

## **Chapter II-7 Scheduling & Notices of Hearing**

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## II-7-1 When to Schedule a Hearing

**Citations:** §§ 405.1000, 405.1004, 405.1034, 405.1038, 405.1050, 405.1052, 405.1104

This chapter describes the process for scheduling a hearing when a hearing is necessary. In general, a hearing is required unless a request is dismissed or remanded, or a decision can be issued based on the record. Scheduling a hearing involves establishing the date, time, and place of the hearing, as well as the manner in which the parties and others will appear (the hearing method).

### A. Requests for Hearing

When a party files a request for hearing following a reconsideration decision, or if a case is escalated from a QIC, a hearing must be scheduled, unless:

1. The request for hearing is dismissed § 405.1052;
2. The evidence supports a fully favorable decision §§ 405.1000(g), 405.1038(a);
3. All parties to the appeal have waived their right to an oral hearing in accordance with §§ 405.1000(e) and 405.1038(b)(i);
4. The appellant lives outside the United States and does not inform the ALJ that he or she wants to appear, and there are no other parties who wish to appear § 405.1038(b)(ii);
5. The ALJ remands the case to the QIC in accordance with § 405.1034; or
6. The request for hearing is removed from the ALJ to the Council pursuant to § 405.1050, or escalated from the ALJ to the Council pursuant to § 405.1104.

**NOTE:** The ALJ is not required to conduct a hearing when the appellant has requested an ALJ review of a QIC's dismissal of a request for reconsideration under § 405.1004.

### B. Remands from the Medicare Appeals Council

If the Council remands a case and orders a hearing, a hearing must be scheduled and conducted in accordance with the remand order. If there is a conflict between the Council remand order and an instruction in this manual, the remand order controls.

## II-7-2 Determining Time and Place

**Citations:** §§ 405.1000, 405.1016, 405.1020, 405.1022, 405.1018, 405.1028, 405.1030

### A. Selecting the Hearing Date

When selecting the date for hearing, the ALJ will consider any applicable adjudication time frame in § 405.1016. The hearing should be scheduled so that the case can be heard, and a decision issued within the applicable adjudication time frame.

In addition, the ALJ must account for the 20-day notice requirement when scheduling the hearing, which requires that notice of a hearing be mailed or served at least 20 calendar days prior to the scheduled hearing date. § 405.1022(a). If the Notice of Hearing is mailed, this requirement applies to the date the Notice of Hearing is mailed, not the date it is received by the recipients. See II-7-6 B for more information on the 20-day notice requirement.

### B. Selecting the Hearing Time

#### 1. Scheduling during normal business hours.

Hearings must be scheduled with a specific start time that must be within normal business hours for the parties and any representatives, unless all parties and representative who will be appearing agree to other times before the hearing is scheduled.

- Normal business hours are 8:00 a.m. to 4:30 p.m. in the time zone where the party or representative is appearing. Where there are parties or representatives in multiple time zones who will be appearing, every effort will be made to ensure that the hearing is scheduled within normal business hours in all time zones.

**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, as 5 U.S.C. § 554(b) requires that the convenience and necessity of the parties or their representatives is considered when setting the time, place, and nature of the hearing.

*Example:* The ALJ is located in the Eastern time zone. The beneficiary is also located in the Eastern time zone; however, the provider is located in the Central time zone. The hearing should be scheduled to occur (that is, start and end) between 9:00 am EST and 4:30 EST to ensure that hearing is conducted during normal business hours for all parties and representatives who attend the hearing.

## **2. Determining hearing length.**

The total amount of time allotted for a hearing must be of sufficient duration to provide the parties and participants with a reasonable opportunity 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, but are not limited to:

- 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/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.

## **3. Requests for specific hearing lengths.**

If an appellant requests a specific hearing length, the ALJ will consider the appellant's stated reason(s) when determining whether to grant such a request. However, the length of the hearing is determined by the ALJ.

If the ALJ determines that the parties did not have a reasonable opportunity to present their arguments and testimony on the claims/issues under appeal at the hearing, the ALJ may take one or more of the following actions:

- a. If the schedules of the ALJ and of all hearing participants permit, the ALJ may extend the length of the hearing;
- b. The ALJ may offer a continuance to the parties; or
- c. The ALJ may keep the record open for a period of time designated by the ALJ to provide the parties with an opportunity to submit written statements (such as a brief), affidavits, and additional documentation related to the claims/issues under appeal, and to provide the non-submitting parties with an opportunity to respond to the submissions. To the extent that a provider or supplier, or a beneficiary represented by a provider or supplier submits new evidence, the ALJ must make a good cause determination before considering that evidence in making the decision. [§§ 405.1000\(b\), 405.1018, 405.1028, 405.1030\(c\)-\(e\)](#).

## C. Selecting the Hearing Place and Method

Hearings may be conducted by video-conference (VTC), by telephone or in-person. §§ 405.1000(b), 405.1020.

### 1. Telephone hearings.

Although VTC is the default hearing method by regulation, the ALJ may offer a telephone hearing if the request for hearing or the administrative record suggests that a telephone hearing may be more convenient than a VTC hearing for one or more of the parties. § 405.1020(b). Telephone hearings may be offered, but may not be mandated. The ALJ determines whether OMHA will initiate the hearing by calling the hearing participants, or whether the hearing participants are required to call into a teleconference number at the time of the hearing.

- If the hearing participants are notified that OMHA will initiate the hearing by calling the hearing participants, the Notice of Hearing informs the recipients that they are responsible for ensuring their correct contact information has been provided and will be updated, if necessary, prior to the hearing date and time.
- If the hearing participants are notified that they must call into a teleconference number, the Notice of Hearing must include the teleconference line number for the parties to call, along with any required passcode or meeting number.
- If a telephone hearing has been offered and a party objects, a VTC appearance must be made available, unless an in-person hearing is more appropriate. See subsections **2.b** and **3.b**, below, for additional information on objections to telephone hearings.

### 2. VTC hearings.

- a. VTC is the default hearing format. The ALJ will direct that the hearing be conducted by VTC if VTC technology is available to conduct the appearance and a telephone hearing is not more convenient for one or more of the parties. § 405.1020(b).
  - 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.
  - As the default hearing format, conducting a hearing by VTC is considered appropriate unless special or extraordinary circumstances exist. See subsection **C.3** below for examples of special or extraordinary circumstances.
- b. Because VTC hearings are the default hearing format, a party who objects to a telephone hearing need not show special or extraordinary circumstances to justify a VTC appearance. A written objection to the proposed method of hearing will suffice,

in accordance with [II-7-6 E](#) below. See subsection **3.b**, below, for additional information on objections to VTC hearings.

### **3. In-person hearings.**

If VTC technology is not available, or if the case on appeal presents special or extraordinary circumstances, the ALJ may, with the concurrence of the Associate Chief Administrative Law Judge (ACALJ), determine that an in-person hearing should be conducted. [§ 405.1020\(b\)](#).

a. Specific instances where special and extraordinary circumstances may be found to exist include:

- Cases that present complex, challenging, or novel presentation issues that necessitate an in-person hearing;
- Cases where witness credibility and veracity are at issue;
- A party's close proximity to and ability to go to the local hearing office; and
- A party's visual, hearing, or cognitive impairments that would result in difficulties using telephone or VTC technology.

[70 Fed. Reg. 11420, 11457 \(Mar. 8, 2005\)](#), [74 Fed. Reg. 65296, 65321 \(Dec. 9, 2009\)](#).

b. A party who objects to a VTC hearing or an ALJ's offer to conduct a hearing by telephone may also request, in writing, an in-person hearing. A party may object to the use of a VTC or telephone hearing only with respect to his or her own testimony, but not with respect to the entire hearing. [70 Fed. Reg. 11420, 11457 \(Mar. 8, 2005\)](#). When a request for an in-person hearing is received, the ALJ may grant the request, with the concurrence of the ACALJ, only upon a showing of good cause.

[§ 405.1020\(i\)](#).

- **NOTE:** The ACALJ's concurrence should include an assessment of the need for an in-person hearing and confirm that there is available budget for any related travel or other in-person hearing expenses.

c. In-person hearings may occur at either an on-site or off-site location.

- On-site in-person hearings are held in the field office of the ALJ conducting the hearing, usually when the party's home or work address is within 75 miles of an OMHA field office and the party is able to travel to that site.
- Off-site in-person hearings are held at a venue other than the field office of the ALJ conducting the hearing. Off-site hearings may be appropriate where the party's home or work address is not within 75 miles of an OMHA field office

location, or when the party is physically unable to travel to an OMHA field office location.

- d. The selection of an in-person appearance as the hearing method has no effect on any applicable adjudication time frame specified in [§ 405.1016](#), unless the appellant agrees to waive such adjudication time frame in writing. [§ 405.1020\(i\)\(4\)](#).

**4. Multiple hearing formats.**

If there are multiple participants in a hearing, the method of appearance may differ for each party. In such instances, the Notice of Hearing must disclose how each party intends to appear, in accordance with [§ 405.1022\(b\)\(3\)](#). See [II-7-3](#) for more information regarding Notices of Hearing.

**5. Travel reimbursement.**

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 form OMHA-26 for more information about travel polices. See subsections **C.2** and **C.3**, above for additional requirements related to VTC and in-person hearings.

**D. Changes to the Hearing Date, Time, or Place/Method**

See [II-7-7](#) for provisions relating to rescheduling of the hearing. For parties' objections to the hearing date, time, or place/method, see section [II-7-6 E](#).

## II-7-3 The Notice of Hearing

**Citations:** §§ 405.910, 405.912, 405.1020, 405.1022 405.1036

When the date, time, and place/method of hearing have been determined, a Notice of Hearing (form OMHA-1024, available in MATS) is sent to the individuals and entities identified in subsection **A**. Notice is typically sent via standard mail to the last known address of the recipient.

### A. Who must receive Notice of the Hearing

#### 1. Generally

A notice of hearing must be sent to the following individuals/entities:

- All parties that filed an appeal of a reconsideration or otherwise participated in the reconsideration;
- Any party that was found financially liable for the services at issue after the initial determination, or the ALJ believes may be found liable at the hearing level;

**NOTE:** Staff must follow OMHA's policy on the use and disclosure of PII when sending the Notice of Hearing to anyone other than the beneficiary that the ALJ believes may be found financially liable at the hearing level.

- The QIC (or QIO) that issued the reconsideration;
- Expert witnesses whose services the ALJ has procured;

**NOTE:** Staff must follow OMHA's policy on the use and disclosure of PII when sending the Notice of Hearing to expert witnesses.

- Any other participant whose presence at the hearing is requested by the ALJ (for example, CMS or CMS contractors attending as non-party participants). See subsection **A.3** below for ALJ requests for CMS or CMS contractor participation.
- The QIC, for appeals that are escalated from the QIC level to the ALJ level without the QIC having issued a reconsideration.

The Notice of Hearing is mailed to the parties and other potential participants at their last known address, or given by personal service. However, notice does not have to be sent to a party who indicates in writing that the party does not wish to receive this notice. § 405.1022(a). See I-4 for information on who may be a party to an appeal.

**NOTE:** If a provider/supplier enters the appeals process through an assignment of appeal rights from the beneficiary under § 405.912, a Notice of Hearing is not sent to

the beneficiary who assigned the appeal rights. See [I-4-2 C.3](#) for more information on assignment of appeal rights.

## 2. Representatives

### a. Generally.

If any party is being represented by an authorized or appointed representative, only the representative should be contacted for purposes of scheduling the hearing. The Notice of Hearing and all related correspondence are sent only to the representative. [§ 405.910\(i\)\(2\), \(j\)](#).

**NOTE:** In accordance with [I-5-3 A](#), staff must verify that an appointment of representative received with the case file from the lower level of review, or an appointment submitted for the first time to OMHA, is valid and meets all regulatory requirements.

**NOTE:** In accordance with [I-5-3 B](#), the record must contain written documentation granting an individual claiming to be an authorized representative that status. For example, documentation of a power of attorney must be made part of the exhibited record.

See [I-5](#) for additional information on representatives.

### b. Exception: Medicare Secondary Payer (MSP) cases.

In cases involving MSP recovery claims where the beneficiary is the party, the Notice of Hearing is sent to both the beneficiary and the beneficiary's representative, if the beneficiary has a representative. [§ 405.910\(i\)\(4\)](#).

**NOTE:** In cases involving MSP recovery claims where the applicable plan is the party against whom recovery is sought the general rule applies. That is, correspondence is sent only to the appointed representative, if the applicable plan has a representative.

See [I-5](#) for more information on representatives.

## 3. CMS and CMS Contractors

Except for the QIC (or QIO) that issued the reconsideration, or the QIC from which a request for reconsideration was escalated, the ALJ is not required to send a Notice of Hearing to CMS or other CMS contractors [§ 405.1020\(c\)](#), [74 Fed. Reg. 65296, 65322 \(Dec. 9, 2009\)](#). However, if the ALJ requests the participation of CMS or a contractor under [§ 405.1010](#) or [§ 405.1012](#), a Notice of Hearing must be sent directly to CMS or the contractor.

See [I-6](#) for more information on CMS and CMS contractor roles.

## **B. Method of Delivery § 405.1022(a)**

Notices of hearing must be sent via one of the following methods of delivery:

### **1. Mail.**

If the Notice of Hearing is mailed, it must be sent via United States Postal Service (USPS) first class mail, or other OMHA approved delivery service, to the last known address of the recipient.

Absent any other current information furnished by the recipient, OMHA will consider the following sources, in the following order, when determining the last known address:

- a. The recipient's address reflected on a request for hearing or later OMHA-level filed correspondence;
- b. For recipients who have not filed any OMHA-level correspondence, or for recipients who filed OMHA-level correspondence that did not contain their address, OMHA will look to the address where the reconsideration decision was mailed, including addresses to which any courtesy copies were sent.
- c. For recipients who have not filed OMHA-level correspondence, and whose address is not present in the reconsideration decision, OMHA will 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, OMHA will reach out to that hearing participant to obtain a current mailing address.

### **2. Fax.**

As an alternative to mail, 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. Staff must:

- a. Confirm the Notice of Hearing does not contain any PII other than the beneficiary's first initial, last name, and truncated HICN.
- b. Confirm the fax machine on the other end 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 QIC fax machine located in an access-restricted area). If not secure, alert the recipient prior to sending to ensure the recipient is waiting at the fax machine.

- c. Immediately remove the documents with PII from the fax machine after sending.
- d. Wait for the transmission completion notification.

### **3. Personal service.**

In exceedingly rare instances where delivery via mail, certified mail with return receipt or fax would be insufficient, the Notice of Hearing may be given by personal service. The use of this method of delivery requires the concurrence of the ACALJ to ensure that requirements for personal service can be met (for example, sufficient budget is available).

## **C. Timing of the Notice [§ 405.1022\(a\)](#)**

### **1. Generally.**

The Notice of Hearing must be mailed or served at least 20 calendar days prior to the scheduled hearing date. Correspondence is considered mailed as of the date it is post-marked by the USPS or another approved delivery service.

### **2. Waivers of the 20-day notice requirement.**

- a. A party may waive the 20-day notice requirement in writing. Use of form HHS-752 is preferred, but not required. If a party verbally waives the 20-day notice requirement, OMHA will send the party a copy of form HHS-752 to complete and return. The OMHA-142 cover letter explaining the waiver is available for use if mailing.
- b. OMHA shall notify all other parties to the hearing that a waiver has been received and inform the party that submitted the waiver that the period cannot be waived unless all other parties affirmatively waive the period.

**NOTE:** A party's waiver does not limit CMS or a CMS contractor's period to elect participant or party status after receiving the notice of hearing. See [I-6-3 C.7](#) for more information.

## **D. Content of the Notice**

The Notice of Hearing must be sent using mandatory form OMHA-1024, (available in MATS). Each of the following items must be included in the mandatory form (follow MATS prompts):

- A statement of the specific issues to be decided at the hearing;
- A statement informing the parties that they may designate a person to represent them during the proceedings;

- A statement explaining the procedures for requesting a change in the time or place of the hearing, a reminder that, if the appellant fails to appear at the scheduled hearing without good cause, the ALJ may dismiss the hearing request, and other information about the scheduling and conduct of the hearing;
- A statement advising the appellant if his or her appearance, or that of any other party or witness, is scheduled by VTC, telephone, or in person. If any party is scheduled to appear by VTC, the notice will advise that the scheduled place for the hearing is a VTC site and explain what it means to appear at the hearing by VTC; and
- A statement advising the appellant or other parties that if they object to appearing by VTC or telephone, and wish instead to have their hearing at a time and place where they may appear in person before the ALJ, they must follow the procedures set forth in § 405.1020(i) for notifying the ALJ of their objections and for requesting an in-person hearing.

In addition, the Notice of Hearing must include:

- A list of any expert witnesses scheduled to appear, along with their specialty;
- A list of other recipients of the Notice of Hearing; and
- OMHA contact information, including:
  - A direct line to the ALJ team that has been assigned to the appeal;
  - A toll-free number for the OMHA field office where the ALJ is located; and
  - For telephone hearings where participants are directed to call into a teleconference number, the telephone number for the parties to call at the time scheduled for hearing, along with any required passcode or meeting number.

#### **E. Other Documentation Sent with the Notice**

The following documentation must be mailed, served, or faxed along with the form OMHA-1024 Notice of Hearing:

- Form HHS-729 Response to Notice of Hearing;
- Form OMHA-156 Exhibit List (if prepared when the hearing is scheduled, but must be sent prior to hearing if not sent with notice of hearing);
- Form OMHA-25 Information Sheet: What to Expect in a Video-teleconference Hearing (VTC appearances only);
- Form OMHA-26 Travel Policy, and Attachments (in-person and VTC appearances only);

## F. Consolidated Notices

1. Where possible, staff should group the information by MAC prior to issuing the consolidated hearing notice to the QIC so the Notice of Hearing can be timely transmitted by the QIC to the MAC.

*Example.* The ALJ decides to consolidate hearings for a nationwide DME supplier. Claims arise from multiple MACs because the subject beneficiaries reside in different jurisdictions. Staff should group and label the beneficiaries by MAC on the consolidated hearing notice.

2. If appeals are consolidated for hearing, but the ALJ elects to maintain separate administrative records, a single Notice of Hearing may be issued for the consolidated hearing. Notice of the consolidated hearing must be provided with the Notice of Hearing, and the Notice of Hearing (or an attachment thereto) must list the individual appeal numbers involved in the consolidated hearing. See [I-6-C](#) for further information on notices of consolidation.

**NOTE:** When a Notice of Hearing is sent to an individual beneficiary or to any other party to a consolidated or multiple beneficiary hearing that is not authorized to receive PII for all of the beneficiaries involved, the Notice of Hearing must be redacted to display only the information pertaining to that beneficiary or party.

## II-7-4 Accommodating Special Needs

Citations: [§ 405.1020](#)

### A. Language Barriers

#### 1. Known language barriers.

If the request for hearing was completed in a language other than English or states that the appellant does not read and/or speak English, or if the ALJ is informed by any other means that translation 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.

#### 2. 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 attempt to confirm whether translation services for the hearing are required.

### B. Physical 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 confirm that special accommodations are needed.

Reasonable accommodations include, but are not limited to:

- Telephone hearings for the blind;
- Text Telephone Yoke/teletypewriter (TTY) at a VTC hearing site for the deaf; and
- Telebraille relay services for the deaf-blind.

If a party is unable to travel to an off-site 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 off-site in-person hearing may be held (with the concurrence of the ACALJ) at a place where the party can appear, including the party's place of residence, if required. [§ 405.1020\(f\)\(1\) and \(i\)](#).

## II-7-5 Amended Notices of Hearing

Citations: [§ 405.1022](#)

### A. Changes Requiring an Amended Notice of Hearing

OMHA must issue an Amended Notice of Hearing whenever:

- The hearing date or time is rescheduled;
- The ALJ determines that a new participant's attendance at the hearing is reasonably necessary, and that participant did not receive the original Notice of Hearing; or
- A recipient did not receive the original notice of hearing (See subsection C, below for special mailing requirements);

The 20-day notice requirement in [§ 405.1022](#) still applies to Amended Notices of Hearing. That is, if a hearing is scheduled to occur fewer than 20 calendar days from the date the Amended Notice of Hearing is issued, the hearing must be rescheduled, unless all parties who receive the amended notice agree in writing to waive the 20-day notice requirement, in accordance with [II-7-3 C.2](#).

**NOTE:** If an Amended Notice is issued to only one party because that party did not receive the original Notice of Hearing, only that party need waive the 20-day notice requirement, so long as all of the other recipients were mailed, faxed, or personally served the original Notice of Hearing at least 20 calendar days prior to the scheduled hearing date.

### B. Changes not Requiring an Amended Notice of Hearing

The ALJ may update information that does not change the substantive information regarding the time or place of a scheduled hearing without the need to issue an Amended Notice of Hearing. Written correspondence sent to the parties, in lieu of an Amended Notice of Hearing, may be used to make the following updates:

- Changes to the issues;  
**NOTE:** If the issues are changed during the course of a hearing, the change must be memorialized in the hearing decision.
- Changes to the place/method of hearing;
- Changes to the list of OMHA experts;
- Changes to OMHA contact information; and
- Changes to the Exhibit List.

The 20-day notice requirement does not apply to written correspondence that makes one or more of the above-listed changes to a scheduled hearing. However, the ALJ, at the request of a party and within the ALJ's discretion, may reschedule the hearing if the ALJ believes that the parties will be disadvantaged by having fewer than 20 calendar days after the correspondence is issued to prepare for the hearing.

**NOTE:** A copy of the correspondence issued to the hearing participants informing them of any changes must be included in the administrative record.

## **C. Sending the Amended Notice of Hearing**

### **1. Generally.**

OMHA staff will make the necessary revisions to the original Notice of Hearing and re-title it as the "Amended Notice of Hearing." The Amended Notice of Hearing must be mailed or otherwise transmitted to all of the recipients of the original Notice of Hearing (and to any newly identified recipients) in accordance with subsection **A**, above.

### **2. If a party states that he or she did not receive the notice of hearing.**

If the Notice of Hearing is amended because the party states he or she did not receive the original Notice of Hearing, an amended notice is issued in accordance with subsection **C.1**, above and must be sent to the party by certified mail. [§ 405.1022\(c\)\(2\)](#).

**NOTE:** The regulation at [§ 405.1022\(c\)\(2\)](#) states that this service may also be made by e-mail, if available; however, e-mail notices are not supported by OMHA systems at this time.

## II-7-6 Responses to the Notice of Hearing

**Citations:** §§ 405.910, 405.966, 405.1010, 405.1012, 405.1016, 405.1018, 405.1020, 405.1022, 405.1024, 405.1026, 405.1028, 405.1052

### A. Acknowledging Receipt

Each party or his or her representative who was sent a Notice of Hearing must acknowledge the Notice of Hearing by indicating whether the recipient plans to attend the hearing or objects to the proposed time and/or place of the hearing. While recipients may acknowledge the Notice of Hearing either verbally or in writing (including fax), certain objections must be made in writing, as detailed in subsection F below.

If CMS or a CMS contractor plans to join a hearing as a party or participant it may respond to the notice for hearing by making an election in accordance with §§ 405.1010(b) or 405.1012(b), as applicable. CMS or the CMS contractor must advise the ALJ, appellant, and all other parties identified in the Notice of Hearing of its intent to elect participant or party status no later than 10 calendar days after receiving the notice. Use of form HHS-732 (Centers for Medicare and Medicaid Services (CMS) or CMS Contractor Participation as a Non-Party or as a Party to an Administrative Law Judge (ALJ) Hearing) is encouraged, but not required.

If CMS or a CMS contractor elects party status in a case, it may object to the time and place of the hearing in the same manner as other parties. See I-6 for more information on CMS and CMS contractor elections and roles.

### B. Unacknowledged Notices

1. If a party or a representative to whom a Notice of Hearing was sent does not acknowledge receipt of the Notice of Hearing and does not appear at a scheduled hearing, OMHA must attempt to contact the party for an explanation.
  - If the party or representative states that he or she did not receive the Notice of Hearing, an amended notice is sent via certified mail. See II-7-5 for more information on Amended Notices of Hearing. § 405.1022(c)(2).
  - If the party or representative states that he or she received the Notice of Hearing, staff documents the conversation in a report of contact (form OMHA-101) and includes the report of contact in the administrative record.
  - If the ALJ finds that the appellant did not establish good cause for missing the hearing after a reasonable attempt to contact the party or representative is made, the ALJ dismisses the hearing request in accordance with § 405.1052.

### **C. Written evidence submitted with the Response**

Parties must submit written evidence they wish to have considered at the hearing with their request for hearing, on a date specified in their request, or within 10 calendar days after receiving the Notice of Hearing. §§ 405.1014(a)(7), 405.1018. If evidence is submitted later than 10 calendar days after receiving the Notice of Hearing, the additional days will not be counted toward any applicable adjudication time frame specified in § 405.1016, unless it was submitted by an unrepresented beneficiary.

If written evidence is received with a party's response to the Notice of Hearing, it is the first time that evidence was submitted, and the party is a provider, supplier, or beneficiary represented by a provider or supplier, the ALJ must review that evidence in accordance with § 405.1028 to determine whether there is good cause for submitting the evidence for the first time at the ALJ level.

**NOTE:** The good cause requirement does not apply to new evidence submitted for the first time by other parties (for example, a Medicaid State Agency or a beneficiary who is not represented by a provider or supplier (§ 405.1018(c)), CMS and CMS Contractors (74 Fed Reg. 65296, 65317 (Dec. 9, 2009)), or their representatives.

### **D. New Individuals Identified as Appearing on Behalf of a Party**

If a party's response to the Notice of Hearing names a new individual to appear on the party's behalf, an Appointment of Representative form (form CMS-1696 or another written instrument that conforms to the requirements in § 405.910(c)) must be completed and submitted. If the new individual is an authorized representative, a copy of the document that grants that individual legal status as an authorized representative (for example, power of attorney, health care proxy, or letter of guardianship) must be submitted.

If an existing appointed representative names a new individual to appear on his or her behalf, the existing appointed representative must delegate his or her appointment to the new individual in accordance with § 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 I-5 for more information on representatives.

### **E. Objections to the Proposed Time and Place**

If a party objects to the time and/or place of the hearing, the party must notify the ALJ at the earliest possible opportunity before the time set for the hearing, and must state the reason for the objection and the time and/or place where he or she would like the hearing to be held instead. This objection must be made in writing. § 405.1020(c)(2)(ii), (e), (f), (g)

The ALJ may change the time or place of the hearing if the ALJ finds good cause for doing so. The ALJ will find good cause where the information available to the ALJ supports a party's contention that (§ 405.1020(f)):

1. 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; or
2. Severe weather conditions make it impossible to travel to the hearing.

Good cause may also be found to exist in circumstances other than those listed above. In determining whether such good cause exists, the ALJ will consider 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. Factors to be considered in determining the impact of the change include, but are not limited to, the effect on other scheduled hearings, potential delays in rescheduling the hearings, and whether any prior changes were granted to the party. § 405.1020(g)(1) and (2).

Examples of other circumstances a party might give for requesting a change in the time or place of the hearing include, but are not limited to: (§ 405.1020(g)(3))

- 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;
- A necessary witness is unavailable to attend the scheduled hearing, and the evidence cannot be otherwise obtained;
- The party's representative has a prior commitment to be in court or at another administrative hearing on the date scheduled for the hearing;
- Transportation is not readily available for a party to travel to the hearing; and
- 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.

If the ALJ finds good cause to change the time or place of the hearing, an amended Notice of Hearing must be issued in accordance with II-7-5, above.

## **F. Objections to the Issues**

If a party objects to the issues described in the Notice of Hearing, he or she must notify the ALJ in writing at the earliest possible opportunity before the time set for the hearing, and no later than 5 calendar days before the hearing. The party must state the reasons for his or

her objections and send a copy of the objections to all other parties who were sent a copy of the Notice of Hearing. A copy of the objections does not have to be sent to non-party participants. The ALJ will make a decision on the objections either in writing or at the hearing. [§ 405.1024](#).

## **G. Objections to the ALJ Hearing the Case**

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. If a party wishes to object to the ALJ who will conduct the hearing, the party must notify the ALJ within 10 calendar days of the date that the Notice of Hearing is mailed, or received if transmitted by fax or personal service. The ALJ will consider the party's objections and decide whether to proceed with the hearing or withdraw. [§ 405.1026](#).

### **1. If the ALJ withdraws.**

If the ALJ withdraws, another ALJ will be appointed to conduct the hearing and issue a decision, dismissal, or remand in the appeal.

### **2. If the ALJ does not withdraw.**

If the ALJ does not withdraw, the party may present his or her objections to the Council, but only after the ALJ has issued a decision or dismissal in the appeal, or if the appeal is escalated to the Council, after a hearing is held but before the ALJ issues a decision.

## II-7-7 Rescheduling the Hearing

Citations: §§ 405.1016, 405.1020

### A. In General

The ALJ sets the time and place for the hearing, and may change the time and place, if necessary.

### B. Effect of Rescheduling on Adjudication Time Frame

Depending on the reason a hearing needs to be rescheduled, any applicable adjudication time frame specified in § 405.1016 may be extended from the originally scheduled hearing date to the rescheduled hearing date.

#### 1. Examples of reasons for rescheduling that will extend an adjudication time frame: (§ 405.1020(h))

- An appellant's objection to the hearing date, time, or place/method, with the exception of an appellant's objection to a VTC or telephone hearing and associated request for an in-person hearing; and
- A party's failure to appear at the originally scheduled time and place for hearing (where the ALJ finds good cause for rescheduling).

#### 2. Examples of reasons for rescheduling that will not extend an adjudication time frame:

- The ALJ's need to postpone or continue a hearing in process;
- A party's objection to a VTC or telephone hearing and associated request for an in-person hearing; and
- OMHA's failure to send a copy of the Notice of Hearing to a necessary party to the hearing.

See [I-7](#) for additional information on adjudication time frames, including information regarding circumstances that extend adjudication time frames.

### C. Notifying the Hearing Participants

When an ALJ has determined that a hearing must be rescheduled, the ALJ must send an Amended Notice of Hearing to all recipients of the original Notice of Hearing, as well as any newly identified parties whose attendance at the hearing is reasonably necessary, in accordance with [II-7-5](#).

## **II-7-8 Canceling the Hearing**

A hearing may need to be canceled for a variety of reasons, including, but not limited to:

- Death or unexpected illness of the appellant or one of the necessary parties to the hearing;
- Withdrawal of the request for hearing;
- Receipt of waiver of the right to appear at the hearing and a request for a decision on the record from all parties who were sent a notice of hearing; or
- A need to reschedule, but a new hearing date and time have not yet been identified.

When an ALJ has determined that a hearing must be canceled, OMHA contacts all hearing participants by telephone or in writing to inform them of the cancellation, including CMS or any CMS contractors that elected participant or party status. If the hearing is canceled fewer than 5 calendar days before the scheduled hearing date, OMHA must first attempt to provide notice of the cancellation by telephone call or fax.

**NOTE:** Any fax sent must be made in compliance with OMHA's PII policy, as outlined above in II-7-3 B.2.

## **II-7-9 Supplemental (Reopened) Hearings**

If the ALJ determines that a supplemental hearing is necessary, the ALJ follows the same notice procedures as for the original hearing, with the following exceptions:

1. The Notice of Hearing must indicate that the hearing is supplemental, or reopened; and
2. The ALJ has the discretion to limit the hearing to those parties and participants that took part in the original hearing.