the subpoena request, the ALJ issues an Order Denying Subpoena Request (OMHA-146T). Send the order with a Notice (OMHA-120) to the requestor, with a copy to any other parties who were sent a copy of the notice of hearing.

10.7.8 Can a party object to an ALJ's subpoena ruling?

General Rule

An ALJ's ruling on a subpoena request is not subject to immediate review by the Council. The ruling may be reviewed solely during the course of the Council's normal review of the claim or matter at issue.⁹²

Exception

To the extent a subpoena compels disclosure of a matter for which an objection based on privilege, or other protection from disclosure such as case preparation, confidentiality, or undue burden, was made before an ALJ, the Council may immediately review the subpoena or that portion of the subpoena, as applicable.⁹³

In a **Part A, Part B, or Part C** appeal where CMS objects to an ALJ's ruling on a subpoena request, the Council must take review, and the subpoena ruling at issue is automatically stayed pending the Council's order.⁹⁴ If a request for immediate review is filed by a party other than CMS, the Council may grant or deny the request to review the subpoena ruling.

⁹¹ 42 C.F.R. § 405.1036(f)(6)(ii).

⁹² 42 C.F.R. §§ 405.1036(f)(5), 423.2036(f)(2).

⁹³ 42 C.F.R. §§ 405.1036(f)(5)(i), 423.2036(f)(3).

⁹⁴ 42 C.F.R. § 405.1036(f)(5)(ii).

10.7.9 What is the effect of a request for immediate Council review on the OMHA proceedings?

Upon notice to the ALJ that a party or non-party intends to seek Council review of a subpoena ruling, the ALJ must stay all proceedings affected by the subpoena.⁹⁵

10.7.10 How long does the stay of proceedings last . . .

10.7.10.1 In a Part A, B, or C appeal?

Requests filed by CMS

Because the Council must take review when CMS objects to a subpoena ruling, the OMHA proceedings and subpoena ruling are stayed until the time the Council issues a written decision that affirms, reverses, or modifies the ALJ's action on the subpoena.⁹⁶

Requests filed by a party other than CMS

The ALJ determines the length of the stay under the circumstances of the case, but in no event is the stay fewer than 15 calendar days from the day on which the ALJ received notice of the party's or non-party's intent to seek Council review.⁹⁷ The ALJ issues a Stay of Proceedings Order (OMHA-165T), with a Notice (OMHA-120), to the appellant and all parties who were sent a copy of the notice of hearing.

If the Council subsequently **grants** the request for immediate review, the subpoena (or portion of the subpoena, as applicable) is stayed until the Council issues a written decision that affirms, reverses, or modifies the ALJ's action on the subpoena.⁹⁸

If the Council **does not grant** the request for immediate review or take own-motion review within the time allotted for the stay, the stay is lifted, the ALJ's action stands, and the proceeding continues.⁹⁹

10.7.10.2 In a Part D appeal?

In a **Part D** appeal, the proceedings are stayed for 15 calendar days or until the Council issues a written decision that affirms, reverses, or modifies the ALJ's subpoena, whichever comes first.¹⁰⁰ If the Council does not take action within the 15

⁹⁵ 42 C.F.R. §§ 405.1036(f)(5)(iii), 423.2036(f)(3)(i).

⁹⁶ 42 C.F.R. § 405.1036(f)(5)(ii)-(v).

⁹⁷ 42 C.F.R. § 405.1036(f)(5)(iv).

⁹⁸ 42 C.F.R. § 405.1036(f)(5)(v).

⁹⁹ 42 C.F.R. § 405.1036(f)(5)(vi).

¹⁰⁰ 42 C.F.R. § 423.2036(f)(3)(ii).

calendar days, then the stay is lifted and the enrollee or non-party must comply with the ALJ's subpoena.¹⁰¹

10.7.11 What if a subpoena recipient does not comply with the subpoena?

If an ALJ determines, whether on his or her own motion or at the request of a party, that a subpoena recipient has refused to comply with a subpoena, the ALJ may request that the Secretary seek enforcement of the subpoena in accordance with [section 205\(e\) of the Act](#).¹⁰²

10.7.11.1 How does an ALJ request enforcement of a subpoena?

Any enforcement request by an ALJ must consist of a written notice to the Secretary describing in detail the ALJ's finding of noncompliance and his or her specific request for enforcement.¹⁰³

The ALJ should contact the **Appeals Policy and Operations Division (APOD)** for assistance in preparing the enforcement request. APOD will prepare a Subpoena Enforcement Request (OMHA-149T) and provide it, along with a copy of the subpoena and evidence of its receipt by certified mail, to the **Chief ALJ**.¹⁰⁴

After submitting an enforcement request in a **Part D** appeal, any applicable adjudication time frame is stayed for 15 calendar days or until the Secretary makes a decision with respect to the enforcement request, whichever occurs first.¹⁰⁵

10.7.11.2 To whom does OMHA send a copy of the enforcement request?

In a **Part A, B, or C** appeal, the **Chief ALJ** sends the enforcement request and related documents to the Secretary, the party or non-party subject to the subpoena, and to any other party and affected non-party to the appeal.¹⁰⁶

In a **Part D** appeal, the **Chief ALJ** sends a copy of the enforcement request and related documents to the Secretary, the individual or entity subject to the subpoena, to the enrollee, and to any other affected person.¹⁰⁷

¹⁰¹ 42 C.F.R. § 423.2036(f)(3)(iii).

¹⁰² 42 C.F.R. §§ 405.1036(f)(6)(i), 423.2036(f)(4)(i).

¹⁰³ 42 C.F.R. §§ 405.1036(f)(6)(ii), 423.2036(f)(4)(iii).

¹⁰⁴ 42 C.F.R. §§ 405.1036(f)(6)(ii), 423.2036(f)(4)(iii).

¹⁰⁵ 42 C.F.R. § 423.2036(f)(4)(ii).

¹⁰⁶ 42 C.F.R. § 405.1036(f)(6)(iii).

¹⁰⁷ 42 C.F.R. § 423.2036(f)(4)(iv).

10.8 Requests and submissions addressed in other chapters

(Issued: 02-19-20, Effective: 02-19-20)

10.8.1 Where does OMHA provide guidance on requests for . . .

10.8.1.1 Information disclosure, case status, or records?

Guidance regarding requests for information disclosure, case status, or records can be found in forthcoming OCPM 2.

10.8.1.2 Disqualification of the adjudicator?

Further guidance regarding requests for disqualification of the adjudicator can be found in forthcoming OCPM 3.

10.8.1.3 Substitution of a party upon the death of a beneficiary?

Guidance regarding a substitution of a party upon the death of a beneficiary can be found in [OCPM 4.1.2.2](#), and on public-use form Request for Substitution of Party Upon Death of Beneficiary or Enrollee (OMHA-106).

10.8.1.4 Approval of a fee for representing a beneficiary?

Guidance regarding approval of representative fees can be found in [OCPM 5.8](#) and on public-use form Petition to Obtain Approval of a Fee for Representing a Beneficiary (OMHA-118).

10.8.1.5 Escalation?

Guidance regarding escalation can be found in [OCPM 7.5](#).

10.8.1.6 Quicker processing or higher case prioritization?

Guidance regarding case prioritization can be found in [OCPM 7.4](#).

10.8.1.7 Waiver or extension of the adjudication period?

Guidance regarding extensions or waivers of the adjudication period can be found in [OCPM 7.2 and 7.3](#), respectively.

10.8.1.8 Limitation on liability or waiver of overpayment?

Guidance regarding limitation on liability and waiver of overpayment can be found in forthcoming OCPM 13.

10.8.1.9 Inclusion in alternate appeal resolution initiatives?

Guidance regarding a request for inclusion in special case processing procedures can be found in forthcoming OCPM 8.

10.8.1.10 Aggregation?

Guidance on processing a request for aggregation at intake can be found in [OCPM 9.4.2.1](#).

Guidance on processing a request for aggregation after a case has been assigned to an adjudication team can be found in [OCPM 11.3.7](#).

10.8.1.11 Appeal combination?

Guidance on appeal combination can be found in [OCPM 9.9.3](#).

10.8.1.12 Consolidation or grouping?

Guidance on processing a request for consolidation or grouping at intake can be found in [OCPM 9.1.5](#). Information on requests to keep appeals involving statistical sampling together can be found in [OCPM 11.5.4](#).

10.8.1.13 Extension of time to request a hearing or review?

Guidance regarding extension of the time to request a hearing or review can be found in [OCPM 11.4.6](#).

10.8.1.14 Copies of the administrative record?

Guidance regarding requests for a copy of the record can be found in forthcoming OCPM 12.

10.8.1.15 Hearing concerns?

Guidance on hearing concerns can be found in [OCPM 14](#) and [OCPM 15](#), including:

- Requests for in-person or VTC hearings;
- Requests for consolidated hearings;
- Requests for prehearing or posthearing conferences;
- Requests to reschedule in the form of an objection to the time and place of a hearing; and

- Requests for accommodation of special needs.

10.8.1.16 Post-adjudication issues?

Guidance on requests concerning post-adjudication issues can be found in [OCPM 20](#), including:

- Requests to re-send the disposition package or its contents;
- Requests to correct clerical errors;
- Requests to reopen a decision;
- Requests to vacate a dismissal; and
- Requests for review of a remand.

10.8.2 Where does OMHA provide guidance on submission of . . .

10.8.2.1 An appointment of representative?

Information on Appointments of Representative (CMS-1696) or other submissions naming an appointed representative can be found in [OCPM 5](#).

10.8.2.2 Objections to the issues or new issues?

Further guidance on objections to the issues or new issues can be found in forthcoming OCPM 13.

10.8.2.3 Proffered orders or decisions?

Further guidance on proffered orders or decisions can be found in [OCPM 16](#).

10.8.2.4 Withdrawal of a request for hearing or review of a dismissal?

Guidance on withdrawal requests can be found in [OCPM 17.1.11](#).

10.8.2.5 Materials concerning a hearing?

Further guidance on submissions of materials concerning a hearing can be found in [OCPM 14](#). Specifically, these submissions include:

- A waiver of advance notice of hearing;
- A request for an on-the-record-decision;
- An objection to the time and place of the hearing; and

- Written statements or evidence at the hearing.

10.8.3 Where does OMHA provide guidance on requests and submissions from CMS, CMS contractors, and plans?

CMS, CMS contractor, and plan elections, requests, and submissions are discussed in [OCPM 6](#).

Revision history

Date	Description	Sections/subsections updated
02/19/2020	Initial Release	N/A

If the table above indicates there are prior versions of this chapter, click [here](#) to view them.