

-- KNOW YOUR RIGHTS --

**RIGHTS of People Who Cannot Travel to a Fair Hearing Because of Disability
VARSHAVSKY – CLASS ACTION INJUNCTION -- updated 9/3/21**

- **Right to INCREASED HOME CARE SERVICES UNTIL HOME HEARING IS HELD**
- **Right to In-Home Hearing if Initial PHONE Hearing is Not Decided Fully Favorably**

Individuals who, because of mental or physical disabilities, cannot travel to a fair hearing without substantial hardship or medical detriment, have rights under an injunction in a class action called *Varshavsky*. Read about the court order and the right to a home hearing here - http://www.wnylc.com/kb_wnylc/entry/47/. When the hearing involves a request for an increase in Medicaid home care, whether denied by a local Medicaid agency or by a mainstream managed care or Managed Long Term Care plan,¹ the appellant has special rights under *Varshavsky*. **See COVID-19 Note At the End of This Fact Sheet.**

SUMMARY OF VARSHAVSKY ORDER and PROTECTIONS

Under this injunction, the [NYS Office of Temporary & Disability Assistance](#) (“OTDA”) is required to hold a hearing at the appellant’s home within 45 days of the hearing request by a class member. The class consists of people who, because of mental or physical disabilities, cannot travel to a fair hearing without substantial hardship or medical detriment. Even outside of COVID-19, it is impractical to hold a home hearing at all, let alone within 45 days of the hearing request. For this reason, the court order permits the state to hold a hearing first either by phone or, outside of the pandemic, with a representative appearing on the appellant’s behalf.

- If that first hearing is decided with a fully favorable decision, then the hearing is over. There is no “home hearing.”

¹¹ **WARNING re MAP Plans:** The state has taken the position that *Varshavsky* rights do **not apply** to the new integrated appeal system for the 10 **Medicaid Advantage Plus (MAP) plans** in NYS, which began in 2020. The appeals are called “FIDE” appeals, which stands for Fully Integrated Dual Eligible Special Needs Plan. A Medicare Advantage Special Needs Plan for Dual Eligibles (Dual-SNP) is an integrated part of a MAP Plan. These FIDE hearings are run by a new office within OTDA – called the Integrated Administrative Hearings Office (IAHO). For more about MAP plans and FIDE appeals see <http://www.wnylc.com/health/entry/225/>. Contact Varshavsky class counsel Nina Keilin for possible advocacy if a MAP member is denied Varshavsky rights – ninakeilin@aol.com.

- If a fully favorable decision is not issued within 45 days of the hearing request, then the state gives the appellant a **temporary form of relief** in some types of cases. For class members asking for an increase in home care hours, the state orders the MLTC plan or local Department of Social Services to provide the requested increase until the home hearing is held and decided. OTDA sends the appellant a letter referencing this “Varshavsky relief” as “Aid Continuing,” which can be confusing, since “Aid Continuing” is generally ordered to prevent a reduction of services. **Sample of OTDA letter attached to this fact sheet at p. 9.**
 - If the issue of the fair hearing is the denial of ANY home care or other services, then there is NO interim relief.
- The initial phone hearing may not even be scheduled within 45 days—let alone have a decision issued. So 45 days after the hearing is requested, OTDA should order the Varshavsky interim relief to start even before a phone/representative hearing is held. **See sample OTDA letter attached at page 9.**

Home Hearing Tips in Hearings for Increases in Medicaid Home Care

-- See the COVID-19 NOTE on page 5 of this Fact Sheet --

It is important to establish homebound status/Varshavsky class membership and to document the request for hours properly to ensure the appellant receives the correct relief.

1. **Indicate “homebound” status when you request the hearing.** The fax and online hearing request forms² ask if the appellant is homebound. If the appellant could not travel to a hearing without substantial hardship or medical detriment, make sure to check YES that the appellant is homebound. If you request the hearing by phone, this question should be asked. If you are not asked, be sure to volunteer that the appellant is homebound. This starts the clock for the 45 days to run until temporary relief is ordered by OTDA,
2. **In the hearing request, specify the number of home care hours that had been requested that the plan or Medicaid office denied.** This is important later, when OTDA orders a “Varshavsky” increase after 45 days. The increase can only be to the amount of hours the plan denied and that is in dispute at the hearing.
 - a. If client requested 24 hour care, be specific about whether it is live-in or split shift – especially if client is seeking split shift. Otherwise they’ll interpret a request for “24 hours” to be live-in, which limits the *Varshavsky* increase.

² Available at <https://otda.ny.gov/hearings/request/>

- b. If the plan’s notice is vague on this distinction, which sometimes happens, be sure to request the hearing about the correct amount at issue and point out in your hearing request that the notice is vague or incorrect. Attach proof of the amount of your request, if this is not clear from the denial notice.
3. **If you’ve indicated that client is homebound, you should then receive the OTDA “Letter 15” requesting that you confirm homebound status by mailing back an attached FORM with MEDICAL proof (Letter 15 and Homebound Form attached as pp. 6-8 of this PDF).**
 - a. **COVID-19 NOTE:** You must verify homebound status even during the COVID-19 pandemic even though all hearings are held by phone. Only people who cannot travel because of disability get the extra *Varshavsky* protections – see COVID-19 note on p. 5 of this fact sheet.
 - b. The doctor’s letter submitted to **OTDA must specifically address client’s inability to travel to the hearing** without substantial hardship or medical detriment by any available means, even by taxi, because of her disability. The letter should not solely list her diagnoses and disabilities.
 - c. **If client is actually receiving Medicaid 24-hour care or is currently in a nursing home, you do not need a doctor’s letter.** Attach to the form proof if you have it. Otherwise just write it on the form. Usually, the state will know that the person already has 24 hour care or is in a nursing home because it will be in the record. It’s not enough to be REQUESTING 24-hour care to be relieved of the need to send medical proof of inability to travel. The client must actually already be receiving it.
 - d. **TIP:** If you are working with the client’s physician to write a letter of medical necessity anyway—at the plan level or for the hearing -- ask the MD to add to the letter of medical necessity the inability to travel to a hearing without substantial difficulty, so that letter can be used to document homebound status. Only one and not two doctor’s letters may be needed.
4. **At the initial hearing (whether held by phone or without the appellant present at the central hearing site) – verify with the Judge that the client is classified as “homebound.”** If the client has not been classified as homebound, it’s not too late. Ask the Judge to change the classification. If it has been more than 45 days since the fair hearing was requested, ask the Judge to notify OTDA that the client is entitled to the “Varshavsky” increase, a/k/a Varshavky aid continuing, described below. Follow up with a call to OTDA a week later to make sure homebound status is indicated.

5. **45 days after you requested the fair hearing, OTDA should direct the local Medicaid agency or managed care plan to implement the “Varshavsky increase,” also called “Varshavsky Aid Continuing.”** OTDA will order an increase to the amount of hours the plan or the local Medicaid agency denied that is at issue in the fair hearing. This is called “Aid Continuing” but it is not the traditional concept of Aid Continuing. It is a temporary increase that is ordered to continue until the Home Hearing is held and a decision issued. If that decision is unfavorable, the temporary increase will stop and the hours will revert back to what they were. ***OTDA informs the appellant of this relief by sending letter attached at p. 9.***

OTDA will never require the plan or local Medicaid agency to give more hours than appellant originally requested and that was denied. Nor will OTDA order that a service be provided if the service was denied altogether.

See footnote 1 – warning for members of Medicaid Advantage Plus (MAP) plans.

6. **Put a tickler in your calendar to call OTDA 45 days after the date the hearing was requested,** and point out that the client is homebound and it is time for the Varshavsky increase. Email AnneMarie Bevilacqua at AnneMarie.Bevilacqua@otda.ny.gov and homebound.hearings@otda.ny.gov, and cc Nina Keilin, Varshavsky class counsel at Ninakeilin@aol.com. You can follow up with Joanne at 518-408-3597. Be sure to include the Fair Hearing ID number assigned by OTDA (this is on the Acknowledgement of fair hearing request sent by OTDA after receiving the request).

7. **After the fair hearing –**

- a. **If you win the initial hearing,** which the client may have participated in by phone, or not at all, OTDA will issue a hearing decision as usual. If the client had received a “Varshavsky increase” in the meantime, the favorable fair hearing decision awards that same increase, and the temporary Varshavsky increase now becomes permanent. If the plan wants to reduce hours in the future, it must send a new Initial Adverse Determination to reduce hours that must comply with NYS DOH [MLTC Policy 16.06](#).
- b. **A person classified as homebound cannot lose the initial hearing.** If the Judge finds that the Medicaid agency or managed care/ MLTC plan was correct in denying your request for an increase, then ***you should not receive a hearing decision.*** Instead you should receive another letter from NYS OTDA (attached at page 19 of this PDF) -- saying the case is being referred for a HOME HEARING. The Notice also explains that “Aid Continuing” is being ordered, which is the special Varshavsky Aid Continuing or “Varshavsky

increase” discussed in No. 5 above. This increase will continue until the home hearing is held and decided.

- c. **Sometimes OTDA mistakenly issues an unfavorable fair hearing decision** after the initial hearing, even though the client is “homebound” and could not have traveled to the hearing because of their disability. This may happen because the client has not been correctly coded as “homebound.” If your homebound client receives an adverse fair hearing decision, contact class counsel for *Varshavsky* and give the name of the appellant and the Fair Hearing number: Nina Keilin at ninakeilin@aol.com. She will investigate whether the decision was properly issued and if not, she will advocate with OTDA to reopen the fair hearing. If the hearing is reopened, “aid continuing” should be reinstated if the issue was a reduction, or the special *Varshavsky* increase should be implemented if the issue was a denial of an increase in hours. Either way, a home hearing will ultimately be scheduled and held.

COVID-19 PANDEMIC NOTE

During the COVID-19 Public Health Emergency, all hearings are held by phone.³ Since all hearings are held by phone, it may seem silly to go through the steps of making sure a client is classified as “homebound” and unable to travel to a regular hearing. However, it is still important to do so because *Varshavsky* rights continue through the pandemic. Though everyone now has a phone hearing, only people who cannot travel to a hearing because of disability get the extra *Varshavsky* protections. These protections are:

1. *Varshavsky* Aid Continuing – the temporary increase in hours that should be ordered by OTDA 45 days after the hearing was requested, requiring the plan or local Medicaid agency to increase home care until a HOME hearing is held and decided. The increase should be to the amount originally requested by the consumer, the denial of which is the issue of the hearing.
2. A Home Hearing – this is the second hearing in the appellant’s home, if the first hearing held by phone cannot be decided fully favorably.

This Fact Sheet posted at <http://www.wnyc.com/health/download/765/> - Check for updates
Prepared by the NYLAG Evelyn Frank Legal Resources Program (EFLRP)

EFLRP Intake Monday and Wed. 10 AM – 2 PM 212-613-7310 eflrp@nylag.org

NYLAG Public Benefits Unit Intake 212-613-5000 M, W, Thurs 9 AM – 3 PM

Nina Keilin, Class Counsel for *Varshavsky* -- Ninakeilin@aol.com

³ See [20 GIS TA/DC 097 – NYS OTDA Office of Admin. Hearings \(OAH\) Transmittal 20-05 - Allowing or Requiring Fair Hearing Appearances by Written, Telephonic, Video, or other Electronic Means](#) (Oct. 16, 2020) - stating that phone hearings will continue until at least March 21, 2021. Updates about fair hearings in COVID-19 will be posted on the NYLAG COVID-19 webpage here - <http://www.wnyc.com/health/news/86/#hearings>.



ANDREW M. CUOMO
Governor

Office of Temporary and Disability Assistance



MICHAEL P. HEIN
Commissioner

BARBARA C. GUINN
Executive Deputy Commissioner

"Letter 15" - Sample

12/25/19

Re: [REDACTED]

[REDACTED]
BRONX, NY 10455

Dear Sir/Madam

You made a request for a fair hearing (or did so on behalf of the appellant, in which case, the language of this letter is directed to the appellant). In your request, you indicated that you are medically unable to attend a hearing at the regular location. This letter will explain your options:

Coming to the Hearing by Special Transportation

If you are unable to use transportation other than public transportation, you may be able to arrange for special transportation to the hearing site by contacting your local social services department/NYC agency. You should be prepared to provide the local social services department/NYC agency current medical verification that you are unable to travel by public transportation.

In NYC, Access-A-Ride is available in all five boroughs. Your local NYC agency can provide instructions for using this service. Taxi fare is reimbursed by the NYC Human Resources Administration (HRA) without prior approval by submitting current medical verification that you are unable to travel by public transportation and a receipt for the taxi. Although HRA will reimburse the total cost of the taxi to and from your verified residence, you will be responsible to pay the cost of the trip to the hearing site and at the hearing site ask HRA for the round-trip fare.

Appearing by a Representative

If you cannot come to a hearing yourself, you can send a representative. Your representative can be a friend or relative or a lawyer. **The representative must bring a current statement from your medical professional (physician, physician's assistant, nurse practitioner, etc.) that you are unable to travel to the hearing site by any available means, including public transportation, Access-A-Ride, or taxi service. This statement must be specific as to the diagnosis and how long you will be unable to travel. If the Appellant is (1) a resident of a Nursing Home or (2) in receipt of Sleep-in or Split-Shift Home Care, the representative does not need to provide a statement from your medical professional to the Hearing Officer.**

If your representative is not a lawyer, or an employee of a lawyer, your representative must ALSO bring the hearing officer a written letter, signed by you, saying that you want that person to represent you.

You should be aware that if you send a representative to your hearing, your own oral testimony will not be part of the fair hearing record. The hearing officer will decide the case based on the testimony and documents, including any written statements made by you, which are submitted by your representative, and any witnesses which your representative brings to the hearing.

LETTER 15

To: Homebound Appellants/Representatives of Homebound Appellants

Letter 15 Sample - page 2

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If you want a lawyer to represent you at the hearing, you may be able to obtain one by contacting your local Legal Aid Society or other advocate group. You may locate the nearest Legal Aid Society or local advocate group by looking in your Yellow pages under LAWYERS (for example, "Legal Aid Services").

Homebound Telephone Hearing

If you cannot make any of the above arrangements for special transportation or a representative to appear on your behalf, it may be possible to schedule a telephone hearing for you. To obtain a homebound telephone hearing, you must send us **current** medical documentation from **your medical professional** that you are unable to travel to the hearing site **by any available means**, including public transportation, Access-A-Ride, or taxi service. This statement must be specific as to the diagnosis and how long you will be unable to travel. Please include the enclosed form with your medical documentation.

Please return the enclosed form as soon as possible, but preferably within the next two weeks. Submit **both** the enclosed form and sufficient medical documentation to the following address:

**New York Office of Temporary and Disability Assistance
Office of Administrative Hearings, Homebound Unit
P. O. Box 1930
Albany, New York 12201-1930**

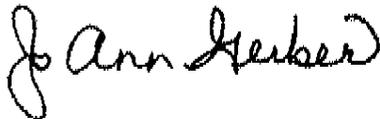
-or-

Fax to: 518-473-6735

Pending receipt of the medical documentation, we have scheduled a hearing at the regular hearing site. If we do not receive sufficient medical documentation verifying that you are unable to travel to the hearing site, we will be unable to adjourn this hearing to a homebound telephone hearing and the hearing will go forward on the scheduled date. Failure to appear for the hearing, or to send an authorized representative, will result in a disposition of "Default". This means that we will be unable to review the issues for which you requested the hearing.

If you want to call about this matter, you may call toll free 1-800-342-3334 and ask to speak with someone in the Homebound Telephone Hearing Unit.

Sincerely,



**Jo Ann Gerber
Director of Administration
Office of Administrative Hearings**

Enc.
Letter 15 (Statewide) Rev. 11/02/10
Requesting Verification of Inability to Travel/Other Options

HOMEBOUND TELEPHONE HEARING QUESTIONNAIRE

RETURN THIS FORM TO:

NYS OTDA
Office of Administrative Hearings
Homebound Unit
P.O. Box 1930
Albany, NY 12201

Fair Hearing #: [REDACTED]
Appellant's Name: [REDACTED]
Address: [REDACTED]
BRONX, NY 10455

Complete the following if you are medically unable to travel to the regular hearing site, cannot send a representative and need a homebound TELEPHONE hearing.

I am enclosing a current statement from my **medical professional** (physician, physician's assistant, nurse practitioner, etc.) that confirms I am unable to travel **by any available means**, including public transportation, Access-A-Ride, or taxi service. This statement indicates my medical condition and how long I will be unable to travel to the hearing site.

You **MUST** provide a telephone number where the Hearing Officer can call you on the day of the hearing:

() _____
Area Code Phone Number

To request a TELEPHONE hearing, you must check this box, provide a telephone number and return this form to the above address.

- or -

Complete the following to CANCEL your fair hearing request:

I no longer require a hearing on the requested Issue. I am withdrawing my request.

_____ (Please SIGN your name here)

To withdraw your request, you may sign and return this form to the above address or fax it to (518) 473-6735 or you may call 1-800-342-3334 to speak with someone in person.

Pending receipt of this form, we have scheduled a hearing at the regular hearing site. If you have any questions, you may call 1-800-342-3334 and ask to speak with someone in the Homebound Telephone Hearing Unit.



Office of Temporary and Disability Assistance



ANDREW M. CUOMO
Governor

SAMUEL D. ROBERTS
Commissioner

BARBARA C. GUINN
Executive Deputy Commissioner

07/25/17

[REDACTED]

NYLAG
7 HANOVER SQUARE 18TH FLR
NEW YORK, NY 10004

Re: [REDACTED]
Req. Date: 06/07/2017

Dear Sir/Madam:

You, or someone on your behalf, recently requested a fair hearing. Our information indicates you may not be able to travel to the hearing site to appear personally at your hearing. As a result of the court order in Varshavsky v. Perales, you may be entitled to the restoration of or an increase in the services or assistance that will be addressed at your hearing.

Such a restoration of or an increase in services or assistance is called "Aid Continuing". Please be aware that "Aid Continuing" is only TEMPORARY. It does not mean that the issues discussed at your hearing will be decided in your favor. You will be given this increase only until:

- 1) a fully favorable decision after fair hearing is issued, or
- 2) fully favorable fair hearing decision compliance is obtained, or
- 3) a decision after a hearing held at your home is issued.

Please be aware that your right to this "Aid Continuing" may end if you withdraw your hearing request.

If you have any questions, please call (518) 474-5415 and ask to speak with someone in the Homebound Telephone Hearing Unit.

Sincerely,

Jo Ann Gerber
Director of Administration
Office of Administrative Hearings

CC: [REDACTED]



Office of Temporary and Disability Assistance

ANDREW M. CUOMO
Governor

SAMUEL D. ROBERTS
Commissioner

BARBARA C. GUINN
Executive Deputy Commissioner

July 20, 2018

Re: F.H. # [REDACTED]
[REDACTED]

Dear Sir/Madam:

The above-captioned Appellant recently had a fair hearing by telephone or had you appear for her/him at a fair hearing. Because the hearing officer is unable to recommend a decision that is "fully favorable," and because the Appellant is homebound, a court order requires that we reopen the fair hearing and give the appellant an opportunity to testify in person and/or to present additional evidence, in his/her home, on the same issue(s). This is called a "home hearing."

NOTE: The Appellant may have received an increase in services or assistance recently. This increase may also be a result of the court order. Such an increase is called "Aid Continuing." Please be aware that Aid Continuing is only TEMPORARY. It does not mean that the issues discussed at the hearing were decided in the Appellant's favor. The Appellant will be given this increase only until a decision is issued after the home hearing. If the decision after the home hearing is not in the Appellant's favor, the increase in services or assistance will come to an end.

Before scheduling the home hearing, we must verify the Appellant's home address and current phone number. Please call (800) 342-3334 and ask to speak with someone in the Homebound Hearing Unit, or complete and return the tear-off portion of this letter in the self-addressed postage paid envelope provided.

When we receive this information, a home hearing will be scheduled. Thank you.

Sincerely,

Joanne Dowd
Legal Affairs Specialist II
Office of Administrative Hearings

PLEASE CORRECT ANY INFORMATION THAT IS INCORRECT

Return to: New York State Office of Temporary and Disability Assistance
Office of Administrative Hearings, Homebound Unit
P.O. Box 1930
Albany, New York 12201

Name: [REDACTED]