LEGAL
SERVICES
INCORPORATED

299 Broadway
New York, NY 10007
Phone: 212-417-3700
Fax: 212-417-3891
www.mfy.org

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Kenneth Lau
Christopher Schwartz
Supervising Attorneys

VIA ELECTRONIC TRANSMISSION TO
Jeanine.Behuniak@otda.ny.gov

March 30, 2012

Jeanine S. Behuniak
New York State
Office of Temporary and Disability Assistance
40 North Pearl Street, Floor 16C
Albany, New York 12243-0001

RE: Comments on Proposed Action: Amendment of Section 358-5.5 of Title 18 NYCRR, "Abandonment of a request for a fair hearing"

Dear Ms. Behuniak:

MFY Legal Services, Inc. (MFY) is writing to provide comments on the proposed amendment of Section 358-5.5 of Title 18 of the Compilation of Codes, Rules and Regulations of the State of New York (NYCRR), "Abandonment of a request for a fair hearing."

MFY envisions a society in which no one is denied justice because he or she cannot afford an attorney. To make this vision a reality, MFY provides free legal assistance to low-income residents of New York City on a wide range of civil legal issues. We prioritize services to vulnerable and under-served populations such as New Yorkers who have disabilities. Simultaneously, we work to end the root causes of inequities through impact litigation, law reform, and policy advocacy. MFY's Mental Health Law Project, funded by the New York City Department of Health and Mental Hygiene, is the largest civil law practice for mental health consumers in the United States. Our attorneys and paralegal provide counsel and representation to more than 1,400 mental health consumers each year.

In general, we support the proposed amendments. However, MFY strongly suggests that OTDA adopt a broad definition of "good cause." Furthermore, we firmly believe that the term "appellant's attorney (or an employee of the attorney)" should <u>not</u> replace the term "appellant's authorized representative" in the opening sentence of §358-5.5(a)

MFY <u>supports</u> the expansion of the time period to request that a fair hearing be restored to the calendar to one year.

MFY strongly supports OTDA's amendments which increase the time period during which a request may be made to restore a fair hearing to the calendar

to one year. As advocates for individuals with serious mental illness, we believe the expansion of the time period is necessary to protect the rights of potentially vulnerable individuals including people with disabilities who may have difficulty responding in such short time frame and need assistance to do so. The 15 and 45 day deadlines were unfair and unduly restrictive.

MFY supports the reinstatement of aid-continuing upon establishment of good cause as described in the proposed new subsections §358-5.5(c)(1) and (c)(2).

MFY strongly supports the amendments that allow for the reinstatement of aid-continuing upon establishment of good cause. In particular, MFY supports §358-5.5(c)(1), which allows for reinstatement of aid-continuing to be restored retroactively when the request to restore the fair hearing to the calendar is made within 60 days. This restoration of aid-continuing is vital to vulnerable families, helping them to avoid homelessness, food instability, and other crises.

MFY encourages OTDA to adopt a broad definition of "good cause" which includes the unavailability of the appellant's authorized representative.

In the Assessment of Public Comment, OTDA notes that "the meaning of good cause will remain as it is commonly understood." MFY encourages OTDA to adopt a broad definition of "good cause" which includes the unavailability of the appellant's authorized representative.

The Social Security Administration (SSA) has taken an expansive view of circumstances to consider in determining whether a "good cause" standard has been met.

For example, SSA's Program Operations Manual System (POMS) provides a list of possible considerations to evaluate in determining whether good cause exists, including:

- whether circumstances impeded the claimant's efforts to pursue his/her claim;
- whether SSA actions were confusing or misleading;
- whether the claimant understood the requirements of the Social Security Act; …
- whether the claimant's physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) prevented him/her from filing a timely request or from understanding or knowing about the need to file a timely request for appeal. SSA POMS GN 03102.150; GN 03101.020.

Notably, the POMS specifically states: "Good cause for late filing may apply to any person standing in the place of the claimant." SSA POMS GN 03102.150; GN 03101.020.

The POMS also provides numerous examples of circumstances in which good cause should be found to exist. SSA notes that a finding of good cause is *not limited* to the situations listed. Examples described by SSA include:

- the claimant was seriously ill and was prevented from contacting SSA in person, in writing, or through a friend, relative, or other person;
- there was a death or serious illness in the claimant's immediate family;

- pertinent records were destroyed or damaged by fire or other accidental cause;
- the claimant was actively seeking evidence to support his/her claim, and his/her search, though diligent, was not completed before the time period expired; …
- the claimant was furnished confusing, incorrect, or incomplete information or was otherwise misled by a representative of SSA … about his or her right[s]. SSA POMS GN 03102.150; GN 03101.020.

Several examples listed by SSA describe a missed deadline for filing an appeal but are directly analogous to situations in which an appellant misses a hearing scheduled by OTDA. For example:

- the claimant did not understand the requirement to file timely or was not able (mentally or physically);
- the claimant did not receive a notice of the determination or decision (e.g.; SSA used an incorrect address or the claimant moved); …
- the claimant thought his or her representative filed the appeal (good cause applies to the claimant despite whether the claimant is still represented or represented by a different person);
- unusual or unavoidable circumstances exist, which prove that the claimant could not reasonably be expected to have been aware of the need to file timely, or such circumstances prevented him or her from filing timely. SSA POMS GN 03101.020.

MFY encourages OTDA to follow the example set by SSA by adopting a broad definition of "good cause." This broad definition should include situations in which an appellant's authorized representative is unavailable to attend the hearing.

MFY <u>opposes</u> the replacement of the term "appellant's authorized representative" with the more restrictive term "appellant's attorney (or an employee of the attorney)" in the opening sentence of § 358-5.5(a).

As Chief Judge Jonathan Lippman has noted, there is a crisis in the availability of free civil legal services for low-income New Yorkers. Indeed, Judge Lippman has made increasing the availability of civil legal services for low-income New Yorkers a central goal of his tenure. Despite Judge Lippman's efforts to increase funding for legal services, MFY is forced on a daily basis to turn away potential clients with valid claims and concerns simply because we do not have the resources or staff to represent every person who requests our assistance.

Some of those whom we are not able to assist do have a social worker, case manager, patient navigator, family member, friend, or other non-attorney advocate who is willing and able to serve as an authorized representative. Indeed, one of the ways our Mental Health Law Project increases capacity is by providing expert support to social workers, case managers, and other non-attorney professionals at our partner organizations who are able to accompany or represent appellants.

Often, these non-attorney advocates attend hearings on behalf of the appellant when the appellant is not able to attend. It would be unfair and unjust for OTDA to consider a fair hearing to have been

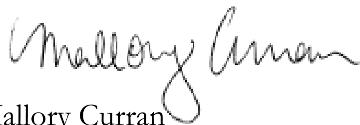
"abandoned" when that fair hearing is attended by an authorized representative but not by the appellant or an attorney.

OTDA should restore the language at the beginning of §358-5.5(a) to read:

> OAH will consider a fair hearing request abandoned if neither the appellant nor the appellant's authorized representative appears at the fair hearing unless either the appellant or the appellant's authorized representative has…. (Emphasis added).

Thank you for providing us the opportunity to submit these comments on this issue, which is of vital importance to many of MFY's clients and to low-income New Yorkers in general.

Sincerely,



Mallory Curran
Supervising Attorney
Mental Health Law Project
mcurran@mfy.org
212-417-3766