



# Grievance Process Counter Arguments

A companion doc to ‘Community Classes: Know Your Rights’

First draft: March 5, 2024

## Counter Arguments Overview

When a Fiscal Intermediary turns down your request for a Community Class or other activity, we recommend that you first get their refusal in writing.

After that, you should send them an email reply laying out the case for approval of your class.

This document provides counter-arguments, drawn from our broad community of advocates. A valid counter-argument that worked with one Fiscal Intermediary might not work with another—this is further evidence of the arbitrary and capricious nature of the system as implemented in New York. Our current recommendation is that you go straight to a Fair Hearing if your Fiscal Intermediary continues to reject your request. For details about Fair Hearing go to this page, which has our latest updates and includes link to our “Know Your Rights” document.

[coalition4sdf.org/know-your-rights](https://coalition4sdf.org/know-your-rights)

Or, just go straight to the doc with this link: <https://tinyurl.com/KnowYourRights-2024>

## Get the refusal in Writing

You can skip this step if the Fiscal Intermediary has already given you, in writing, their reasons for refusal. This is a copy/paste from the Know Your Rights document.

### **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]*

# Arguments and Counter-Arguments

‘CommHab worker could do this’

FIs frequently use a variation of this argument, especially to reject a cooking class or a social skills class. A common variation is ‘This is duplicative of CommHab’ or ‘Not a specific subject’.

Counter: Successfully over-turned a rejection at the FI level by working with the provider to get a sample lesson plan and a curriculum for the class, and sending that to the FI. And, at least one FI has rejected a high-quality curriculum and lesson plan created by a teacher with a Masters in Education. So, you never know.

Fair Hearing: This counter-argument has not yet been brought to a Fair Hearing.

‘Due to length of class, duplicative of Respite or DayHab’

Frequently encountered.

Counter: Use real-world examples. Here is a 3 hour 45 minute figure drawing class. Does that make it a DayHab program?

[https://studioclasses.artstudentsleague.org/course/Burban-Elements-of-Figure-Drawing-Anatomy\\_cd\\_2082\\_6102](https://studioclasses.artstudentsleague.org/course/Burban-Elements-of-Figure-Drawing-Anatomy_cd_2082_6102)

Michael Burban				
Elements of Figure Drawing, Anatomy				
Class #2082				
Session	Days	Time	Dates	Price
Mon-Fri	5 days/week	1pm-4:45pm	Mar 2024	\$402

Fair Hearing: This counter-argument has not yet been brought to a Fair Hearing.

‘It is not attended by people who do not have disabilities’

Frequently encountered.

Counter: The guidance says ‘open to the public’, not ‘attended by the public’. Provide a screen shot of the website or brochure showing that there are no pre-conditions. Supplement this with an affidavit from the provider stating that they are open to the public. This has been successful on multiple occasions.

Fair Hearing: This counter-argument has been brought to at least two Fair Hearings. At one the arguments were ignored because the Administrative Law Judge bought the argument that there was no hear-able decision. We are waiting to hear from the other.

‘This provider also offers certified Services, such as Respite or DayHab’

This is valid grounds for rejection. The criteria are clear-cut and unambiguous. This is a Medicaid Provider trying to work both sides of the street, and is not allowed.

# Sample letter with multiple counter-arguments

We created this lengthy letter recently to help with the grievance process for a social skills class. Use as much or as little as you see fit—though we are hoping that the armadillo story gets injected into every grievance, just as a ‘marker’. Let them know that we are organized. The FI decided to reject anyway, and this case is now going to a Fair Hearing.

Dear [Fiscal Intermediary]-

This message is with regard to the Marlene Meyerson JCC's Transitions class.

The claim I am contesting is that this activity is duplicative of Community Habilitation. This claim simply does not hold up under even the slightest of scrutiny. Start with a reminder: CommHab is defined as a face-to-face service, and CommHab workers are paid only for face-to-face time.

In contrast to that, this activity involves a group of individuals who are brought together on a weekly basis, for multiple sessions. The theoretical CommHab worker who would duplicatively create this activity would need to:

1. donate the coordination time required to recruit other people willing to commit to meeting weekly over the course of months;
2. donate the time required to find a meeting place for this group of individuals;
3. pay out of pocket any rental fee for the meeting place.

These are not reasonable expectations. I would hope that the above is sufficient to demonstrate that the activity in question could not be duplicated by a CommHab worker.

Perhaps the claim will now be made that since this activity is done in a group, it is duplicative of Day Habilitation. This claim also does not hold up to scrutiny. Day Habilitation is inherently:

- Available only to people who have OPWDD eligibility,
- Provided by an entity that has been certified to provide HCBS Waiver services.

This activity is neither of those. Instead it is an activity which has been offered to the public by a community organization. Further, Day Hab as described in the NYS HCBS waiver is a service which has door-to-door responsibility for the individual. As described on page 61 of NY.0238.R06.14, retrieved from <https://opwdd.ny.gov/2023-hcbs-waiver-amendment>

▲ The day habilitation program is responsible for "to and from" transportation...

As described on page 24 of Self-Direction Guidance for Providers, the criteria for community activities also includes the restriction that the activity cannot "duplicate any Medicaid State Plan or HCBS Waiver service". The language is very specific-- "duplicate". The wording of the exclusion

- is not 'has some similar characteristics to';
- nor 'reminds some observers of';
- nor 'could achieve the same goals as'.

I am blessed with an active imagination, and so I can find similarities between just about any two things, such as a tin can and an armadillo. I can provide details of the ways that a tin can reminds me of an armadillo, and can even tell you how a tin can could achieve the same goals— both of them can serve as paperweights, and either of them can be a meal for someone who is sufficiently hungry and willing to put in some effort. But no one can reasonably claim that a tin can duplicates an armadillo. Duplicate is a very specific word, meaning "an exact copy".

Now I turn our attention away from armadillos and back to community activities. In general, among the characteristics that differentiate a community activity from a Day Hab are that the activity is not provided by an entity that has been certified to provide HCBS Waiver services. This prevents a traditional provider, such as YAI or AHRC, from slapping a "community class" label on a Day Hab. Another differentiator is that the community activity is open to the general public.

I believe that the above should be sufficient to allow the approval of any community class which is

- A. offered to the public
- B. by an entity which is not a Medicaid Service provider.

I believe the Fiscal Intermediary has discharged its responsibilities under the current set of regulations, if it demonstrates that it has verified these criteria.

In the specific case of the class, the brief description on the web-site is sufficient to demonstrate that it meets the criteria of a community class. Here is the relevant text from their web-site

*In Person.* The class is a program designed for young adults that teaches independent living skills. Lessons include money management, creating and meeting schedules, travel training, meal prep and nutrition and interpersonal skills for the workplace.

I believe the above is sufficient to justify approval of the class by the Fiscal Intermediary.

As the system tries to be ever more person-centered, the personal choice of the person and their family should be one of the first criteria which is evaluated by the FI— and by audit. Therefore, in anticipation of that future state, I offer:

    this specific class is the frequently voiced choice of my child, who is deeply disappointed whenever the class does not meet due to holiday schedule or some other event.

As supplemental evidence, I also attach a document which provides the curriculum for the Winter semester of the program, and a sample lesson plan. These materials were curated by the instructor who is not related to any of the students by either blood or marriage.

Yours, [Me]