

## OMHA Case Processing Manual

# Chapter 14 SCHEDULING AND NOTICING FOR PREHEARING CONFERENCES AND HEARINGS

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### 14.0 Chapter overview

(Issued: 09-28-18, Effective: 09-28-18)

This chapter describes the process for scheduling prehearing conferences and hearings, the activities that must be completed before a hearing is scheduled, and the circumstances where a hearing is required. This chapter also identifies the parties, potential parties, and participants to whom notices must be sent, and how to address responses to these notices and any objections or requests that may be made by the recipients. Finally, this chapter discusses when a hearing may be rescheduled or canceled with appropriate notice, and when a supplemental hearing may be necessary.

**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).

## 14.1 Prehearing conferences

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### 14.1.1 When is a prehearing conference held?

A prehearing conference may be held to facilitate a hearing.<sup>1</sup> For example, a prehearing conference may be conducted to:

- Clarify or narrow the issues for the hearing;
- Establish how the hearing will proceed; or
- Discuss what information the ALJ may find most useful in preparation for the hearing or at the hearing.

*Example:* In an appeal of a statistical sample and extrapolation, the appellant indicates that it may call multiple witnesses and experts, and that the underlying claims at issue were denied for the same reason. The ALJ may determine that a prehearing conference would be beneficial to facilitate scheduling the hearing and the hearing itself. The conference may cover the length of time each proposed witness is expected to testify, and whether the appellant intends to present evidence and argument for each underlying claim in the sample or address the general denial reason common to the claims.

*Note:* A prehearing conference may not be conducted for an appeal assigned to an attorney adjudicator.

### 14.1.2 Is there a right to a prehearing conference?

There is no right to a prehearing conference. A party may request a prehearing conference, but the ALJ determines whether one will be conducted.<sup>2</sup> An ALJ may also decide on his or her own to conduct a prehearing conference.

### 14.1.3 What notice of a prehearing conference is provided?

#### 14.1.3.1 Who is invited to a prehearing conference?

A Notice of Prehearing Conference (OMHA-153) is sent to:

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<sup>1</sup> 42 C.F.R. §§ 405.1040(a), 423.2040(a).

<sup>2</sup> 42 C.F.R. §§ 405.1040(a), 423.2040(a).

- 1) The **parties** who will be or were sent a notice of hearing (*see* OCPM 14.5.4), except any party that, in writing, waives receipt of the notice; and
- 2) CMS or a CMS contractor, or a Part D plan sponsor that is a **participant** to the appeal as of the date the notice is sent.<sup>3</sup>

*Note:* Parties include an MAO in a **Part C** appeal, or CMS or a CMS contractor that elected party status as of the date the notice is sent in a **Part A** or **Part B** appeal.

*Note:* In an **expedited Part D** appeal, the enrollee may waive notice orally.<sup>4</sup> The oral waiver must be documented in a Report of Contact (OMHA-101) and made part of the administrative record.<sup>5</sup>

#### 14.1.3.2 What information must the notice contain?

The Notice of Prehearing Conference (OMHA-153) provides the **time, place, and purpose** (that is, the matters that will be discussed) of the conference.<sup>6</sup>

#### 14.1.3.3 When is the notice sent?

The Notice of Prehearing Conference (OMHA-153) is sent so that the recipients are informed of the conference at least 7 calendar days before the conference date, or for **expedited Part D** appeals, at least 2 calendar days before the conference date.<sup>7</sup>

*Note:* Faxing the notice is acceptable if agreed to by the recipient and all PII safeguards are observed.

*Note:* To achieve the 7 calendar day requirement, a notice sent by regular mail must be placed in the mail 12 calendar days before the conference date. Receipt is presumed to be 5 calendar days after it is placed in the mail.

*Note:* For **expedited Part D** appeals, a mailed notice is sent by overnight mail. Otherwise, the advance notice requirement plus the time frame for objections in OCPM 14.1.12 would exceed the 10 calendar day adjudication period.

<sup>3</sup> 42 C.F.R. §§ 405.1040(b), 423.2040(b)–(c).

<sup>4</sup> 42 C.F.R. § 423.2040(c).

<sup>5</sup> 42 C.F.R. § 423.2040(d).

<sup>6</sup> 42 C.F.R. §§ 405.1040(b), 423.2040(b)–(c).

<sup>7</sup> 42 C.F.R. §§ 405.1040(b), 423.2040(b)–(c).

#### **14.1.4 Who may conduct a prehearing conference?**

The ALJ assigned to the appeal or an OMHA attorney designated by the assigned ALJ may conduct a prehearing conference.<sup>8</sup>

#### **14.1.5 Is the prehearing conference recorded?**

The conference will be recorded and an audio recording is included in the administrative record of the appeal.<sup>9</sup>

#### **14.1.6 What matters may be discussed at a prehearing conference?**

At the conference, the matters stated in the notice of the prehearing conference may be discussed.<sup>10</sup>

Additional matters may only be considered if:

- 1) The **ALJ** is conducting the conference; and
- 2) The **parties consent** to consideration of the additional matters **in writing**.<sup>11</sup>

#### **14.1.7 Can testimony and evidence be taken at a prehearing conference?**

Testimony and other evidence may not be taken at a prehearing conference.<sup>12</sup>

#### **14.1.8 What is a prehearing conference order?**

The Prehearing Conference Order (OMHA-154) documents the actions and agreements resulting from the prehearing conference.<sup>13</sup>

##### **14.1.8.1 Who may issue a prehearing conference order?**

The **ALJ** issues the Prehearing Conference Order (OMHA-154), even if the conference was conducted by an OMHA attorney.<sup>14</sup>

##### **14.1.8.2 To whom is the prehearing conference order sent?**

Send the Prehearing Conference Order (OMHA-154) with a Generic Notice (OMHA-120) to all parties and participants who attended the conference.<sup>15</sup>

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<sup>8</sup> 42 C.F.R. §§ 405.1040(c)(1), 423.2040(e)(1).

<sup>9</sup> 42 C.F.R. §§ 405.1040(c)(2), 405.1042(a)(1), 423.2040(e)(2), 2042(a)(1).

<sup>10</sup> 42 C.F.R. §§ 405.1040(c)(1), 423.2040(e)(1).

<sup>11</sup> 42 C.F.R. §§ 405.1040(c)(1), 423.2040(e)(1).

<sup>12</sup> 82 Fed. Reg. 4974, 5076 (Jan. 17, 2017).

<sup>13</sup> 42 C.F.R. §§ 405.1040(d), 423.2040(f).

<sup>14</sup> 42 C.F.R. §§ 405.1040(d), 423.2040(f).

### 14.1.8.3 When does a prehearing conference order become binding?

If the parties do not object to the prehearing conference order within 10 calendar days of receiving the order, or 1 calendar day for **expedited Part D** appeals, plus any additional time granted by the ALJ, the agreements and actions become part of the administrative record and are binding on all parties.<sup>16</sup>

*Note:* For orders that are sent by regular mail, receipt is presumed to be 5 calendar days after the notice is placed in the mail.

*Note:* For **expedited Part D** appeals, a mailed notice is sent by overnight mail. Otherwise, the advance notice requirement in section 14.1.3.3 plus the time frame for objections would exceed the 10 calendar day adjudication period.

### 14.1.8.4 What if a party objects to a prehearing conference order?

If a party objects to the prehearing conference order, the order is not binding but must remain in the appeal's administrative record.<sup>17</sup> The ALJ will rule on the objection if necessary, and may schedule another prehearing conference if needed.

*Example:* A prehearing conference is conducted for an appellant that requested to be part of OMHA's statistical sampling initiative. The ALJ issues a prehearing conference order confirming the appellant's consent to participate and the universe of appeals for statistical sampling. The appellant objects to the order, withdrawing consent for statistical sampling. The order is not binding, and the appeals cannot be combined for statistical sampling.

*Example:* The parties agree to a specific date for the hearing at a prehearing conference, which is documented in the prehearing conference order. The appellant objects to the order and requests that the hearing be rescheduled. The ALJ must determine if the party has good cause to reschedule the hearing, and may change the hearing date or schedule another prehearing conference if needed.<sup>18</sup>

<sup>15</sup> 42 C.F.R. §§ 405.1040(d), 423.2040(f).

<sup>16</sup> 42 C.F.R. §§ 405.1040(d), 423.2040(f).

<sup>17</sup> 42 C.F.R. §§ 405.1042(a), 423.2042(a).

<sup>18</sup> 42 C.F.R. §§ 405.1020(e)(4), 423.2020(e)(4).

*Example:* A prehearing conference is conducted to clarify the issues on appeal. The ALJ issues a prehearing conference order confirming the issues that were agreed upon at the conference. The appellant objects, stating that the issues are not accurately described in the order. The ALJ must make a decision on the objection to the issues either in writing, at another prehearing conference, or at the hearing.<sup>19</sup>

**14.1.9 If a prehearing conference is conducted, does a hearing also have to be conducted?**

A hearing is generally expected to follow a prehearing conference. However, if the ALJ concludes that a fully favorable decision can be issued in accordance with [42 C.F.R. section 405.1038](#) or [423.2038](#) after the prehearing conference occurs, or a dismissal or remand is appropriate, a hearing is not required.

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<sup>19</sup> [42 C.F.R. §§ 405.1024\(c\), 423.2024\(c\)](#).

## 14.2 When to schedule a hearing

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### 14.2.1 What must occur before a hearing is scheduled?

All appeals other than **expedited Part D** appeals must be screened for procedural defects, and any procedural defects must be resolved before a hearing is scheduled.

**Expedited Part D** appeals must also be screened for procedural defects, but a hearing may be scheduled before the screening is complete and any procedural defects are resolved, to facilitate meeting the 10 calendar day adjudication period.

### 14.2.2 When must a hearing be scheduled for . . .

#### 14.2.2.1 Requests for hearing before an ALJ?

A hearing must be scheduled, subject to OCPM 14.2.2, *unless* one of the following exceptions applies:

- The request is dismissed.<sup>20</sup>
- The request is remanded.<sup>21</sup>
- In a **Part A** or **Part B** appeal, a decision can be issued without a hearing because:
  - The evidence in the administrative record supports a finding fully in favor of the appellant(s) on every issue;
  - No other party to the appeal is liable for the claims or other matters at issue; and
  - CMS or a contractor has not elected party status (such an election may occur if a notice of hearing was previously issued for the case).<sup>22</sup>

*Caution:* A decision favorable to the appellant without a hearing may not be issued in a **Part C** appeal because the MAO is a party and is

<sup>20</sup> 42 C.F.R. §§ 405.1052, 423.2052.

<sup>21</sup> 42 C.F.R. §§ 405.1056, 423.2056.

<sup>22</sup> 42 C.F.R. §§ 405.1000(g), 405.1038(a).

responsible for paying for, authorizing, or providing the service in dispute if a finding is favorable to the appellant.<sup>23</sup>

*Note:* For **Part D** appeals, the only requirement is that the decision is fully favorable to the enrollee on every issue because the enrollee is the only party, and CMS or a contractor may not elect party status in **Part D** appeals.<sup>24</sup>

*Note:* A written stipulation from CMS, a CMS contractor, or a Part D plan sponsor that an item or service should be covered or payment may be made, can be considered in determining whether a decision can be issued without a hearing under this exception.<sup>25</sup>

- A decision can be issued without a hearing because all of the parties who would be sent a notice of hearing (see OCPM 14.5.4) indicate **in writing**, or orally in an **expedited Part D** appeal, that they do not wish to appear at an oral hearing.<sup>26</sup>

*Note:* The ALJ may still conduct hearing and require the parties to attend if the ALJ believes that a personal appearance and testimony by the appellant or any party is necessary to decide the case.<sup>27</sup>

*Note:* For **Part D** appeals, only the enrollee has to waive the oral hearing because only the enrollee is a party.<sup>28</sup>

- A decision can be issued without a hearing because:<sup>29</sup>
  - The appellant lives outside of the United States;
  - The appellant does not inform OMHA that he or she wants to appear at an oral hearing; and
  - There are no other parties who would be sent a notice of hearing (see OCPM 14.5.4).

<sup>23</sup> 42 C.F.R. § 422.618(c).

<sup>24</sup> 42 C.F.R. §§ 405.1038(c), 423.2038(c).

<sup>25</sup> 42 C.F.R. §§ 405.1038(c), 423.2038(c).

<sup>26</sup> 42 C.F.R. §§ 405.1000(e), 405.1038(b)(i).

<sup>27</sup> 42 C.F.R. §§ 405.1000(f), 405.1036(b)(3), 423.2000(f), 423.2036(b)(3).

<sup>28</sup> 42 C.F.R. §§ 423.2000(e), 423.2038(b)(i).

<sup>29</sup> 42 C.F.R. § 405.1038(b)(ii).



*Note:* The “United States” means the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, American Samoa, and the Northern Mariana Islands.<sup>30</sup>

*Note:* For **Part D** appeals, the requirement is limited to an enrollee who lives outside of the United States and does not indicate he or she wants to appear at a hearing, because only the enrollee is a party.<sup>31</sup>

- The request is removed from OMHA by the Council.<sup>32</sup>
- In a **Part A** or **Part B** appeal, the request is escalated from OMHA to the Council (see [OCPM 7.5](#)).<sup>33</sup>

*Note:* A request for escalation alone is not a basis to issue a decision without conducting a hearing. If a valid request for escalation is filed, a decision can only be issued without conducting a hearing if that action is otherwise authorized by the regulations (for example, if a fully favorable decision can be issued in accordance with [42 C.F.R. section 405.1038\(a\)](#)).

- A request for expedited access to judicial review is filed.<sup>34</sup>

#### **14.2.2.2 Escalations of a request for a Part A, Part B, or DME QIC reconsideration?**

All of the provisions that apply for determining when a hearing must be scheduled for a request for hearing (see [OCPM 14.2.1.1](#)) apply to an escalated request for a **Part A** or **Part B** QIC reconsideration.

#### **14.2.2.3 Requests for a review of a dismissal?**

Hearings are not required when conducting a review of a prior adjudicating entity’s dismissal of a request for reconsideration.<sup>35</sup>

<sup>30</sup> [42 C.F.R. § 400.200](#).

<sup>31</sup> [42 C.F.R. § 423.2038\(b\)\(ii\)](#).

<sup>32</sup> [42 C.F.R. §§ 405.1050, 423.2050](#).

<sup>33</sup> [42 C.F.R. § 405.1016\(f\)](#).

<sup>34</sup> [42 C.F.R. §§ 405.990, 423.1990](#).

<sup>35</sup> [42 C.F.R. §§ 405.1004, 423.2004](#).

#### **14.2.2.4 Re-established appeals, such as reopenings, returned contractor remands, and Council remands?**

See [OCPM 20.12.7](#) to determine whether a hearing is necessary for a re-established appeal.

#### **14.2.3 When can a hearing not be scheduled for an appeal?**

A hearing cannot be scheduled for an appeal if it is assigned to an **attorney adjudicator**.<sup>36</sup> If a request for hearing or escalated request for a Part A or Part B QIC reconsideration requires a hearing in accordance with OCPM 14.2.2.1 or 14.2.2.2, the appeal must be reassigned to an ALJ.

#### **14.2.4 May we request a waiver of the oral hearing?**

The parties have a right to an oral hearing, and also the right to voluntarily waive the oral hearing. No party, including an appellant, may be induced, coerced, or compelled to waive the oral hearing.

A waiver of the right to an oral hearing may not be requested or solicited from an appellant. An appellant and other parties who are sent the notice of hearing have an opportunity to waive their individual right to attend the oral hearing when filing a request for hearing, and again in response to the notice of hearing (*see* forms OMHA-102, section 4; OMHA-105, section 4; and OMHA-305, section 3).

If an appellant waives the oral hearing, OMHA staff may contact the other parties who were or would be sent the notice of hearing to inform the other parties that the appellant waived the oral hearing and that the other parties may voluntarily waive the oral hearing as well by completing and filing a Waiver of Right to an Administrative Law Judge (ALJ) Hearing (OMHA-104).

*Note:* The contact may be made by letter or by telephone and documented with a Report of Contact (OMHA-101).

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<sup>36</sup> 42 C.F.R. § 405.1000(d).

### 14.3 Determining the time and place of the hearing

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#### 14.3.1 Do we have to contact the appellant or other parties before scheduling a hearing?

Contacting the appellant or other parties before scheduling the hearing is not required, *unless* the notice of the hearing will not be mailed, transmitted, or served on time (*see* OCPM 14.5.6). However, contacting the appellant and other parties may reduce the likelihood of a request to reschedule or objection to the time of the hearing. Examples of circumstances in which reaching out to the appellant or other parties may be especially helpful:

- There are a large number of claims involved;
- There are a large number of parties or witnesses; or
- An unrepresented beneficiary is involved.

*Note:* If contact is made and an **appellant** indicates that he or she will be unavailable, or requests a hearing date that will not allow sufficient time to conduct the hearing and issue a decision, dismissal, or remand within an applicable adjudication time frame, consider requesting a waiver of any applicable adjudication time frame for the period of time necessary to accommodate the appellant's request or availability (*see* OCPM 7.3.4). Alternatively, a hearing date closer in time can be scheduled, and the appellant can object to the hearing date and the hearing can be rescheduled, which will toll any applicable adjudication time frame (*see* OCPM 7.2).<sup>37</sup>

*Note:* If the **appellant** cannot be reached despite sufficient attempts to do so, the request may be subject to dismissal for abandonment.

#### 14.3.2 How is the date selected?

The date selected for the hearing:

- Must be a date when OMHA is open for regular business (for example, not on a weekend or Federal holiday);

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<sup>37</sup> 42 C.F.R. §§ 405.1020(h), 423.2020(h).

- Should be a date that allows any applicable adjudication time frame or goal to be achieved, to the extent it can be;
- Must be on the date or within any specific date range in which the ALJ indicates that he or she would like to conduct a hearing on the case; and
- Generally must allow for notice of the hearing to be mailed, transmitted or personally served on time (20 calendar days before the hearing for non-expedited appeals or 3 calendar days for expedited appeals (*see* OCPM 14.5.6)).

*Note:* If a party or witness has a special need related to a date (for example, the beneficiary will be out of the country until a certain date and unable to attend a hearing), that special need should be considered in selecting the date for the hearing.

### 14.3.3 How are the time and duration of the hearing selected?

#### 14.3.3.1 What are the requirements for the hearing time and duration?

The hearing must begin and be expected to conclude between the hours of 8:00 a.m. to 4:30 p.m. in the time zones where the parties and any representatives are appearing, *unless* a party or representative requests another time, and all other parties and representatives who will be appearing agree to that time if it would also be outside the hours of 8:00 a.m. to 4:30 p.m. in the time zone(s) where they will be appearing.

*Note:* Offering a hearing time or otherwise soliciting a party's or participant's agreement to a hearing time outside 8:00 a.m. to 4:30 p.m. in the time zone where a party or representative will be appearing is generally prohibited. *However*, if a party or representative requests such a time, and that time would also be outside 8:00 a.m. to 4:30 p.m. in the time zone where another party or representative will be appearing, OMHA may contact the other party or representative to obtain his or her agreement.

*Example:* The appellant is a physician who has clinic hours Monday through Friday, 8:00 a.m. to 5:00 p.m. The hearing is scheduled for 3:00 p.m. in the time zone where the physician will be appearing. The beneficiary, who is in the same time zone as the physician, is also noticed and indicates he will attend the hearing. The physician objects to the scheduled time and requests that the hearing be rescheduled for 6:00 p.m. If the ALJ finds

good cause to reschedule the hearing, OMHA must contact the beneficiary to obtain his agreement prior to rescheduling the hearing for 6:00 p.m.

A hearing must have a **specific start time**, unless a consolidated hearing is conducted. If a consolidated hearing is conducted, the hearing start time and duration is for all of the appeals involved in the consolidated hearing.

*Note:* Non-specific start times (for example, advising appellants that a hearing will begin sometime between 8:00 a.m. and 4:00 p.m.) are not permitted.<sup>38</sup>

#### 14.3.3.2 How long should the hearing be scheduled for?

The length of the hearing must be sufficient for the ALJ to fully examine the issues, question the parties and other witnesses, and accept and examine any additional evidence submitted.<sup>39</sup> To facilitate a full examination of the issues, the length of the hearing must provide the parties and participants with a reasonable opportunity, as determined by the ALJ,<sup>40</sup> to present their arguments and testimony on the claims/issues under appeal, respond to cross-examination from other parties, and address any questions the ALJ may have.

Factors to be considered when setting the hearing length include:

- The ALJ's assessment of the need for developing the record in the case, including any questions the ALJ may have for the parties and participants;
- The number of appeals to be heard (in a consolidated hearing);
- The number of claims or beneficiaries involved in each appeal;
- The number of distinct dates of service in each claim;
- The complexity of the issues to be heard and the ALJ's familiarity with the issues; and
- The number of parties, participants, and witnesses other than the appellant that will attend the hearing.

<sup>38</sup> See 5 U.S.C. § 554(b) (requiring that the convenience and necessity of the parties or their representatives is considered when setting the time, place, and nature of the hearing).

<sup>39</sup> 42 C.F.R. §§ 405.1030(b)(1), 423.2030(b)(1).

<sup>40</sup> Cf. 5 USC § 556(c)(5).

### 14.3.3.3 Can an appellant request a specific length of time for the hearing?

An appellant may request a specific length of time for the hearing, and the ALJ will consider the appellant's stated reasons when determining whether to grant such a request. However, the length of the hearing is determined by the ALJ.

*Note:* If an appellant requests a length of time that the ALJ does not believe is necessary, the ALJ may offer the appellant and other parties an opportunity to submit written briefs and affidavits in lieu of additional time.

### 14.3.4 How are the hearing place and format selected?

#### 14.3.4.1 What are the hearing place and format options?

The place of the hearing is determined by the hearing format, and the place is not specified unless a party or participant will attend the hearing at a specific physical location.

**Telephone** hearings involve an ALJ and parties and participants calling into an audio conference number, or being called by OMHA staff and connected through an OMHA conference line. Only OMHA conference lines may be used to connect to the ALJ, but parties may use bridge lines to connect their points of contact and witnesses to the hearing.

**Video-teleconference (VTC)** hearings involve an ALJ and parties and participants calling into an audiovisual conference number through which those connected can see and hear each other. The ALJ will conduct the hearing from an OMHA office or OMHA-contracted VTC vendor. The parties and participants may use their own or their representative's VTC equipment, if compatible. If parties or participants do not have compatible VTC equipment, they may appear through an OMHA-contracted VTC vendor (OMHA selects the vendor and vendor site).

**In-person** hearings involve an ALJ conducting a hearing with at least one of the parties and participants physically present at the hearing location. An in-person hearing may be at an OMHA office or a remote site selected by OMHA (for example, a local government facility or OMHA-contracted meeting place).

*Note:* In-person hearings require the concurrence of the field office Associate Chief ALJ, as designee of the Chief ALJ, to ensure any authorized travel is

justified and OMHA staff and equipment will be secure.

*Note:* If there is good cause for an in-person hearing and the appellant is fewer than 75 miles from another OMHA field office, the appeal is transferred to an ALJ in the closer OMHA field office.

*Note:* If there is good cause for an in-person hearing and the appellant is 75 or more miles from an OMHA Field Office, the ALJ is expected to travel to a local site within 75 miles of the appellant to conduct the hearing, unless the appellant waives travel reimbursement for the appellant and his or her witnesses, if any.

#### 14.3.4.2 What is the default hearing place or format?

##### *Unrepresented beneficiaries*

A VTC hearing is the default hearing format for an appellant who is an **unrepresented beneficiary**.<sup>41</sup>

*Note:* A beneficiary represented by a friend or family member is not an unrepresented beneficiary.

- An **in-person** hearing is conducted if the ALJ finds VTC technology is not available and the field office Associate Chief ALJ concurs.<sup>42</sup>
  - For purposes of determining availability of VTC technology, the VTC site will typically be within 75 miles of the party's home, and must be generally convenient, accessible, and easy to operate.
- An **in-person** hearing is conducted if the ALJ finds special or extraordinary circumstances exist and the field office Associate Chief ALJ concurs.<sup>43</sup>
  - Instances in which special and extraordinary circumstances may be found to exist include:
    - Cases with complex, challenging, or novel presentation issues that necessitate an in-person hearing;
    - Cases where witness credibility and veracity are at issue;

<sup>41</sup> 42 C.F.R. §§ 405.1020(b)(1), 423.2020(b)(1).

<sup>42</sup> 42 C.F.R. §§ 405.1020(b)(1)(ii)(A), 423.2020(b)(1)(ii)(A).

<sup>43</sup> 42 C.F.R. §§ 405.1020(b)(1)(ii)(B), 423.2020(b)(1)(ii)(B).

- A party's close proximity to and ability to be present at the local hearing office; and
- A party's visual, hearing, or cognitive impairments that would result in difficulties using telephone or VTC technology.<sup>44</sup>
- A **telephone** hearing may be offered in place of a VTC hearing, but may not be mandated, if the request for hearing or administrative record suggests that a telephone hearing may be more convenient for the beneficiary.<sup>45</sup>

*Note:* There is no extension of any applicable adjudication time frame if: (1) a telephone hearing is initially scheduled, the beneficiary objects, and the default VTC hearing must be scheduled; or (2) a telephone or VTC hearing is initially scheduled, the beneficiary objects, and good cause is found to conduct an in-person hearing.<sup>46</sup>

*Individuals other than unrepresented beneficiaries*

A **telephone** hearing is the default hearing format for an appellant who is **not an unrepresented beneficiary** and for all **non-appellant parties** and **participants**.<sup>47</sup>

- A **VTC** hearing is conducted if the ALJ finds that a VTC hearing is necessary to examine the facts or issues involved in an appeal.<sup>48</sup>
- An **in-person** hearing is conducted if the ALJ finds VTC and telephone technology are not available and the field office Associate Chief ALJ concurs.<sup>49</sup>
  - See above for factors in determining whether VTC technology is available.
- An **in-person** hearing is conducted if the ALJ finds special or extraordinary circumstances exist and the field office Associate Chief ALJ concurs.<sup>50</sup>
  - See above for factors in determining whether special or extraordinary circumstances exist.

<sup>44</sup> 70 Fed. Reg. 11420, 11457 (Mar. 8, 2005), 74 Fed. Reg. 65296, 65321 (Dec. 9, 2009).

<sup>45</sup> 42 C.F.R. §§ 405.1020(b)(1)(i), 423.2020(b)(1)(i).

<sup>46</sup> 42 C.F.R. §§ 405.1020(i)(4), 423.2020(i)(4).

<sup>47</sup> 42 C.F.R. §§ 405.1020(b)(2), 423.2020(b)(2).

<sup>48</sup> 42 C.F.R. §§ 405.1020(b)(2)(i), 423.2020(b)(2)(i). A concurrence by the Chief ALJ or designee is not required if the hearing is initially scheduled as a VTC hearing, as opposed to rescheduled in response to an objection to a telephone hearing and request for a VTC hearing. See §§ 405.1020(i)(5), 423.2020(i)(5).

<sup>49</sup> 42 C.F.R. §§ 405.1020(b)(2)(ii)(A), 423.2020(b)(2)(ii)(A).

<sup>50</sup> 42 C.F.R. §§ 405.1020(b)(2)(ii)(B), 423.2020(b)(2)(ii)(B).



*Note:* There is no extension of any applicable adjudication time frame if: (1) a telephone hearing is initially scheduled, the appellant objects, and good cause is found to conduct a VTC hearing; or (2) a telephone or VTC hearing is initially scheduled, the appellant objects, and good cause is found to conduct an in-person hearing.<sup>51</sup>

#### **14.3.4.3 Do all parties and participants have to appear using the same hearing format?**

All parties and participants do not have to appear using the same hearing format.

*Note:* The notice of hearing must indicate how the parties and participants are appearing (*see* OCPM 14.5.1).<sup>52</sup>

#### **14.3.4.4 Can appellants or other parties request a specific hearing place or format?**

Appellants and other parties may request a specific hearing place or format, but the ALJ determines the hearing place and format,<sup>53</sup> except that an unrepresented beneficiary who filed a request for hearing will be scheduled to appear by VTC.<sup>54</sup> An ALJ may offer to conduct an unrepresented beneficiary's hearing by telephone, for the convenience of the unrepresented beneficiary, but VTC technology must be used if it is requested and available.<sup>55</sup>

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<sup>51</sup> 42 C.F.R. §§ 405.1020(i)(4), 423.2020(i)(4).

<sup>52</sup> 42 C.F.R. §§ 405.1022(b)(4), 423.2022(b)(4).

<sup>53</sup> 42 C.F.R. §§ 405.1020(a), 423.2020(a).

<sup>54</sup> 42 C.F.R. §§ 405.1020(b)(1), 423.2020(b)(1).

<sup>55</sup> 42 C.F.R. §§ 405.1020(b)(1)(i), 423.2020(b)(1)(i).

## 14.4 Scheduling the hearing

(Issued: 09-28-18, Effective: 09-28-18)

### 14.4.1 How do we schedule a telephone hearing?

A telephone hearing is scheduled with one of two options, based on ALJ preference:

- 1) OMHA calls the parties and participants at the designated time of the hearing; or
- 2) The hearing participants call a teleconference line at the time of the hearing.

*Note:* For option 2, OMHA staff must take steps to ensure that parties and participants scheduled for consecutive hearings before the same ALJ do not inadvertently join the hearing for another appeal (for example, locking the teleconference line during a hearing or using a different passcode for each hearing).

For **option 1**, the notice of hearing must indicate that:

- OMHA will initiate the hearing by calling the hearing parties and participants;
- The parties and participants are responsible for ensuring OMHA has their correct contact information prior to the hearing date and time.

For **option 2**, the notice of hearing must indicate that:

- The hearing parties and participants must call into a teleconference number and enter the designated passcode.

### 14.4.2 How do we schedule a VTC hearing?

For the **ALJ**, reserve a VTC hearing room using the local field office protocols.

*Note:* Reserve sufficient time before and after the scheduled hearing time, for set-up and to prepare and clear the room for the next hearing.

For **parties** or **participants** who will appear by VTC:

- If a party or participant, or their representative, has VTC capabilities:
  - Contact the field office VTC coordinator to determine whether they are compatible with OMHA systems.

- If the VTC capabilities are compatible with OMHA systems, use the location of the party or participant VTC as the place of the hearing for the party or participant.
- If a party or participant does not have VTC capabilities or the capabilities are not compatible with OMHA systems:
  - Select a VTC vendor and site within a reasonable distance from where the party or participant will be when the hearing is scheduled to begin.

*Example:* If a beneficiary is represented by her son and her son will be at work, select a VTC site close to where the son works, unless the beneficiary is also appearing—if the beneficiary is also appearing, select a site close to the beneficiary’s home.

- Use the local field office protocols to reserve the VTC site.
- Use the location of the party or participant VTC as the place of the hearing for the party or participant.

#### **14.4.3 How do we schedule an in-person hearing at an OMHA office?**

Coordinate with the Hearing Office Director or designee to ensure there is sufficient security and to confirm reception staff is aware of the in-person hearing. The preferred date may have to be changed to ensure sufficient security and reception staffing for all hearings.

When the date and time are selected, reserve a hearing room using the local Field Office protocols. Use the location of the OMHA field office as the place of hearing for the party or participant who will be appearing in person.

#### **14.4.4 How do we schedule an in-person hearing at an offsite location?**

Coordinate with the Hearing Office Director or designee to secure a location to conduct the hearing close to the party or participant’s residence or work address, and make other arrangements necessary for a remote hearing. Potential locations include a:

- Local SSA hearing office;
- Local court; or
- Rented meeting room.

Use the location of the remote site as the place of hearing for the party or participant who will be appearing in person.

#### **14.4.5 When will OMHA reimburse parties and witnesses for travel and other expenses related to the hearing?**

Hearing participants who travel to a VTC or in-person hearing site may be eligible for reimbursement of a portion of their travel expenses, subject to certain limitations. See Interim Travel Policy for the Office of Medicare Hearings and Appeals (OMHA-26) for more information about hearing travel reimbursement.

#### **14.4.6 How do we accommodate language barriers?**

##### **14.4.6.1 How do we accommodate known language barriers?**

If the request for hearing or review was completed in a language other than English or states that the appellant does not read or speak English, or if the ALJ or support staff is informed by other means that interpretation services are required for the appellant or any other party to the hearing, OMHA will arrange for interpreter services to be provided during the hearing.

##### **14.4.6.2 How do we accommodate suspected language barriers?**

If the administrative record suggests that one of the parties to a hearing may have a language barrier (for example, lower-level procedural documentation was issued in a foreign language or the medical records indicate that the beneficiary does not speak English), OMHA staff will reach out to the party to ascertain whether interpretation services for the hearing are required.

*Note:* A Notice of Nondiscrimination (OMHA-001) is mailed with the notice of hearing to inform beneficiaries that they may obtain free language-assistance services by calling the toll-free number included in the notice.

#### **14.4.7 How do we accommodate functional impairments?**

If a party requests a special accommodation, or it is evident from the administrative record that a party may have a physical or mental impairment or limitation, OMHA staff will contact the party to ascertain whether the party needs any special accommodations for the hearing.

*Note:* A Notice of Nondiscrimination (OMHA-001) is mailed with the notice of

hearing to inform beneficiaries that they may obtain free auxiliary aids and services by calling the toll-free number included in the notice.

Reasonable accommodations may include:

- Qualified sign language interpreters;
- Telephone hearings for the blind;
- Presence of a support animal;
- Text Telephone Yoke/teletypewriter (TTY) at a VTC hearing site for the deaf, or that are initiated by the caller through a public relay service; and
- Tele-braille relay services for the deaf-blind.

If a party is unable to travel to an offsite or VTC hearing site due to the party's physical or mental impairment or limitation, and it has been determined that a telephone hearing is not appropriate, an offsite in-person hearing may be held, with the concurrence of the field office Associate Chief ALJ, at a place where the party can appear, including the party's place of residence, if necessary (*see* OCPM 14.3.4.1 and 14.4.4).<sup>56</sup>

#### **14.4.8 What if we have to change the hearing date, time, place, or format?**

See OCPM 14.7 for information on rescheduling a hearing for a new date or time. If the date, time, place, or format of a hearing is changed, an amended notice of hearing must be issued (*see* OCPM 14.8).

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<sup>56</sup> 42 C.F.R. §§ 405.1020(f)(1), (i); 423.2020(f)(1), (i).

## 14.5 The notice of hearing

(Issued: 09-28-18, Effective: 09-28-18)

### 14.5.1 What information does the notice of hearing contain?

A Notice of Hearing (OMHA-1024) or Notice of Expedited Part D Hearing (OMHA-624) is sent when the hearing date and time, and place and format are selected.

*Note:* Use the most current version of the approved notice of hearing form to help ensure all standard rights and responsibilities are provided to the recipients. The list below is not inclusive of all content requirements.<sup>57</sup>

Each of the following items must be included in the notice of hearing:

- A statement that the issues before the ALJ include all of the issues brought out in the initial determination, redetermination (if one was conducted), or reconsideration (if one was conducted) that were not decided entirely in a party's favor, for the claims specified in the request for hearing;<sup>58</sup>
- A statement of any specific new issues the ALJ will consider at the hearing in accordance with [42 C.F.R. sections 405.1032](#) and [423.2032](#);<sup>59</sup>
- A statement advising the appellant whether his or her appearance, or that of any other party or witness, is scheduled by VTC, telephone, or in person;<sup>60</sup>
- A list of any OMHA expert witnesses scheduled to appear, along with their specialty;
- A list of other recipients of the notice of hearing; and
- Contact information, including:
  - The assigned ALJ team's direct contact line;
  - The assigned ALJ's field office toll-free number; and

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<sup>57</sup> The mandatory-use notice of hearing forms (OMHA-1024 and OMHA-624) include standard language that is required but not appeal-specific—for example, the right to designate a representative, how to request a change to the time and place, a reminder that the request may be dismissed if the appellant fails to appear without good cause, information on VTC hearings if anyone is scheduled to appear by VTC, and how to object to the hearing forms. See §§ [405.1022\(b\)\(2\)–\(b\)\(5\)](#), [423.2022\(b\)\(2\)–\(b\)\(5\)](#).

<sup>58</sup> [42 C.F.R. §§ 405.1022\(b\)\(1\)\(i\)](#), [423.2022\(b\)\(1\)\(i\)](#).

<sup>59</sup> [42 C.F.R. §§ 405.1022\(b\)\(1\)\(ii\)](#), [423.2022\(b\)\(1\)\(ii\)](#).

<sup>60</sup> [42 C.F.R. §§ 405.1022\(b\)\(4\)](#), [423.2022\(b\)\(4\)](#).

- For telephone hearings where participants are directed to call into a teleconference number, the telephone number for the parties and participants to call at the time scheduled for hearing, along with any required passcode or meeting number.

#### **14.5.2 What additional information or preparation is required for consolidated hearings?**

Notice of a consolidated hearing must be included in the notice of hearing, and the notice must list all of the OMHA appeals that the consolidated hearing will address and include any required appeal-specific information for each appeal.

*Note:* Notice of the consolidated hearing and the list of the original OMHA appeals must be included even if the administrative record has already been consolidated.

*Note:* PII, including beneficiary names, initials, and Medicare numbers (HICNs or MBIs), must be redacted if the consolidated hearing involves:

**Multiple contractors** at a level (for example, if claims adjudicated by multiple MACs are involved and each MAC elected to be a participant to the proceedings, then the copy of the notice for each MAC must be redacted of any PII related to beneficiaries whose claims were not redetermined by that MAC).

**Multiple beneficiaries** (the notice for any one beneficiary must be redacted of any PII related to other beneficiaries).

If the ALJ decides to make a separate decision and administrative record for each appeal, the redacted version of the notice of hearing applicable to an appeal must be included in the administrative record of that appeal.

#### **14.5.3 What other documents are sent with the notice of hearing?**

The following must accompany the notice of hearing (OMHA-1024 or OMHA-624):

- Response to Notice of Hearing (OMHA-102);
- Index of the Administrative Record (OMHA-156) (if prepared when the hearing is scheduled; it must be sent prior to hearing if not sent with notice of hearing);
- (VTC hearings only) Information Sheet: What to Expect in a Video-teleconference Hearing (OMHA-25);

- (In-person or VTC hearings only) Interim Travel Policy for the Office of Medicare Hearings and Appeals (OMHA-26), and attachments; and
- (Beneficiary copies only) Notice of Nondiscrimination (OMHA-001).

#### 14.5.4 Where do we send the notice of hearing?

The recipients of the notice of hearing and enclosures depend on what has been appealed. The notice of hearing is mailed, transmitted, or served to the parties and other potential parties and participants at their last known address. However, notice does not have to be sent to a recipient who indicates in writing that he or she does not wish to receive the notice of hearing (the notice must still be sent to the other recipients).<sup>61</sup>

*Note:* A Waiver of Advance Written Notice of Hearing (OMHA-143) may be used to waive advance written notice of the hearing. If a party attempts to waive the notice orally, direct the party to the OMHA website to download and complete the waiver form, and document the conversation in a Report of Contact (OMHA-101).

*Note:* If the Council remanded the appeal, Council instructions on where to send the notice of hearing must be followed.

- If a **party is represented**, the notice is sent only to the representative (except in MSP recoveries against a beneficiary where the notice is sent to both the representative and the beneficiary).<sup>62</sup>
- If a **beneficiary has assigned his or her appeal rights**, the notice is sent to the provider or supplier to which the appeal rights were assigned. Note this is different from assignment of a claim, which gives the provider or supplier independent appeal rights.
- If a **beneficiary is deceased**, the notice may be sent to a party whose status is derived from the beneficiary (for example, the estate).

<sup>61</sup> 42 C.F.R. §§ 405.1022(a), 423.2022(a)(1).

<sup>62</sup> 42 C.F.R. §§ 405.902; 405.910(i)(2), (i)(4), (j).



Send the notice and appropriate enclosures to:

*Part A or Part B QIC reconsideration (non-MSP)*

- The **appellant(s)**;
- Each **non-appellant party**, unless the party:
  - 1) Did not participate in the reconsideration (for example, did not also file a request for reconsideration);
  - 2) Was not found liable for the items or services at issue after the initial determination and
  - 3) Will not be found liable at the OMHA level;

*Note:* Non-appellant parties include both the provider and beneficiary when the appellant is a State Medicaid agency.

- The **AdQIC**;
- CMS or any CMS contractor that elected **participant** status; and
- Any other CMS component or contractor involved in processing the claim or an appeal of the claim that the ALJ believes would be beneficial to the hearing (for example, the MAC, or a RAC or UPIC that reviewed the claim).<sup>63</sup>

*Part A or Part B QIC reconsideration of MSP recovery against beneficiary*

- The **beneficiary** (if represented, both the **beneficiary** and **representative**);
- The **AdQIC**;
- CMS or any CMS contractor that elected **participant** status; and
- Any other CMS component or contractor involved in the recovery that the ALJ believes would be beneficial to the hearing (for example, the CMS Benefits Coordination and Recovery Center (BCRC)).<sup>64</sup>

*Part A or Part B QIC reconsideration of MSP recovery against applicable plan*

- The **applicable plan**;

<sup>63</sup> 42 C.F.R. § 405.1020(c)(1).

<sup>64</sup> 42 C.F.R. § 405.1020(c)(1).

*Note:* If the applicable plan is represented, notice is sent to the representative. The special rule for noticing both the representative and the beneficiary in MSP appeals only applies when the recovery is against the beneficiary.

- The **AdQIC**;
- CMS or any CMS contractor that elected **participant** status; and
- Any other CMS component or contractor involved in the recovery that the ALJ believes would be beneficial to the hearing (for example, the CMS Commercial Repayment Center (CRC)).<sup>65</sup>

*Part A QIO reconsideration*

- The **appellant(s)**;
- Each **non-appellant party**, unless the party:
  - 1) Did not participate in the reconsideration (for example, did not also file a request for reconsideration);
  - 2) Was not found liable for the items or services at issue after the initial determination; and
  - 3) Will not be found liable at the OMHA level; and

*Example:* For discharge or service-termination appeals where no services were denied and no services were furnished after the date the provider determined Medicare coverage would end, the provider has not submitted a claim for the potential services at issue and therefore cannot be held financially responsible. However, the ALJ may wish to send the provider notice of the hearing.

- The **QIO** that issued the reconsideration (or its successor for the jurisdiction).<sup>66</sup>

*Part C IRE reconsideration*

- The **appellant**;

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<sup>65</sup> 42 C.F.R. § 405.1020(c)(1).

<sup>66</sup> 42 C.F.R. § 405.1020(c)(1).

- The **MAO**;
- CMS or any CMS contractor that elected **participant** status;
- Any CMS component or contractor involved in adjudicating the organization determination or subsequent appeal that the ALJ believes would be beneficial to the hearing (for example, the IRE); and
- Any other person or entity whose rights with respect to the reconsideration may be affected by the hearing, as determined by the ALJ.<sup>67</sup>

*Part C QIO reconsideration*

- The **appellant**;
- The **MAO**;
- CMS or any CMS contractor that elected **participant** status;
- Any CMS component or contractor involved in adjudicating the organization determination or subsequent appeal that the ALJ believes would be beneficial to the hearing (for example, the IRE); and
- Any other person or entity whose rights with respect to the reconsideration may be affected by the hearing, as determined by the ALJ.<sup>68</sup>

*Part D IRE reconsideration*

- The **enrollee**;
- The **Part D plan sponsor**; and
- The **IRE** that issued the reconsideration (or its successor for the jurisdiction).<sup>69</sup>

*SSA reconsideration (entitlement, Part B late enrollment penalty, IRMAA)*

- The **beneficiary or applicant**.<sup>70</sup>

**Note:** For all appeals, a notice is also sent to any **expert witnesses** procured by

<sup>67</sup> 42 C.F.R. § 422.602(c).

<sup>68</sup> 42 C.F.R. § 422.602(c).

<sup>69</sup> 42 C.F.R. § 423.2020(c)(1).

<sup>70</sup> 42 C.F.R. § 405.1020(c)(1). Note that SSA is not a CMS contractor and therefore no notice of hearing is due to SSA.

the ALJ. Follow OMHA's policy on the use and disclosure of PII when sending the notice to an expert witness.

#### 14.5.5 What form of delivery (mail, fax, email, oral, personal service) can we use?

Notices of hearing must be mailed, transmitted, or served by one of the following methods of delivery.

##### *Oral notice*

Notice of a hearing may be provided orally only for an **expedited Part D** appeal, but must be followed by written notice within 1 calendar day of the oral notice.<sup>71</sup>

##### *Mail*

The notice of hearing may be mailed by United States Postal Service (USPS) first class mail, or other OMHA-approved delivery service, to the last known address of the recipient.

The following sources are considered, in the following order of preference, when determining the last known address:

1. The most recent contact information furnished by the recipient to OMHA for the appeal, including correspondence filed after the request for hearing;
2. The recipient's address on the request for hearing;
3. For recipients who have not filed any OMHA-level correspondence, or for recipients who filed OMHA-level correspondence that did not contain their address, look to the address where the reconsideration decision was mailed, including addresses to which any courtesy copies were sent; and
4. For recipients who have not filed OMHA-level correspondence, and whose address is not present in the reconsideration decision, look to addresses present in systems available to OMHA staff and other procedural documentation received with the request for an ALJ hearing or contained in the administrative record.

If the administrative record does not contain an address for the recipient, but contains other contact information, such as a telephone number, reach out to that hearing participant to obtain a current mailing address and add a Report of Contact (OMHA-101) to the administrative record, if applicable.

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<sup>71</sup> 42 C.F.R. § 423.2022(a)(2).

*Note:* Premium services such as certified mail with return receipt or delivery confirmation may be used if necessary for a particular appeal, such as when the recipient asserts a notice was not received initially and needs to be resent.

### *Fax*

The notice of hearing may be faxed, but only where the recipient has expressly consented to receipt by fax and all of the requirements for fax transmission of PII have been observed.

- Confirm the notice does not contain any PII other than the beneficiary's first initial, last name, and truncated beneficiary identifier (for example, a HICN or MBI).
- Confirm the receiving fax machine is secure, meaning the fax machine is located where only the intended recipient(s) can receive the fax or is in a limited-access environment (for example, faxing to a fax machine located in an access-restricted area). If not secure, alert the recipient prior to sending to help confirm the recipient is available to receive the incoming fax.
- Immediately remove the documents with PII from the fax machine after sending.
- Wait for the transmission completion notification.

*Note:* Retain the fax transmission report for the administrative record to document where the notice was sent and that the transmission was successful.

### *Email*

The notice of hearing may be sent by email to the AdQIC or another CMS contractor in accordance with the OMHA electronic notice of hearing (eNOH) protocol, but staff must ensure that the notice does not contain PII and that all other terms of the eNOH protocol have been observed.

### *Personal service*

In instances where delivery via mail, certified mail with return receipt or delivery confirmation, or fax would be insufficient, the notice of hearing may be delivered by personal service using an OMHA-approved delivery company. Use of personal service requires the concurrence of the field office Associate Chief ALJ to ensure that

requirements for personal service can be met (for example, sufficient budget is available).

#### 14.5.6 When does the notice of hearing have to be sent?

The notice of hearing must be mailed, transmitted, or served:

- At least 20 calendar days before a **standard** hearing; or
- At least 3 calendar days before an **expedited Part D** hearing or within 1 calendar day of providing oral notice of an **expedited Part D** hearing.

*Note:* Correspondence is considered mailed on the date it is placed in the mail.

A recipient may **waive** the advance notice period and agree to the notice being mailed, transmitted, or served fewer than 20 or 3 calendar days before the hearing.<sup>72</sup> The waiver must be in writing.

*Note:* A Waiver of Advance Written Notice of Hearing (OMHA-143) may be used to waive advance written notice of the hearing. If a party attempts to waive the notice orally, direct the party to the OMHA website to download and complete the waiver form, and document the conversation in a Report of Contact (OMHA-101).

*Note:* Each party who was sent the notice of hearing must individually waive the advance notice period for the waivers to be valid.

*Note:* A party's waiver of the advance notice period does not limit CMS's or a CMS contractor's period to elect participant or party status in **Part A, B, or C** appeals, or request participant status in **Part D** appeals, after receiving the notice of hearing.

#### 14.5.7 What if we need to update or correct the notice of hearing or its accompanying documents?

##### 14.5.7.1 How do we correct a notice to provide a new hearing date, time, place, or format?

An amended notice must be issued (*see* OCPM 14.8)

<sup>72</sup> 42 C.F.R. §§ 405.1022(a), 423.2022(a)(2).

**14.5.7.2 How do we provide an updated statement of issues?**

Send the updated statement of issues in a Supplement to Notice of Hearing (OMHA-126), to all notice of hearing recipients.

**14.5.7.3 What if we need to provide the index of the administrative record because it was not sent with the notice of hearing?**

Send the index of the administrative record with a Supplement to Notice of Hearing (OMHA-126), to all notice of hearing recipients.

**14.5.7.4 What if we have an updated index of the administrative record to provide?**

Send the updated index of the administrative record with a Supplement to Notice of Hearing (OMHA-126), to all notice of hearing recipients.

**14.5.8 What if a notice is returned as not deliverable?**

If the **address was not correct** (that is, it is not the latest complete address of record), contact the recipient to inform him or her that the notice was misdirected.

- If the notice can be sent *with sufficient advance notice*, send the notice to the correct address with delivery confirmation.
- If the notice cannot be sent with sufficient advance notice and the party is willing to waive the full advance notice period, obtain a Written Waiver of Advance Written Notice of Hearing (OMHA-143) and send the notice with delivery confirmation.
- If the notice cannot be sent with sufficient advance notice and the party is not willing to waive the full advance notice period, the hearing **must be rescheduled** to provide the party with the required advance notice of the hearing.

If the returned mail has a **forwarding address**, contact the recipient to confirm the correct current address.

- If the recipient states the original address is correct, resend the notice to that address with delivery confirmation.
- If the recipient states the new address is correct, update the address of record in the administrative record and case processing system and send the notice to the new address with delivery confirmation.

- If the recipient cannot be reached, send the notice to the new address with delivery confirmation. If the notice is returned before the hearing and the recipient is the appellant, consider whether the appeal has been abandoned.

If a notice that was sent to a beneficiary is returned with an indication that **the beneficiary is deceased**, verify whether the Medicare Beneficiary Database contains a date of death for the beneficiary.

- If the Medicare Beneficiary Database indicates the beneficiary is deceased, but contains an address for an estate, update the address of record in the administrative record and case processing system and send the notice, with a Request for Substitution of Party upon Death of Beneficiary or Enrollee (OMHA-106) to the estate with delivery confirmation.
- If the Medicare Beneficiary Database indicates the beneficiary is deceased, there is no contact information for an estate, and the beneficiary filed the only request for hearing, consider whether dismissal is appropriate.
- If the Medicare Beneficiary Database does not indicate the beneficiary is deceased, attempt to contact the beneficiary by telephone to verify and to determine the current address, if any.
  - If the beneficiary can be reached and states the original address is correct, resend the notice to that address with delivery confirmation.
  - If the beneficiary can be reached and provides a new address, update the address of record in the administrative record and case processing system and send the notice to the new address with delivery confirmation.
  - If the beneficiary cannot be reached and the beneficiary is the appellant, consider whether dismissal is appropriate.

If the **address on the returned mail appears to be correct**, contact the recipient to confirm the current address.

- If the recipient states the original address is correct, resend the notice to that address with delivery confirmation.
- If the recipient provides a new address, update the address of record in the administrative record and case processing system and send the notice to the new address with delivery confirmation.



- If the recipient contact cannot be reached, send the notice to the original address with delivery confirmation. If the notice is returned before the hearing and the recipient is the appellant, consider whether the appeal has been abandoned.

## 14.6 Responses to the notice of hearing

(Issued: 09-28-18, Effective: 09-28-18)

### 14.6.1 How do parties respond to notices of hearing?

Each **party** or representative who was sent a notice of hearing must reply within the time frame indicated in the notice by:

- Indicating whether the party or representative plans to attend the hearing at the time and place proposed in the notice or objects to the proposed time, place, or format of the hearing;
- If applicable, identifying who from a party or representative entity or organization plans to attend the hearing and in what capacity (for appellants, this is in addition to the individual who filed the request for hearing); and
- Listing the witnesses who will be providing testimony at the hearing.<sup>73</sup>

The reply may be submitted in **writing** using a Response to Notice of Hearing (OMHA-102) or another writing that provides the above information; or may be made **orally** and documented in a Report of Contact (OMHA-101), *except that*:

- An **objection to the time or place** of the hearing must be made in writing *unless* the party is requesting that the hearing be rescheduled the day prior to the hearing or the hearing is an **expedited Part D** hearing (*see* OCPM 14.6.6.2);<sup>74</sup> and
- An **objection to the issues** must be made in writing *unless* the hearing is an **expedited Part D** hearing (*see* OCPM 14.6.7.2).<sup>75</sup>

*Note:* Use of an OMHA-102 to reply to the notice of hearing is not mandatory.<sup>76</sup>

*Note:* A response by fax or email qualifies as a writing.

*Note:* Failing to reply to the notice of hearing is not an independent basis to dismiss a request for hearing.<sup>77</sup> If a party does not reply to the notice of hearing,

<sup>73</sup> 42 C.F.R. §§ 405.1020(c)(2); 423.2020(c)(2).

<sup>74</sup> 42 C.F.R. §§ 405.1020(e)(3), 423.2020(e)(3).

<sup>75</sup> 42 C.F.R. §§ 405.1024(a), 423.2024(a).

<sup>76</sup> The notice of hearing form language indicating the response form must be returned within 5 calendar days of receipt is accurate as to when a response must be returned but does not create a legal obligation to use the OMHA-102, as the regulations do not require use of a particular form or require all of the information requested in the OMHA-102.

<sup>77</sup> *See* 42 C.F.R. §§ 405.1052(a), 423.2052(a).

regulations require that OMHA attempt to contact the party for an explanation.<sup>78</sup>

#### 14.6.2 How do CMS, CMS contractors, and Part D plan sponsors respond to notices of hearing?

See OCPM 6.5.8.2 for information on how CMS, CMS contractors, and Part D plan sponsors may elect or request to participate or be a party in an appeal after receipt of a notice of hearing. Generally, a separate response to the notice of hearing is not required, so long as the election or request meets the regulatory requirements for responding to a notice of hearing (see OCPM 6.5.9).

#### 14.6.3 What if a party does not respond to the notice of hearing?

If a **party** does not acknowledge receipt of the notice of hearing by submitting a reply to the notice (see OCPM 14.6.1), the regulations require that OMHA attempt to contact the party for an explanation.<sup>79</sup>

- If contact is made **before the hearing** and the party **received** the notice of hearing, the acknowledgment information (see OCPM 14.6.1) may be documented in a Report of Contact (OMHA-101), except than an objection to the time or place, or an objection to the issues may require a writing (see OCPM 14.6.6.2 and 14.6.7.2, respectively).
- If contact is made **before the hearing** and the party states it **did not receive** the notice of hearing, a copy of the notice of hearing is sent by certified mail or other means requested by the party (provided the means are in accordance with OMHA's policy on the use and disclosure of PII).<sup>80</sup> If the party is unable to attend the hearing, the party may request that the ALJ reschedule the hearing (see OCPM 14.7).<sup>81</sup>
- If contact is attempted **before the hearing** and the party **cannot be reached**, document the attempts to contact the party in a report of contact (OMHA-101).

<sup>78</sup> 42 C.F.R. §§ 405.1022(c)(1), 423.2022(c)(1).

<sup>79</sup> 42 C.F.R. §§ 405.1022(c)(1), 423.2022(c)(1).

<sup>80</sup> 42 C.F.R. §§ 405.1022(c)(2), 423.2022(c)(2).

<sup>81</sup> 42 C.F.R. §§ 405.1022(c)(3), 423.2022(c)(3).

*Note:* If the party is the **appellant**, and OMHA staff is unable to contact the appellant after making reasonable efforts to do so, the request may be subject to dismissal for abandonment.<sup>82</sup>

- If contact is made **after the hearing** and the party **received** the notice of hearing or contact is attempted and the party **cannot be reached**, document the explanation for not replying to the notice of hearing or the attempts to contact the party in a Report of Contact (OMHA-101).

*Note:* If the party is the **appellant**, the ALJ will provide an opportunity to explain why the party did not appear at the hearing by issuing an Order to Show Cause for Failure to Appear (OMHA-164) with a Generic Notice (OMHA-120).

- If contact is made **after the hearing** and the party states it **did not receive** the notice of hearing, a supplemental hearing with the party is necessary to provide the party with an opportunity for the hearing. The notice for the supplemental hearing is sent by certified mail or other means requested by the party (provided the means are in accordance with OMHA's policy on the use and disclosure of PII).

#### 14.6.4 How do we process responses to notices of hearing?

Responses to and documentation of other follow-up to the notice of hearing must be added to the administrative record not later than the date of the scheduled hearing, and any new information in the response or documentation must be immediately brought to the ALJ's attention so that the ALJ may consider the new information and respond as necessary or otherwise prepare for the hearing. New information includes:

- Objections (for example, to the time and place, or the issues);
- New individuals, in addition to those indicated in the request for hearing or other filings, who will attend the hearing and their roles; and
- Lists of witnesses.

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<sup>82</sup> 42 C.F.R. §§ 405.1052(a)(6), 423.2052(a)(6).

### 14.6.5 How do we process briefs, position papers, or evidence submitted with a response?

**Briefs, position papers, or evidence** submitted with a response to the notice of hearing must be added to the administrative record no later than the date of the scheduled hearing, and brought to the ALJ's attention in a timely manner so that the ALJ may prepare for the hearing. If the submitting party or participant failed to send a copy of the submission to the other parties, note for the ALJ to address at the hearing.

If new **evidence** is submitted in a **Part A** or **Part B** appeal of a QIC reconsideration by a provider or supplier, or beneficiary represented by a provider or supplier, the evidence must be examined for good cause before it may be considered.<sup>83</sup>

*Note:* The good cause examination does not apply to new evidence submitted by an unrepresented beneficiary, a beneficiary represented by someone other than a provider or supplier, a Medicaid State agency, CMS or a CMS contractor, or an applicable plan.<sup>84</sup> It also does not apply to evidence submitted by any party in a **Part C** or **Part D** appeal, or appeals of QIO reconsiderations.<sup>85</sup>

*Note:* The adjudication time frame is extended for late submission of evidence, *unless* the evidence was submitted by an unrepresented beneficiary (except in the case of a Part D expedited appeal) (*see OCPM 7.2.2*).

### 14.6.6 What if new individuals are identified as appearing?

If a response identifies new individuals who will appear, follow-up may be necessary based on the new individual's role.

- If the new individual is a **new representative** (for example, a friend or family member), an appointment of representative (form CMS-1696 or another written instrument that conforms to the requirements in [42 C.F.R. section 405.910\(c\)](#)) or documents of an authorized representation must be in the record for the new individual (*see OCPM 5.2.1.2*).

*Note:* An authorized representative may appoint a representative.

<sup>83</sup> [42 C.F.R. § 405.1018\(c\)](#).

<sup>84</sup> [42 C.F.R. § 405.1018\(d\)\(2\)](#).

<sup>85</sup> [42 C.F.R. §§ 422.562\(d\)\(2\)\(vi\), 423.562\(c\), 478.40\(c\)\(2\)\(vi\)](#).

- If the new individual is an **employee in the same firm or organization as the representative** and the authorized or appointed representative named in the request for hearing will also be appearing, no follow-up is necessary if the individual's role in the hearing is indicated in the response.
- If the new individual is a **designee of an existing appointed representative**, the existing appointed representative must delegate his or her appointment to the new individual in accordance with 42 C.F.R. section 405.910(l), and the party must accept the delegation in writing unless the existing appointed representative and the new individual are both lawyers in the same law firm or organization (*see* [OCPM 5.6](#)).

*Note:* A delegation is not effective until OMHA receives a copy of either: (1) the notice to the party that another attorney in the appointed representative's firm or organization has been designated to act as the representative; or (2) the party's acceptance of a delegation of an appointment.<sup>86</sup>

- If the individual is an **employee of a party**, no follow-up is necessary if the individual's role in the hearing is indicated in the response (*see* [OCPM 5.1.3.2](#)).
- If the new individual indicates that the **beneficiary is deceased** and the individual is appearing for the estate, a substitution of party form must be submitted.

*Note:* If the beneficiary died before the request for hearing was filed, a substitution of party is not necessary.

- If the new individual will merely be **assisting an unrepresented beneficiary** during the hearing, no follow-up is necessary if the individual's role in the hearing is indicated in the response.

*Note:* The individual may also serve as a witness for the unrepresented beneficiary.

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<sup>86</sup> 42 C.F.R. § 405.910(l)(2).

## 14.6.7 How do we address objections to the time or place, or format?

### 14.6.7.1 Who may object to the time or place, or format?

A **party** may object to the hearing time or place, or format.<sup>87</sup> Objections must be brought to the ALJ's attention in a timely manner for possible rescheduling.

*Note:* A **non-party** may not object to the hearing time or place, or format.

*Note:* A party may object to the hearing **format** with respect to his or her appearance, but not with respect to how the other parties will appear.<sup>88</sup>

### 14.6.7.2 How must the objection to time or place, or format be made?

The party must notify the ALJ team at the earliest possible opportunity before the time set for the hearing, and must state the reason for the objection and indicate the preferred hearing time or place, or format.<sup>89</sup> An objection to the hearing time or place, or format must be made in **writing** *unless*:

- 1) The party is requesting that the hearing be rescheduled the day prior to or day of the hearing; or
- 2) The hearing is an **expedited Part D** hearing.<sup>90</sup>

If an **oral objection** is made under one of the exceptions, the objection is documented in a Report of Contact (OMHA-101).

### 14.6.7.3 When may the hearing time or place be changed?

The ALJ may change the time or place of the hearing if the ALJ finds good cause for doing so. If the ALJ finds good cause to change the time or place of the hearing, an **amended notice of hearing** is issued (*see* OCPM 14.8).<sup>91</sup> The ALJ may find good cause where the information available to the ALJ supports a party's contention that:

<sup>87</sup> 42 C.F.R. §§ 405.1020(e), (i); 423.2020(e), (i).

<sup>88</sup> *See* 70 Fed. Reg. 11420, 11457 (Mar. 8, 2005).

<sup>89</sup> 42 C.F.R. §§ 405.1020(e)(1)–(2), 423.2020(e)(1)–(2).

<sup>90</sup> 42 C.F.R. §§ 405.1020(e)(3), 423.2020(e)(3).

<sup>91</sup> 42 C.F.R. §§ 405.1020(j), 423.2020(j).

- The party or his or her representative is **unable to attend or to travel to the scheduled hearing** because of a serious physical or mental condition, incapacitating injury, or death in the family;<sup>92</sup>
- **Severe weather conditions** make it impossible to travel to the hearing;<sup>93</sup> or
- **Other circumstances** present good cause,<sup>94</sup> considering:
  - The party's reason for requesting the change;
  - The facts supporting the request; and
  - The impact of the proposed change on the efficient administration of the hearing process.<sup>95</sup>

*Note:* When determining the impact of the proposed change, factors to consider include the effect on other scheduled hearings, potential delays in rescheduling the hearing, and whether any prior changes were granted to the party.

Examples of **other circumstances** a party might give for requesting a change in the time or place of the hearing include:

- The party has attempted to obtain a representative, but needs additional time;
- The party's representative was appointed within 10 calendar days of the scheduled hearing and needs additional time to prepare for the hearing;
- The party's representative has a prior commitment to be in court or at another administrative hearing on the date scheduled for the hearing;
- A necessary witness is unavailable to attend the scheduled hearing, and the evidence cannot be otherwise obtained;
- Transportation is not readily available for a party to travel to the hearing;

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<sup>92</sup> 42 C.F.R. §§ 405.1020(f)(1), 423.2020(f)(1).

<sup>93</sup> 42 C.F.R. §§ 405.1020(f)(2), 423.2020(f)(2).

<sup>94</sup> 42 C.F.R. §§ 405.1020(f)(3), 423.2020(f)(3).

<sup>95</sup> 42 C.F.R. §§ 405.1020(g)(1), 423.2020(g)(1).



- The party is unrepresented and is unable to respond to the notice of hearing because of a physical, mental, educational, or linguistic limitation (including any lack of facility with the English language) that he or she has;
- The party or representative has a prior commitment that cannot be changed without significant expense; and
- The party or representative asserts that he or she did not receive the notice of hearing and is unable to appear at the scheduled time and place.<sup>96</sup>

*Note:* If an appellant objects to the time or place of the hearing and the hearing is rescheduled for any of the reasons described in OCPM 14.6.6.3, any applicable adjudication time frame is extended by the time between the original hearing date and the rescheduled hearing date (*see* OCPM 7.2.2).<sup>97</sup>

#### 14.6.7.4 When may the hearing format be changed?

If an **unrepresented beneficiary who filed a request for hearing** objects to an offer to conduct a telephone hearing and requests a VTC hearing, the request *must* be granted because a VTC hearing is the default hearing format for unrepresented beneficiaries who filed a request for hearing.<sup>98</sup>

If an **unrepresented beneficiary** objects and requests an in-person hearing, or a **party other than an unrepresented beneficiary who filed a request for hearing** objects and requests a VTC or in-person hearing, the ALJ may grant the request and change the hearing format if he or she finds good cause and the field office Associate Chief ALJ, as designee of the Chief ALJ, concurs.<sup>99</sup>

*Note:* The Associate Chief ALJ's concurrence should include an assessment of the need for a VTC or in-person hearing, and confirm that there is available budget and staffing for any related hearing expenses.

<sup>96</sup> 42 C.F.R. §§ 405.1020(g)(3), 423.2020(g)(3).

<sup>97</sup> 42 C.F.R. §§ 405.1020(h), 423.2020(h).

<sup>98</sup> 42 C.F.R. §§ 405.1020(b)(1), 423.2020(b)(1).

<sup>99</sup> 42 C.F.R. §§ 405.1020(i)(5), 423.2020(i)(5).

- Good cause for a VTC hearing may be found when the ALJ determines that VTC is necessary to examine the facts or issues involved in the appeal.<sup>100</sup>
- Good cause for an in-person hearing may be found when:
  - VTC or telephone technology is not available for an **unrepresented beneficiary who filed a request for hearing**;<sup>101</sup>
  - VTC and telephone technology are not available for a party **other than an unrepresented beneficiary who filed a request for hearing**;<sup>102</sup> or

*Note:* For purposes of determining availability of VTC technology, the VTC site will typically be within 75 miles of the party's home, and must be generally convenient, accessible, and easy to operate.

- Special or extraordinary circumstances exist.<sup>103</sup> Instances in which special and extraordinary circumstances may be found to exist include:
  - A case involves complex, challenging, or novel presentation issues that necessitate an in-person hearing;
  - A witness's credibility and veracity are at issue;
  - A party is located in close proximity to, and is able to go to, the local hearing office; and
  - A party has visual, hearing, or cognitive impairment(s) that would result in difficulties using telephone or VTC technology.<sup>104</sup>

If the ALJ finds good cause to change the hearing format for a party, an **amended notice of hearing** is issued (*see* OCPM 14.8).<sup>105</sup>

*Note:* There is no extension of an applicable adjudication time frame when a party objection to the hearing format is granted and a hearing must be

<sup>100</sup> 42 C.F.R. §§ 405.1020(b)(2)(i), 423.2020(b)(2)(i).

<sup>101</sup> 42 C.F.R. §§ 405.1020(b)(1)(ii)(A), 423.2020(b)(1)(ii)(A).

<sup>102</sup> 42 C.F.R. §§ 405.1020(b)(2)(ii)(A), 423.2020(b)(2)(ii)(A).

<sup>103</sup> 42 C.F.R. §§ 405.1020(b)(1)(ii)(B), (b)(2)(ii)(B); 423.2020(b)(1)(ii)(B), (b)(2)(ii)(B).

<sup>104</sup> 70 Fed. Reg. 11420, 11457 (Mar. 8, 2005); 74 Fed. Reg. 65296, 65321 (Dec. 9, 2009).

<sup>105</sup> 42 C.F.R. §§ 405.1020(j), 423.2020(j).

rescheduled.<sup>106</sup>

## 14.6.8 How do we address objections to the issues to be heard?

### 14.6.8.1 Who may object to the issues?

A **party** may object to the issues.<sup>107</sup> Objections must be brought to the ALJ's attention for consideration and to prepare in advance of the hearing.

*Note:* A **non-party** may not object to the issues.

### 14.6.8.2 How must the objection be made?

A party must make an objection to the issues **in writing**, *unless* the hearing is an **expedited Part D** hearing.<sup>108</sup> If an **oral objection** is made under the exception, the objection is documented in a Report of Contact (OMHA-101). The party must:

- Notify the ALJ of the objections no later than 5 calendar days prior to the hearing (or 2 calendar days prior to an **expedited Part D** hearing);<sup>109</sup>
- State the reasons for his or her objections;<sup>110</sup> and
- Send a copy of the objections to all other parties who were sent a copy of the notice of hearing, and CMS or a CMS contractor that elected to be a party to the hearing.<sup>111</sup>

### 14.6.8.3 When may the issues be changed?

The ALJ considers the objections and may change the issues if he or she concludes the issues presented in the objections may be considered under the authorities that apply to the appeal (for example, an issue in a Part A or Part B appeal related to a determination that is not an initial determination may not be considered). The ALJ makes a decision on the objections in writing, or orally at a prehearing conference, or at the hearing on the record.<sup>112</sup>

<sup>106</sup> 42 C.F.R. §§ 405.1020(i)(4), 423.2020(i)(4).

<sup>107</sup> 42 C.F.R. §§ 405.1024, 423.2024.

<sup>108</sup> 42 C.F.R. §§ 405.1024(a), 423.2024(a).

<sup>109</sup> 42 C.F.R. §§ 405.1024(a), 423.2024(a).

<sup>110</sup> 42 C.F.R. §§ 405.1024(b), 423.2024(b).

<sup>111</sup> 42 C.F.R. §§ 405.1024(b). This requirement does not apply to Part D appeals because only the enrollee is a party.

<sup>112</sup> 42 C.F.R. §§ 405.1024(c), 423.2024(c).

### 14.6.9 How are objections to the ALJ hearing the case addressed?

An ALJ cannot conduct a hearing if he or she is prejudiced or partial to any party, or if he or she has any interest in the matter pending for decision.<sup>113</sup> If a party objects to the ALJ who will conduct the hearing in response to the notice of hearing, the party must notify the ALJ within 10 calendar days of the date on the notice of hearing (or 2 calendar days of the date on a notice of an **expedited Part D** hearing).<sup>114</sup> The ALJ considers the party's objections and decides whether to proceed with the hearing or withdraw.<sup>115</sup>

If the ALJ **withdraws**, another ALJ will be assigned to adjudicate the appeal, and any applicable adjudication time frame is extended by 14 calendar days (or 2 calendar days for an **expedited Part D** hearing).<sup>116</sup>

If the ALJ proceeds with the hearing and **does not withdraw**, the party may present their objections to the Council after the ALJ has issued a decision or dismissal in the appeal or, if escalation is available and exercised by the appellant, after the appeal is escalated to the Council.<sup>117</sup>

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<sup>113</sup> 42 C.F.R. §§ 405.1026(a), 423.2026(a).

<sup>114</sup> 42 C.F.R. §§ 405.1026(b), 423.2026(b).

<sup>115</sup> 42 C.F.R. §§ 405.1026(b), 423.2026(b).

<sup>116</sup> 42 C.F.R. §§ 405.1026(d), 423.2026(d).

<sup>117</sup> 42 C.F.R. §§ 405.1026(c), 423.2026(c).

## 14.7 Rescheduling the hearing

(Issued: 09-28-18, Effective: 09-28-18)

### 14.7.1 When can a hearing be rescheduled?

A hearing may be rescheduled when, before the scheduled hearing begins, the ALJ determines that changing the **date or time of the hearing** is necessary.<sup>118</sup> A hearing may be rescheduled at the request of or pursuant to an objection by a party, or on the ALJ's own motion.

*Note:* If a hearing begins but the ALJ determines it needs to be rescheduled or continued beyond the time allotted for the scheduled hearing, use the continuance procedures.

Examples of potential reasons to reschedule a hearing include:

- A party's objection to the time or place of the scheduled hearing;
- A party being unavailable for the scheduled hearing;
- A party obtaining a new representative close in time to the scheduled hearing;
- The notice of hearing was not sent to the parties and potential parties and participants who are due the notice of hearing (*see* OCPM 14.5.4);
- The assigned ALJ is unexpectedly not available for the scheduled hearing; and
- Weather conditions affecting the parties, participants, or the ALJ or the ALJ's staff.

### 14.7.2 What if a rescheduled hearing date and time has not been identified?

If the date and time of the rescheduled hearing have not been identified at the time the ALJ makes the determination to reschedule the hearing, follow the procedures for canceling the hearing (*see* OCPM 14.9).

*Note:* If the date and time for the rescheduled hearing are identified before notice of the canceled hearing is sent, a notice of the rescheduled hearing is issued instead of a notice of hearing cancellation.

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<sup>118</sup> 42 C.F.R. §§ 405.1020(a), 423.2020(a).

### 14.7.3 What is the effect of rescheduling a hearing on an adjudication time frame?

An applicable adjudication time frame is extended if a hearing is rescheduled at the request of the **appellant** and the request is **unrelated** to the appellant objecting to a VTC hearing or an offer to conduct a telephone hearing and requesting an in-person or VTC hearing (*see* OCPM 7.2.2).<sup>119</sup>

Rescheduling the hearing has no effect on an applicable adjudication time frame when a hearing is rescheduled:

- At the request of a non-appellant party or participant;
- To provide a requested in-person or VTC hearing when the appellant objected to a VTC hearing or an offer to conduct a telephone hearing; or
- On the ALJ's own motion.

### 14.7.4 How are the time and place of the rescheduled hearing selected?

The date, time, place, and format of the rescheduled hearing are selected in the same manner as for an initial hearing (*see* OCPM 14.3), *except that* the time and place of the rescheduled hearing must be consistent with the ALJ's decision on any request or objection made by a party to the time and place of the initial hearing.

### 14.7.5 What notice is required?

An Amended Notice of Hearing (OMHA-1024A) or Amended Notice of Expedited Part D Hearing (OMHA-624A) is issued for a rescheduled hearing (*see* OCPM 14.8) and sent to the parties and potential parties and participants who are due an initial notice of hearing (*see* OCPM 14.5.4), and CMS or a CMS contractor that elected party or participant status.<sup>120</sup>

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<sup>119</sup> 42 C.F.R. § 405.1020(h)–(i), 423.2020(h)–(i).

<sup>120</sup> 42 C.F.R. §§ 405.1020(j), 423.2020(j).

## 14.8 Amended notices of hearing

(Issued: 09-28-18, Effective: 09-28-18)

### 14.8.1 When do we have to issue an amended notice?

An Amended Notice of Hearing (OMHA-1024A) or an Amended Notice of Expedited Part D Hearing (OMHA-624A) is issued when:

- The time or place of the hearing is changed (*see* OCPM 14.6.6.3), including when a hearing is rescheduled to new date (*see* OCPM 14.7);
- The hearing format is changed (*see* OCPM 14.6.6.4);
- The notice of hearing must be corrected (*see* OCPM 14.5.7); or
- The ALJ determines that a party's, or potential party or participant's, attendance at the hearing is reasonably necessary, and the notice of hearing was not sent to the individual or entity.

Amended notices of hearing are not issued in the following instances. Instead send a Supplement to Notice of Hearing (OMHA-126) to all notice of hearing recipients for:

- Changes to the issues;

*Note:* Notice of changes to the issues may also be made on the record at a prehearing conference or at the hearing.

- Changes to the list of OMHA experts;
- Changes to OMHA contact information; and
- Changes to the index of the administrative record.

### 14.8.2 What are the content requirements of an amended notice of hearing?

The content requirements for the amended notice of hearing are the same as for an initial notice of hearing (*see* OCPM 14.5.1). Use an Amended Notice of Hearing (OMHA-1024A) or an Amended Notice of Expedited Part D Hearing (OMHA-624A) to show that the notice amends a prior notice of hearing. Include a brief summary at the outset of the amended notice indicating when the original notice was issued and the changes that were made.

*Example:* This amended notice of hearing is issued to change the hearing date listed on

the original notice of hearing issued on March 28, 2018.

### **14.8.3 To whom must an amended notice of hearing be sent?**

The amended notice must be sent to the same individuals and entities as an initial notice of hearing (*see* OCPM 14.5.4), plus any additional individuals or entities identified by the ALJ.

### **14.8.4 What advance notice period is required for an amended notice of hearing?**

The advance notice periods that apply to an initial notice of hearing also apply to amended notices of hearing. If a hearing is scheduled to occur fewer than 20 calendar days from the date the amended notice of hearing is issued (or 3 calendar days for an **expedited Part D** hearing), the hearing must be rescheduled, unless all parties who receive the amended notice agree in writing to waive the advance notice requirement, in accordance with OCPM 14.5.6.

### **14.8.5 How is an amended notice of hearing sent?**

The amended notice must be mailed, transmitted, or served in the same manner as an initial notice of hearing (*see* OCPM 14.5.5), *except* where a party asserted they did not receive the initial notice of hearing and the hearing was rescheduled, the amended notice of hearing must be sent by certified mail or other reasonable means requested by that party.<sup>121</sup>

### **14.8.6 What response is required?**

Each party or representative who was sent an amended notice of hearing must reply to the notice in the same manner as an initial notice of hearing (*see* OCPM 14.6).

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<sup>121</sup> 42 C.F.R. §§ 405.1022(c)(2), 423.2022(c)(2).



## **14.9 Canceling the hearing**

(Issued: 09-28-18, Effective: 09-28-18)

### **14.9.1 When can a hearing be canceled?**

A hearing may be canceled when a hearing is no longer needed or the hearing needs to be rescheduled but a new hearing date and time have not yet been identified. Examples of potential reasons to cancel a hearing include:

- The request for hearing was withdrawn (request will be dismissed);
- CMS or a CMS contractor, or an MAO or Part D plan sponsor submitted a written stipulation that addresses the issues to be adjudicated (fully favorable decision will be issued);
- All parties who were sent a notice of hearing waived the oral hearing, provided that CMS or a CMS contractor did not elect party status in response to the notice of hearing;
- The appellant or one of the necessary parties to the hearing has died or has an unexpected illness (substitute party may need to be established or hearing rescheduled but new hearing date and time is not yet identified);
- The request for hearing will be dismissed or remanded; or
- A hearing was inadvertently scheduled on a request for a review of a dismissal.

### **14.9.2 What is the effect on an adjudication time frame?**

Canceling a hearing has no effect on an applicable adjudication time frame.

### **14.9.3 What notice is required?**

A Notice of Canceled Hearing (OMHA-127) is sent to all recipients of the notice of hearing (including potential parties and participants), and CMS or any CMS contractors that elected party or participant status.

- If the hearing will not be rescheduled, that is indicated in the notice.
- The notice must be sent within 5 calendar days of cancellation of the hearing.
- If the hearing is rescheduled before notice of the canceled hearing is sent, the amended notice of hearing providing the rescheduled hearing information (see OCPM 14.8) will serve as notice that the original hearing date was canceled.

The parties and participants to the hearing must also be notified by **telephone** if:

- Notice of the canceled hearing is sent fewer than 10 calendar days before the hearing date; or
- The canceled hearing is for an **expedited Part D** appeal.

## 14.10 Scheduling supplemental hearings

(Issued: 09-28-18, Effective: 09-28-18)

### 14.10.1 When can a supplemental hearing be scheduled?

A supplemental hearing may be scheduled when, after a hearing is conducted, the ALJ determines additional hearing proceedings are necessary before a decision, dismissal, or remand can be issued.<sup>122</sup> A supplemental hearing may be scheduled at the request of a party or on the ALJ's own motion.

*Note:* When an appeal is re-established (for example, as a result of a reopening or Council remand), an initial hearing would be conducted on the re-established appeal, using the procedures for an initial hearing. A supplemental hearing would only be conducted for a re-established appeal after an initial hearing is conducted for that re-established appeal.

### 14.10.2 What is the effect of a supplemental hearing on an adjudication time frame?

If the **appellant** requested the supplemental hearing and an adjudication time frame applies to the appeal, the time frame is extended by the period between the initial hearing date and the supplemental hearing date (*see OCPM 7.2.2*).<sup>123</sup>

A supplemental hearing has no effect on an applicable adjudication time frame when a supplemental hearing is scheduled:

- At the request of a non-appellant party or participant; or
- On the ALJ's own motion.

### 14.10.3 How are the time and place of the supplemental hearing selected?

The date and time, and place and format of the supplemental hearing are selected in the same manner as for an initial hearing (*see OCPM 14.3*).

### 14.10.4 What notice is required?

A Notice of Supplemental Hearing (OMHA-1024B) or a Notice of Supplemental Expedited Part D Hearing (OMHA-624B) is sent to the parties and potential parties and

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<sup>122</sup> 42 C.F.R. §§ 405.1030(f), 423.2030(f).

<sup>123</sup> 42 C.F.R. §§ 405.1030(f)(2), 423.2030(f)(2).

participants who were sent an initial notice of hearing (*see* OCPM 14.5.4), and any additional recipients identified by the ALJ.<sup>124</sup>

The content requirements for the notice of the supplemental hearing are the same as an initial notice of hearing (*see* OCPM 14.5.1). Include a brief statement at the outset of the notice indicating that the hearing is a supplemental hearing and when the original hearing was held.

*Example:* A hearing in this appeal was previously conducted on March 28, 2018. The Administrative Law Judge has determined that a supplemental hearing is necessary to resolve the issues on appeal.

The notice must be mailed, transmitted, or served with the same advance notice period as an initial notice of hearing (*see* OCPM 14.5.6).

#### **14.10.5 What response is required?**

Each party or representative who was sent a notice of supplemental hearing must reply to the notice in the same manner as an initial notice of hearing (*see* OCPM 14.6).

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<sup>124</sup> 42 C.F.R. §§ 405.1020(j), 423.2020(j).

**Revision history**

<b>Date</b>	<b>Description</b>	<b>Sections/subsections updated</b>
09/28/2018	Initial Release	N/A

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