

**NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE
OFFICE OF ADMINISTRATIVE HEARINGS**

TO: All Administrative Law Judges **DATE:** September 18, 2007
and Professional Staff

FROM: Henry Pedicone **SUBJECT:** Subpoenas: An Overview

18 NYCRR §358-5.9(e) provides that

“(i)n addition to subpoenas issued at the discretion of the fair hearing officer as allowed by section 358-5.6(b)(8), attorneys for parties in fair hearings shall have the same authority to issue subpoenas as is possessed by attorneys under section 2302 of the Civil Practice Law and Rules.”

Accordingly, a party’s attorney has the authority to issue an administrative subpoena pursuant to CPLR section 2302 prior to the scheduled hearing date. In practice, the ALJ will turn to a party’s counsel to issue any subpoena which that party deems necessary, or, where the appearance is by a paralegal, the ALJ should refer the paralegal to the supervising law office. We have advised legal representatives that we are unaware of any specific form that is available, so it likely will be necessary for them to adapt the language of a judicial subpoena to comport with the provisions of CPLR section 2302.

A local district has argued that it is necessary for a party to obtain a subpoena duces tecum from the supreme court to compel the production of documents by the agency, citing Irwin v. Board of Regents (27 NY2d 292). A complete reading of that case, however, does not support the agency’s position. Aside from the fact that CPLR 2307 (the basis of Irwin) refers to a judicial subpoena and not an administrative subpoena, the Irwin case indicates that CPLR 2307 has no applicability when there is a specific statutory grant of subpoena power to an administrative agency (page 3 of the decision). Social Service Law 34(5)(b) is our specific statutory grant of subpoena power, which the Commissioner has delegated to ALJ’s as well to attorneys for parties to the administrative hearing, under CPLR 2302(a).

Should there be any issue of enforcement of the subpoena, CPLR 2308(b) provides that the issuer of the subpoena or the party on whose behalf the subpoena was issued may move in supreme court to compel compliance. If an attorney represents that an agency or other person has refused to comply with a subpoena, he or she should be advised to apply to the supreme court for relief, unless the target of the subpoena is the social services agency.

Where the documents or witnesses sought are under the control of the social services agency, the provisions of 18 NYCRR §§358-3.7 and 358-4.2 require the agency to comply with requests for documents. §358-5.6 empowers the ALJ to compel the production of witnesses or documents, without requiring a subpoena. Should the agency fail to comply with such requests or directives, the ALJ may fashion a remedy in accordance with §358-3.7(b)(4).

Pursuant to 18 NYCRR 358-5.6(b)(8), the ALJ is empowered to issue or sign a subpoena, when, at his/her discretion, it is necessary to develop a complete evidentiary record. The ALJ may also require the attendance of other agency witnesses at the hearing where it is determined by the hearing officer to be necessary to complete the record. A request for such a subpoena or directive from the ALJ would be made at the hearing, at which time the ALJ would assess whether it was necessary, and whether the matter should be recessed or adjourned to allow for the production of the witness or documents.