

August 2, 2021

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Comment submitted by email to [MedicaidRulesComments@dhhs.nc.gov](mailto:MedicaidRulesComments@dhhs.nc.gov)

**Re: 10A NCAC 21A .0304 — Conducting Department Appeal Hearings by Telephone or Electronic Means**

Dear Madam:

Thank you for the opportunity to submit comments on the North Carolina Department of Health and Human Services' Division of Health Benefits' (NCDHHS) proposed rule regarding Conducting Department Appeal Hearings by Telephone or Electronic Means.

The undersigned are a group of non-profit law firms and advocacy organizations that represent the interests of public assistance claimants across the state of North Carolina. Many of us provide direct legal representation for claimants facing barriers to obtaining benefits such as SSI, SSDI, Medicaid, SNAP, WIC, and other services. Many claimants we serve face barriers to meaningful use of technology due to their financial, geographic, linguistic, and/or socio-economic experiences, or due to their disabilities.

The proposed rule fails to provide claimants adequate options to accommodate their federally protected rights. While we appreciate NCDHHS adapting public assistance de novo administrative hearings during the COVID-19 public health emergency (and other future emergencies), and acknowledge the efficiency of telephonic hearings in some cases, we have several concerns about the current proposed rule's effects. While the proposed rule acknowledges NCDHHS' due process obligations (section (d)), adhering to due process requirements alone does not ensure a process free from discrimination. Further, despite citing to 42 C.F.R 431.242, NCDHHS' proposed rule lacks clarification regarding how, exactly, it will protect claimants' rights to determine their preferred place and method of hearing given their unique needs. Our concerns are detailed herein.

- I. Requiring all claimants to participate in a hybrid model of hearings is a violation of claimants' rights, and in certain instances prohibits presenting an argument without undue interference.

II. Telephonic hearings make it difficult for public assistance claimants to meaningfully access files and evidence, which are critical aspects of state hearings.

**I. Requiring all claimants to participate in a hybrid model of hearings is a violation of their rights, and in certain instances prohibits presenting an argument without undue interference.**

The current proposed rule enables the claimant and their representative to attend hearings at the local county department of social services in person, but requires the hearing officer to attend by telephone without the option for a fully in-person or fully remote hearing. This hybrid model of public assistance hearings will lead to the following violations of law.

The current proposed rule does not provide an opportunity for claimants to choose an in-person hearing or fully remote hearing, thus violating multiple laws protecting the rights of people with disabilities. First, it would violate Section 504 of the Rehabilitation Act of 1973, which prohibits against discrimination on the basis of disability in programs or activities receiving federal financial assistance from HHS.<sup>1</sup> Second, it would violate the U.S. Department of Justice’s “effective communications” regulations interpreting Title II of the Americans with Disabilities Act (ADA).<sup>2</sup> These regulations require that state and local governments “take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others,”<sup>3</sup> unless doing so would fundamentally alter “the nature of a service, program, or activity or in undue financial and administrative burdens.”<sup>4</sup> Further, as the DOJ notes on its website, “effective communications” regulations require state and local governments “to give primary consideration to the choice of aid or service requested by the person who has a communication disability” and “to honor the person’s choice.”<sup>5</sup> Because public assistance de novo appeals have been conducted in person for decades, they will not be fundamentally altered by the provision of an in-person option, and should be provided if chosen by the claimant.

To ensure that Section 504 of the Rehabilitation Act and the DOJ “effective communications” regulations are met, the proposed rule must be amended to allow claimants to choose an in-person hearing or fully remote hearing. Some of our clients’

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<sup>1</sup> 29 U.S.C. § 794.

<sup>2</sup> 28 C.F.R. part 35.

<sup>3</sup> 28 C.F.R. § 35.160(a)(1).

<sup>4</sup> 28 C.F.R. § 35.164.

<sup>5</sup> *Effective Communication*, US DEP’T OF JUST. CIV. RTS. DIV. DISABILITY RTS. SECTION, <https://www.ada.gov/effective-comm.htm> (last visited July 30, 2021).

health conditions, disabilities, and language needs preclude them from having meaningful telephonic hearings. For example, our clients with schizophrenia, bipolar disorder, brain injuries, Schizotypal Personality Disorder, and other conditions associated with active psychosis often experience ideas of reference and delusions of reference that may make it difficult, if not impossible, for them to fully engage with a hearing conducted by telephone. Likewise, claimants experiencing serious physical impairments limiting mobility or mental impairments that affect their ability to function outside of their home, such as agoraphobia, require the ability to attend the hearing remotely by telephone or other electronic means in order to accommodate their disability.

Additionally, the current proposed rule must be amended to ensure reasonable accommodations for claimants who choose a telephonic hearing at the local DSS. NCDHHS must require that all county social services offices have the devices and protocol necessary to ensure effective communications for people with disabilities. For example, all county social services offices will need auxiliary aids and services for people who are deaf or hard of hearing.<sup>6</sup> Failure to account for these reasonable accommodations will be a violation of Section 504. Further, telephonic hearings, if not accompanied by robust and standardized trainings for hearing officers and office staff, may not be able to accommodate the number of participants who need to be in a call. This will affect a significant number of claimants in North Carolina, since according to the U.S. Census Bureau, nearly one in ten (9.4%) North Carolinians below the age of 65 live with a disability.<sup>7</sup>

The current proposed rule will also violate the Age Discrimination Act of 1975, which prohibits discrimination on the basis of age in programs or activities receiving federal financial assistance.<sup>8</sup> Older adults are generally less literate with technology than their younger peers. Additionally, older adults experiencing cognitive decline because of conditions such as Alzheimer's may find that it is easier to engage in in-person communication rather than remote communication.<sup>9</sup> Without the ability to choose an in-person hearing, older adults may be prejudiced in their ability to fully engage in the way necessary to ensure they have a fair hearing.

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<sup>6</sup> These auxiliary aids and services include VP, TTY, and a telephone with amplification or volume control. *Court Access for Individuals Who Are Deaf and Hard of Hearing*, AM. BAR ASSOC. COMM'N ON DISABILITY RTS. (Feb. 2017), <https://www.americanbar.org/content/dam/aba/administrative/commission-disability-rights/court-access-guide-ir-intractv-accsb-rev022317.authcheckdam.pdf>.

<sup>7</sup> *QuickFacts North Carolina*, US CENSUS BUREAU, <https://www.census.gov/quickfacts/NC> (last visited July 30, 2021).

<sup>8</sup> 42 U.S.C § 6101.

<sup>9</sup> See, e.g., *Communication and Alzheimer's*, ALZHEIMER'S ASSOCIATION, <https://www.alz.org/help-support/caregiving/daily-care/communications> (last visited July 30, 2021); *Tips for communicating with a person with dementia*, ALZHEIMER'S SOCIETY, <https://www.alzheimers.org.uk/about-dementia/symptoms-and-diagnosis/symptoms/tips-for-communicating-dementia> (last visited July 30, 2021).

Moreover, the current proposed rule will violate Title VI of the Civil Rights Act, which prohibits discrimination on the basis of one's race, color, or national origin, including one's limited English proficiency (LEP) status.<sup>10</sup> To ensure meaningful access to claimants with LEP, it is vital that teleservices match the specific needs and preferences of the claimant.<sup>11</sup> There is a digital divide among people with LEP. In fact, the Migration Policy Institute has noted that the digital divide is worsened in part because people with LEP may experience difficulty using telephone services without visual cues.<sup>12</sup> Further, the proposed rule may prevent claimants from utilizing in-person interpretation services when they would otherwise be available. A 2021 piece published in the AMA Journal of Ethics noted that utilizing remote interpretation services introduces limitations such as an "impersonal quality that can hamper clear communication of complex health information, especially during emotionally distressing encounters."<sup>13</sup> Further, when hearing officers are unfamiliar with the court technology, they may ask claimants to have either an interpreter or an advocate, but not both – as was noted by the New York Legal Assistance Group regarding citizenship interviews conducted by U.S. Citizenship and Immigration Services ("USCIS").<sup>14</sup> This is very problematic in public assistance cases which may involve the interpreter and hearing officer joining by phone. If the hearing officer is unaware of how to enable a claimant's interpreter to join the call, the claimant's case may be prejudiced as a result. The inability to meaningfully engage in or understand hearings conducted by phone may affect many thousands of North Carolinians, since more than one in ten (11.8%) North Carolinians speak a language other than English at home.<sup>15</sup>

In addition to the discrimination claimants with LEP will face if they cannot meaningfully access interpretation services during the hearing, immigrants with LEP who are forced to participate in hearings by telephone will have to navigate distrust and difficulty establishing credibility that they might not otherwise experience.<sup>16</sup> As the

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<sup>10</sup> 42 U.S.C. § 2000d.

<sup>11</sup> George M. Powers et al., *Telemedicine: Access to Health Care for People with Disabilities*, 17 HOUS. J. HEALTH L. & POL'Y 7 (2017), [https://www.law.uh.edu/hjhlp/volumes/Vol\\_17/V17 - Frieden-FinalPDF.pdf](https://www.law.uh.edu/hjhlp/volumes/Vol_17/V17 - Frieden-FinalPDF.pdf).

<sup>12</sup> Alexis Cherewka, *The Digital Divide Hits U.S. Immigrant Households Disproportionately during the COVID-19 Pandemic*, MIGRATION POL'Y INST. (Sept. 3, 2020), <https://www.migrationpolicy.org/article/digital-divide-hits-us-immigrant-households-during-covid-19>.

<sup>13</sup> Jason Espinoza & Sabrina Derrington, *How Should Clinicians Respond to Language Barriers That Exacerbate Health Inequity?*, 23 AMA J. ETHICS E109 (Feb. 2021), <https://journalofethics.ama-assn.org/article/how-should-clinicians-respond-language-barriers-exacerbate-health-inequity/2021-02>.

<sup>14</sup> *Access to Justice in Virtual Court Proceedings: Lessons from COVID-19 and Recommendations for New York Courts*, NEW YORK LEGAL ASSISTANCE GRP. (July 2021), [https://nylag.org/wp-content/uploads/2021/07/NYLAG\\_CourtsDuringCovid\\_WP\\_FINAL.pdf](https://nylag.org/wp-content/uploads/2021/07/NYLAG_CourtsDuringCovid_WP_FINAL.pdf).

<sup>15</sup> *QuickFacts North Carolina*, US CENSUS BUREAU, <https://www.census.gov/quickfacts/NC> (last visited July 30, 2021).

<sup>16</sup> *2019 Update Report: Reforming the Immigration System. Proposal to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, AM. BAR ASSOC. COMM'N ON IMMIGRATION (March 2019) [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/2019\\_reforming\\_the\\_immigration\\_system\\_volume\\_1.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf).

Brennan Center for Justice noted, research has shown that not being in the room with a claimant may hinder an adjudicator's ability to assess the credibility of the claimant.<sup>17</sup>

Moreover, Section 1557 of the Affordable Care Act will also be violated by the current proposed rule. Section 1557 prohibits discrimination on the basis of race, color, national origin, sex (including both one's sexual orientation as well as their gender identity), age, or disability in any health program or activity, any part of which is receiving federal financial assistance.<sup>18</sup> For the above explained reasons, the proposed rule will discriminate against public assistance claimants on the basis of their national origin, age, and disability.

Further, this proposed rule will deny claimants facing claims of Intentional Program Violation (IPV) for Food and Nutrition Services (FNS) the impartial review to which they are entitled.<sup>19</sup> Hearings for IPVs of FNS programs, such as SNAP or WIC, are adversarial, with a county worker present in the room who has investigated the claimant and is testifying against the claimant. FNS claimants are entitled in these IPV hearings to confront all documents and records against them,<sup>20</sup> which is unlikely to be done in a meaningful way without the hearing officer in the room as an impartial, unbiased party. Further, although federal regulations for FNS programs require that "[s]tate level hearings shall be conducted by State level personnel and shall not be conducted by local level personnel,"<sup>21</sup> claimants are less likely to feel that the state level hearing official is conducting the hearing when the hearing officer is not present in the room.

For claimants with Medicaid, there are additional considerations. Medicaid Aid to the Disabled (MAD) disability hearings must follow the SSI rules laid out in 20 C.F.R. § 416 et seq. to determine eligibility. These SSI regulations require that claimants have the option to appear before the adjudicator in-person, by video teleconference, or by telephone.<sup>22</sup> North Carolina statute also allows Medicaid claimants to receive an in-person hearing. The statute governing NC OAH hearings for contested Medicaid cases dictates that Medicaid claimants still have the right to an in-person hearing in their county.

Hearings shall be conducted telephonically or by video technology with all parties, however the recipient may request

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<sup>17</sup> Alicia Bannon & Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court> (last visited July 30, 2021).

<sup>18</sup> 42 U.S.C. § 18116(a); *Section 1557 of the Patient Protection and Affordable Care Act*, US DEP'T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html> (last visited July 30, 2021).

<sup>19</sup> 7 C.F.R. § 273.15(m).

<sup>20</sup> 7 C.F.R. § 273.15(p)(1).

<sup>21</sup> 7 C.F.R. § 273.15(m).

<sup>22</sup> 20 C.F.R. § 416.1450.

that the hearing be conducted in person before the administrative law judge. An in-person hearing shall be conducted in Wake County, however, for good cause shown, the in-person hearing may be conducted in the county of residence of the recipient or a nearby county.<sup>23</sup>

Finally, there are significant equal protection considerations at issue. Public assistance claimants at state hearings are entitled to the same protection as similarly-situated people in state hearings who are not applying for public assistance. Without the choice of an in-person hearing, claimants at state hearings will not be afforded the same protections as their similarly-situated peers.

## **II. Telephonic hearings make it difficult for public assistance claimants to meaningfully access files and evidence, which are critical aspects of state hearings.**

As public comments on the earlier version of this proposed rule emphasized in April 2020,<sup>24</sup> state law requires that public assistance claimants are provided with robust access to their case information. Despite these protections codified in state law, NCDHHS' proposed rule as written does not comply with the spirit of the statute.

Prior to and during the hearing, the appellant or his personal representative shall have adequate opportunity to examine his case file and all documents and records which the county department of social services intends to use at the hearing together with those portions of other public assistance or social services case files which pertain to the appeal.<sup>25</sup>

Specifically in MAD disability hearings, there is a distinction between Disability Determination Services (DDS) disability files and Department of Social Services (DSS) case summaries. While NCDHHS is already responsible for preparing DSS case summaries, NCDHHS is not adequately positioned to prepare DDS disability files because they are confidential.

Local DSS offices accept and process applications for Medicaid, including assessing financial eligibility. A separate entity, DDS, processes Medicaid disability claims for the State, including developing medical evidence and making a disability determination using the same protocols as outlined for Social Security Disability Benefits. Depending on the claimant, these files may include thousands of pages of medical

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<sup>23</sup> N.C.G.S. § 108A-70.9B(b)(2).

<sup>24</sup> Matthew Jordan Cochran, *Comments to Proposed Emergency and Temporary Rule (10A N.C.A.C. 21A.0304)*, OTT CONE & REDPATH (Apr. 29, 2020), <https://medicaid.ncdhhs.gov/media/7541/download>.

<sup>25</sup> N.C.G.S. § 108A-79(i)(1).

records (a single visit to the emergency room can result in 700 pages of medical records). According to state policy, DDS must “return all medical evidence used to make the disability decision on all Medicaid only applications.”<sup>26</sup>

Our procedural experience in appealing disability denials prior to COVID-19 relied heavily on the physical presence of the hearing officer. Having a hearing officer physically present enabled claimants to meaningfully review and access files, as well as submit new evidence. Representatives’ practice includes bringing (often voluminous to the point of preventing digital transmission) medical records on a disc to hand to the hearing officer. Given limited opportunity to review the file prior to hearing, ethical representation requires submission of all medical evidence available. If public assistance claimants’ files cannot be fully uploaded, transmitted, and reviewed digitally, claimants’ rights will be prejudiced.

Further, the need for county departments of social services to both print and send files to claimants and send evidence presented at the hearing to NCDHHS is an additional cost posed by this proposed rule that is not currently accounted for in the Fiscal Impact Analysis.<sup>27</sup> Finally, during COVID-19, we have experienced a huge discrepancy across county DSS offices in the way that claimants and their representatives have been allowed to access client files. Only in select instances have representatives been able to go to their county DSS office to view their clients’ files. This poses a particularly large concern for pro se claimants, who may not know their rights to view their files, nor the proper method through which to submit documentary evidence or visual aids before the hearing.<sup>28</sup>

## CONCLUSION

A blanket rule that requires a hybrid telephonic and in-person hearing instead of a fully in-person or remote option for public assistance claimants will lead to unnecessary confusion, repetition, frustration, and prolonged hearings which may delay claimants from acquiring the benefits they need and are entitled to. While NCDHHS states that this proposed rule is intended to benefit Medicaid hearing officers through “streamline[d] disposition, reduce[d] staff time spent on travel, and [an] alternative means of holding hearings in the event a local DSS office is closed due to emergency,”<sup>29</sup> it fails to adequately protect the rights of the claimants themselves. Not only does this proposed

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<sup>26</sup> *Aged, Blind and Disabled, Medicaid Manual*, NCDHHS DIV. OF MED. ASSISTANCE MEDICAID ELIGIBILITY UNIT, MA-2525 Sec. IV.D.1. (Nov. 1, 2017), <https://policies.ncdhhs.gov/divisional/health-benefits-nc-medicaid/adult-medicaid/policies-manuals/documents/ma-2525-disability>.

<sup>27</sup> *Fiscal Impact Analysis of Proposed Rules*, N.C. OFFICE OF STATE BUDGET AND MGMT., <https://www.osbm.nc.gov/media/1821/open> (last visited July 30, 2021).

<sup>28</sup> *Remote Hearings and Access to Justice During COVID-19 and Beyond*, THE CALIFORNIA COMMISSION ON ACCESS TO JUSTICE (May 18, 2020), <https://www.ncifcj.org/wp-content/uploads/2020/06/2020-Remote-Hearings-Guide.pdf>.

<sup>29</sup> *Rules Actions*, NCDHHS NC MEDICAID DIV. OF HEALTH BENEFITS, <https://medicaid.ncdhhs.gov/meetings-notice/rules-actions> (last visited July 30, 2021).

rule not meet the needs of claimants, but it will also undoubtedly lead to new challenges in court, increasing caseloads rather than relieving them.

We urge NCDHHS to consider these comments in order to improve health outcomes and economic security for public assistance claimants across the state. Ultimately, it is imperative that NCDHHS not only follow due process requirements, but further, that it ensure public assistance claimants have a meaningful hearing.

We have included numerous citations to supporting research, including direct links to the research. We direct NCDHHS to each of the studies we have cited and made available through active links, and we request that the full text of each of the studies cited, along with the full text of our comment, be considered part of the formal administrative record for purposes of the North Carolina Administrative Procedure Act. If NCDHHS is not planning to consider these citations part of the record as we have requested here, we ask that you notify us and provide us an opportunity to submit copies of the studies into the record.

We would welcome opportunities to discuss further our comments or our work ensuring access to public assistance across the state. If you have any questions, please contact Cassidy Estes-Rogers at [cassidyr@charlottelegaladvocacy.org](mailto:cassidyr@charlottelegaladvocacy.org).

Respectfully submitted,

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