



# Community Classes: Know Your Rights

February 6, 2024

## New Territory

What we can tell you about your rights will change over time.

- By tracking the progress of people actively challenging decisions, we are learning more with each passing month.
- New York State has announced that they will soon issue an Administrative Directive Memo (ADM) on this subject.

We might not get immediate relief, but we must speak up to bring change. Don't be discouraged. Even when we appear to lose, we are winning, because it supplies us with evidence of the lack of recourse.

To stay current, sign up at [coalition4sdf.org/what-do-you-want-from-self-direction](https://coalition4sdf.org/what-do-you-want-from-self-direction).

Please send emails to [coalition4sdf@gmail.com](mailto:coalition4sdf@gmail.com) to inform us of your progress & problems.

## Overview

There are multiple pathways for appealing a rejection, and we don't know yet which work. We do know you must start by getting the denial in writing. You might succeed simply by challenging your Fiscal Intermediary (FI), as described on the next page. And you will never succeed if you stay silent.

This document guides you through the process. Here are the highlights of what you will find on the following pages. Please, cc: us so we can track your progress: [coalition4sdf@gmail.com](mailto:coalition4sdf@gmail.com)

- **Start here**  
How to respond to your Fiscal Intermediary when a Community Class is rejected. Includes a sample email message. With luck, this could be all you need to do. Your Fiscal Intermediary might approve the class upon re-consideration.
- **Appealing the rejection of a previously approved class**  
When a class was approved but is now being rejected, the regulations give you additional rights-- if you assert them. Start the assertion in every communication, starting with that first letter to your Fiscal Intermediary.
- **Multiple Escalation Paths**  
If your Fiscal Intermediary stands firm on their rejection, then you have three ways to appeal that decision. Only the first two are realistic options. The steps to take in each case are detailed in the following pages.
  - **Choice A: Continue with the 633.12 process**
  - **Choice B: Fair Hearing**
  - **Choice C: Article 78 Hearing**
- **Stalled?**  
At any point in this process, you might stop getting responses. When that happens, reach out to Constituent Services at your State Senators office. In many cases, they can usually get things moving for you. Use this link to get the contact info for your State Senator [nysenate.gov/find-my-senator](https://nysenate.gov/find-my-senator).  
There are people who are ready to help you if you speak up, so: *Don't stay silent!*

# Start here

**Situation:** Your FI (Fiscal Intermediary) rejected a community class.

**Response: Challenge the rejection!** And, if the FI is rejecting a class that was previously approved, then be sure to read “**Appealing the rejection of a previously approved class**”.

Send an email to challenge that rejection, asking to start the informal resolution process.

In your email, refer to the policy on page 24 of “Self-Direction Guidance for Providers”.

[opwdd.ny.gov/system/files/documents/2022/03/sd\\_guidance-final\\_march2022.pdf](https://opwdd.ny.gov/system/files/documents/2022/03/sd_guidance-final_march2022.pdf)

Include a request for the reason for the rejection if you don’t yet have it in writing, and for a copy of their procedure. Explicitly assert your 633.12 rights. See sample email below.

On your email, copy us at: [coalition4sdf@gmail.com](mailto:coalition4sdf@gmail.com)

and the OPWDD central office at: [self.direction.redesign@opwdd.ny.gov](mailto:self.direction.redesign@opwdd.ny.gov)

and the Self-Direction contact at the regional OPWDD office

[SPS.R1.SD@opwdd.ny.gov](mailto:SPS.R1.SD@opwdd.ny.gov) for Region 1

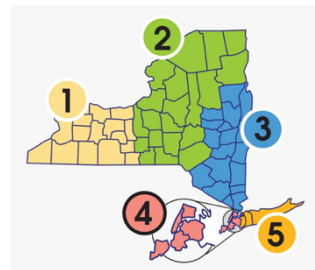
[SPS.R2.SD@opwdd.ny.gov](mailto:SPS.R2.SD@opwdd.ny.gov) for Region 2

[SPS.R3.SD@opwdd.ny.gov](mailto:SPS.R3.SD@opwdd.ny.gov) for Region 3

[SPS.R4.SD@opwdd.ny.gov](mailto:SPS.R4.SD@opwdd.ny.gov) for Region 4

[SPS.R5.SD@opwdd.ny.gov](mailto:SPS.R5.SD@opwdd.ny.gov) for Region 5

Also copy your Support Broker and Care Manager.



You might also want to copy the Director of your regional OPWDD office.

As of January 10<sup>th</sup> 2024, the current Directors of the Developmental Disability Regional Offices, DDROs, are:

- |                    |  |              |
|--------------------|--|--------------|
| 1. Maria Torgalski | <a href="mailto:maria.j.torgalski@opwdd.ny.gov">maria.j.torgalski@opwdd.ny.gov</a> | 716-517-2010 |
| 2. Vincent Schmidt | <a href="mailto:vincent.schmidt@opwdd.ny.gov">vincent.schmidt@opwdd.ny.gov</a>     | 607-240-4900 |
| 3. Joan Volpe      | <a href="mailto:joan.a.volpe@opwdd.ny.gov">joan.a.volpe@opwdd.ny.gov</a>           | 518-388-0431 |
| 4. Delia Tucker    | <a href="mailto:delia.m.tucker@opwdd.ny.gov">delia.m.tucker@opwdd.ny.gov</a>       | 646-766-3466 |
| 5. Michelle Torres | <a href="mailto:michelle.x.torres@opwdd.ny.gov">michelle.x.torres@opwdd.ny.gov</a> | 631-434-6100 |

We will keep this DDRO Director list current. Please alert us by email if you have an update.

OPWDD publishes regional phone numbers at [opwdd.ny.gov/contact-us](https://opwdd.ny.gov/contact-us)

## Sample e-mail

Dear *[Fiscal Intermediary]*-

I am writing to object to the denial of *[name of class]*, and to trigger the informal resolution process as specified in 633.12(a)(8). Please reply in writing with the reason for that denial, letting us know which of the six exclusion criteria is the basis for the decision. See page 24 of “Self-Direction Guidance for Providers”. Please be specific.

If we do not hear from you within five days, we will treat that as a constructive denial and proceed directly to the next stage. *[If this is rejection of class that was previously approved. We will expect continued funding of the class, in accord with the 633.12 requirement that you not ‘reduce, suspend or discontinue’ during the review process.]*

If you have a written description of your internal resolution process, please forward that. Many thanks in advance for your prompt reply, *[name]*

# What happens next?

What happens next depends on the response of your Fiscal Intermediary.

The best outcome: They change their minds and approve the Community Class.

In that case, you are done—please send us an email so we can join you in celebrating this victory. [coalition4sdf@gmail.com](mailto:coalition4sdf@gmail.com)

It is also possible that New York State government will intervene. We are hearing of instances where a Fiscal Intermediary has been told to alter their policies by OPWDD personnel. For example, one Fiscal Intermediary informed all of their participants that any class with duration longer than two hours would be refused. This was brought to the attention of OPWDD, and the FI was informed that this blanket policy is not valid.

However, the likely outcome is that they stand by their original decision, and you will have to escalate. And now things, unfortunately, get more complicated.

## Stalled?

If the process stalls at any point, reach out to Constituent Services at the office of your State Senator. They can quickly get things moving for you. [nysenate.gov/find-my-senator](http://nysenate.gov/find-my-senator).

## Multiple Escalation Paths

You have a decision to make. It is not clear at this time which of these three options makes sense. There are more details on each in the sub-sections below. You can

- A. Go through the rest of the 633.12 process.
- B. Go directly to a fair hearing.

Success is more likely for a Community Class that has been discontinued after previously being approved. Less likely for a class that was never approved to begin with.

- C. Go directly to State Court with an Article 78 case.

We are tracking the progress of advocates who have picked each of these pathways. Today there does not seem to be satisfactory process for appealing community class rejections. It seems likely that as a community we will need either to win an Article 78 case, or get the NYS legislature to intervene with new laws that create a new process.

If we hear news that either 633.12 or Fair Hearing is effective, we will provide immediate updates. And if neither is effective, then we win in the long run by demonstrating that the first two options are exercises in futility. So even if we lose, we win—we collect information which demonstrates the futility. That is why it is so important for each person who challenges a decision to be in touch with the Coalition.

The Coalition is advocating with the Governor's office for changes in Community Class policy:

- eliminate subjective judgements about whether something qualifies.
- expand the activities that qualify, by centering on the freedom of choice of the individual.

For more information on our policy work, see [coalition4sdf.org/initiatives](http://coalition4sdf.org/initiatives).

## Choice A: Continue with the 633.12 process

If you want to look at the actual wording of the regulation yourself, it is available under section 8: [govt.westlaw.com/nycrr/Document/I5039098acd1711dda432a117e6e0f345](http://govt.westlaw.com/nycrr/Document/I5039098acd1711dda432a117e6e0f345)

The process laid out in 633.12 calls for going through three levels of review. You of course will not escalate to the next level if you get a satisfactory answer.

1. An informal process with the Fiscal Intermediary.  
That process ends when the chief executive officer of the FI, or their designee, provides you with written notification of their decision. No timeline is specified.
2. Triggered by your formal written objection to the Director of DDRO\*.  
The regulations specify a strict timeline.
  - a. You send to the Director of DDRO a request for administrative review. See email list under “**Start here**”. You have 14 days after you get that written notification of denial from the FI.
  - b. Hearing scheduled. Within 5 days of your request (or 14 in some cases\*\*), and with at least 10 days notice.  
So in theory you could get a reply the same day as your request, informing you that the hearing will take place ten days later. Or it could take place two years later—there is no upper limit specified in regulation.
  - c. Hearing by hearing officer appointed by Director of DDRO\*.  
For tips on how to prepare for the hearing, see “**Prepare for Administrative Hearing or Fair Hearing**”.
  - d. Written decision. Within 14 days after the hearing.
3. Triggered by a formal appeal by either party, review by OPWDD’s Commissioner or their designee.  
Again, the regulations specify a strict timeline.
  - a. Appeal to the Commissioner, [kerri.e.neifeld@opwdd.ny.gov](mailto:kerri.e.neifeld@opwdd.ny.gov)  
Sent within 10 days of getting the decision.
  - b. Final decision of the Commissioner. Sent within 14 days of the appeal.
4. After those three levels, you can choose to appeal with an Article 78 case.  
You must file the case within four months of the final decision from the Commissioner.

\*The regulations describe the OPWDD review in Step 2 as being performed by the DDSO director. This is outdated terminology. The review is performed by one of the 5 Directors of the DDRO, the Developmental Disability Regional Office—or by someone they assign.

\*\*For a previously approved class, in step 2.b above OPWDD is meant to attempt to mediate the dispute for 14 days before scheduling a hearing.

## Appealing the rejection of a previously approved class

If you had previously been approved for a class, and now are encountering a refusal, then according to regulation the Fiscal Intermediary must give you 14 days notice before terminating the service, and the funding for the class must continue during the entire appeals process unless you specifically agree to “reduce, suspend or discontinue”. Assert your right to have funding for the Community Class continue until the 633.12 process is completed.

## Choice B: Fair Hearing

We believe any denial of service can be appealed through a Fair Hearing. You just need to be armed with the right arguments. On the positive side, two Fair Hearings in 2016 found in favor of people who appealed the discontinuation of Community Classes.

[otda.ny.gov/fair\\_hearing\\_images/2016-3/Redacted\\_7220725N.pdf](https://otda.ny.gov/fair_hearing_images/2016-3/Redacted_7220725N.pdf)

[otda.ny.gov/fair\\_hearing\\_images/2016-5/Redacted\\_7243022N.pdf](https://otda.ny.gov/fair_hearing_images/2016-5/Redacted_7243022N.pdf)

Since then, NYS has been able to convince some Administrative Law Judges—the people who make decisions in Fair Hearings—that those Fair Hearings are not the appropriate venue for an initial denial of Community Classes. Central to their argument is the fact that the individual still has their Self-Direction budget which they could spend elsewhere. This strikes one as a nonsense argument that was won by NYS mainly because the family was not prepared to counter the OPWDD argument that there is “No hearable issue”. Here is one example:

[otda.ny.gov/fair\\_hearing\\_images/2023-12/Redacted\\_8635263R.pdf](https://otda.ny.gov/fair_hearing_images/2023-12/Redacted_8635263R.pdf)

However, they do not always assert that there is no hearable issue. For example, an initial denial case in 2022 was decided by judging the class against the criteria on page 24 of Self-Direction Guidance for Providers. In this case OPWDD did not make the “No hearable issue” argument. We lost, but at least the issue was deemed to be hearable.

[otda.ny.gov/fair\\_hearing\\_images/2022-9/Redacted\\_8460665L.pdf](https://otda.ny.gov/fair_hearing_images/2022-9/Redacted_8460665L.pdf)

### Hearable Issue?

It is possible that the Administrative Law Judges were in error when they decided that there was no hearable case. If discontinuing a service is hearable, then so is not starting it in the first place, since denial and discontinuation are just two different ways of not getting a service.

According to the federal authority that over-see's Medicaid, as documented in “CMS Technical Guidance on the Waiver” [wms-mmdl.cms.gov/WMS/help/35/Instructions\\_TechnicalGuide\\_V3.6.pdf](https://wms-mmdl.cms.gov/WMS/help/35/Instructions_TechnicalGuide_V3.6.pdf)

As provided in §1915(c)(2)(C) of the Act and 42 CFR §441.302(d), individuals have freedom of choice in the selection of home and community-based services or institutional services. .... When an individual is not given freedom of choice of institutional or home and community-based services, the person must be afforded the opportunity to request a Fair Hearing.... [page 190] Many states operate an additional dispute resolution process in addition to the Fair Hearing process. This is permissible so long as an individual is not required to use this process as a prerequisite to accessing the Medicaid Fair Hearing process or the process operates in lieu of the Fair Hearing process. To be acceptable, the mechanism must preserve the individual's right to pursue a Fair Hearing. [page 234]

It appears NYS might be attempting to do something that is not permissible:

Assert the 633.12 process as a substitute for Fair Hearing.

Central to the “not hearable” argument is that the individual still has their budget, and thus it is asserted that nothing has been denied.

By this logic, no discontinuation of services would be hearable. For example, someone has been expelled from a group home. By the logic of ‘they still have budget’, this would not count as denial of service. After all, they are still approved, and the money is still available. This position is contrary to common sense and appears to also be contrary to law.

## Mechanics of making a Fair Hearing Request

Start your request at [otda.ny.gov/hearings/request](http://otda.ny.gov/hearings/request)

On-line forms are available in a dozen languages.

1. Fill out the first page of the form, which is mostly your name and address.
  - a. There is a field asking for your County or NYC Center #. If you are in NYC, just put “unknown” in that field
  - b. Since the State did not inform you of your due process rights, select “My request is NOT about a notice.”

(None)
Discontinuance
Reduction
<input checked="" type="checkbox"/> Denial
Inadequacy
Other (please explain below)

2. On the second page
  - a. at the top you will select either Discontinuance or Denial as the issue, and “Other” as the service
  - b. The agency is OPWDD, and the service is HCBS Waiver Services

Agency	OPWDD
Type of Service	HCBS Waiver Services

- c. There is a text box where you will briefly explain why you think the agency was wrong. You only have 255 characters, so something like  
“Reimbursement for a Community Class was denied, despite the provider meeting the criteria on page 24 of Self-Direction Guidance for Providers.”
3. You will get a letter within a few days acknowledging your request. The hearing will probably occur within three weeks of the request– and most likely a letter with the date of the hearing will come only a few days before the hearing. You will want to spend those weeks preparing for the hearing.

## Prepare for Administrative Hearing or Fair Hearing

If you are going through the 633.12 process, you can likely do an adequate job on your own of pulling together the evidence that Community Class does not violate the six criteria on page 24 of [Self Direction Guidance for Providers](#).

At a Fair Hearing you will be up against New York State lawyers who have been at dozens of Fair Hearings. Ideally, you will also have a lawyer assisting you. The Coalition is working to identify lawyers who can assist you at no or low cost. You will still need to do most of the work yourself, to pull together evidence.

The evidence you need to gather will depend on which criteria the class is accused of violating. Here are all six criteria, numbered for convenience, followed by descriptions of the evidence you will want to gather. The most common reasons for rejection are the first two criteria.

Each of the following are excluded from being funded with the IDGS as a Community Class:

1. Classes that duplicate any Medicaid State Plan or HCBS Waiver service or are conducted by an entity that delivers such services;
2. Classes where participation is restricted solely to people with intellectual/developmental disabilities (I/DD);
3. Classes where there are not established published fees;
4. Classes that are credit bearing for matriculating students;
5. Classes in a setting accessed only by people with I/DD (not including paid staff support), including all certified settings; and
6. Classes that do not adhere to the standards identified in the broader IDGS rules and standards (e.g. experimental therapies).

Participation in specialized classes that take special needs, such as physical limitations or beginner level learning, into consideration are appropriate as long as those specialized classes are open to the broader public.

Most commonly, classes are attacked based on criteria 1 and 2.

For #1, you might want to counter with ways in which the class is not a DayHab or Respite program. Focus on choice, the ability of participants to choose which classes to attend, when to show up and depart. If possible, get figures for how many of the participants are not funded by Self-Direction.

For #2, you might want to gather descriptions from the web-site that make it clear there are no restrictions on participation. The class provider might be willing to provide you with an affidavit formally stating that there are no restrictions. It might be valuable to cite the “specialized classes” sentence from the guidance document.

## Choice C: Article 78 Hearing

An article 78 action is a NYS court case.

To bring an Article 78 action against OPWDD, one must either exhaust all administrative avenues within the agency, or be prepared to demonstrate that those administrative avenues are futile.

- A decision from either the administrative hearing or fair hearing is considered "final agency action", meaning there is no other way within the agency that this question/issue can be further discussed or appealed. The decision can then be further appealed outside of the state agency.
- A long-established principle of common law holds that you cannot be required to engage in futility.
- Generally, Article 78 proceedings **must be filed within four months of the date you receive the decision you want to appeal.**

## Filing an Article 78 Case

This is beyond the scope of this document. You will definitely need a lawyer. The Coalition is tracking several Article 78 cases. If you wish to pursue an article 78, or if you are a lawyer who can help, reach out to us. We can help do 'match-making'.