Minutes of Rulemaking Public Hearing
May 20, 2020 10a.m. to noon

Staff Present
Shazia Keller, DHB Rulemaking Coordinator
Lorianne Caskey, DHB Appeals Chief

Member of the Public Present
Matthew Jordan Cochran, Ott Cone & Redpath

Purpose of Hearing
This purpose of this hearing was to solicit verbal and/or written comments from the public on the North Carolina Department of Health and Human Services, Division of Health Benefits' proposed temporary rule10 NCAC 21A .0304 published in the North Carolina Register on May 15, 2020, pages 2102-2104.

Hearing Summary and Transcript of Comments
The public hearing was conducted telephonically due the to the prohibitions on mass gatherings, mandate to stay at home and social distancing requirements mandated by Executive Order No. 120, 121 and 135. The meeting was opened by Shazia Keller at 10:01a.m.. There was one member of the public present for the hearing. The oral comments from Michael Jordan Cochran were recorded. The speaker was not limited in his speaking time due because he was the only member of the public to make comments.

Matthew Jordan Cochran, Ott Cone & Redpath Transcript of Comments
Okay. All right. Well, again, my name is Matthew Cochran. I'm with the firm of Ott Cone and Red Path, and we assist countless individuals in Medicaid eligibility-related activities regularly at different levels of appeal.

Sometimes we are assisting folks, and they never need an appeal. Which is, of course, a good thing for everybody. But this rule is, of course, particularly interesting to me and to those of us who work in the world of Medicaid eligibility on behalf of the applicants and beneficiaries because it impacts a fairly broad spectrum of interests, procedurally speaking at least.

And so, because of our familiarity with the existing process, we thought it was important to comment on the way we see some of these changes impacting that process.

So, at the outset, I want to discuss, basically, so the overview is much like you saw in our comment letter, and that was, I believe, posted or it actually would probably be posted on DHB's - I'm on the materials.

But in any case, Shazia, my letter to you and to the rules comment's folks was organized along four basic points.

One is to try and seek clarification as the scope of the rule.
The other is to talk a little bit about that triggering event or, in other words, who gets to decide when a proceeding ought to be remote versus, perhaps, rescheduled or maybe even in-person, notwithstanding the emergency.

The other - third item would be based, because looking at the statutory requirement for review of case file documents and to insure that the requirement is honored in the context of a remote hearing.

And then, the fourth and final item is to emphasize a need for some sort of mechanism to address flexibility or to address the limitations, be they technical or otherwise of not only the appellant, but any witnesses, fact witnesses that may be needed in the proceeding.

So that review in place, I'll start with item one, which is, you know, the focus being on scope, the applicability of the rule.

Right now, the rule talks in terms of in-county hearings. And the thing that troubles us just a little bit about that is it's not entirely clear what is meant by in-county.

Now we do believe that there is some indication in the initial or the introductory phrases of the rule because it says, "The Public Assistance and Social Services appeal's file, pursuant to general Statute 108A-79."

Well, of course, within 108A-79, are not only local appeals, but also, de novo appeals. And in my little world, we sometimes refer to these as local appeals and state appeals.

And that may not be the best set of labels, but really, we're talking about local appeals under GS 108A-79(d). And then, the de novo administrative hearing under 108A-79(i).

Those two categories of appeals, I believe are what are contemplated in the statute. So, the phrase in-county appeal or in-county hearing or in-county appeals hearing, we don't think that's particularly helpful. It creates a little bit of confusion, and it suggests, perhaps, that either only local hearings or only de novo hearings are to be conducted remotely.

Now, in practice, we know that at this point, most, if not all of the state hearing officers, have been scheduling and conducting the de novo hearings by phone.

But there's still a few situations in which local hearings have been, if they're a little bit more difficult to get clarification from DSS staff, as to whether they believe they're required to do this as well.

So, and again, looking at and making sure we are clear on the scope of the rule, we think the appropriate scope is, of course, both the local appeals, as well as the de novo administrative appeals.

And to the extent that the department agrees with that view, then we would perhaps suggest that there be some language tweaked just a bit within paragraph 1 of the existing rule to replace phrase, "in-county appeal hearings," and similar phrases with just "the requested hearing."

Because that's what we're always talking about, a hearing requested under 108-79, which could be either the local or the de novo. So that's splashed out a little bit more plainly in our written comments.

But that's the main concern as to scope, wanting to make sure that's it clear that this applies to both types of hearings that are in that statute.

The second category of concern is the, what I'm referring to here as the trigger, meaning, you know, what is the standard for determining whether or not the telephonic or electronic hearing or remote hearing is going to be the methodology for that proceeding?

Right now, the rule is set up in such a way so it says the Department, basically has carte blanche. So, the Department may, okay? That's sort of unbridled discretion right now.

And, obviously, in practice, the Department is doing things by telephone, you know, as far as I can tell at present. Particularly, again, with the state or de novo hearings. And, of course, with the oral arguments before the Chief Hearing Officer, I believe those are also being done by telephone right now.

But, I believe that it's important for the rules to at least address in some manner that, to the extent that the Department has not seen fit to do a remote hearing, for whatever reason, should that sort of situation arise, that it would be appropriate to hold a remote hearing upon the request of the appellant.

So, in other words, it ought not be that only the Department can determine that a remote hearing would be appropriate, but also, that the appellant would be able to make that determination.

So that, for example, if an individual is, in fact, ill, perhaps they have COVID-19 and yet they do need to provide the fact, you know, factual evidence or any other information as part of that hearing.

If a local hearing officer, for example, at a county DSS office were inclined to insist upon an in-person hearing, it ought to be - the rule ought to be worded such that the actual appellant could say, "No. I'm requesting that the hearing be conducted remotely, and I have medical circumstances," for example.

So that, again, I'm just talking about the language right now that's encapsulated in paragraph 1 of the rule, which says the Department may require conducting, you know, the hearing in that fashion.

It ought to be augmented such that says, the Department may, and upon the request of the appellant, shall be conducted in the remote fashion.

You know, the idea here is that the rule ought to at least acknowledge whose rights these are that we're talking about. They are due process and statutory rights that belong to the appellant.

They're not the rights of the state or the county. So, the individual whose rights they are ought to have some say in determining whether or not this is, in fact, the way that hearings are going to be conducted in a given case.

So, again, the Department shouldn't have the total say so because, in the event that someone is inclined to act arbitrarily or capriciously, at particularly at the county level, it would be problematic.

The third category of concern I mentioned earlier, but the idea of the statutory right to review of the case file, both local proceedings and de novo proceedings, under 108A-79, have provisions that allow the appellant or his representative to have an adequate opportunity to examine - I'm quoting here from statute - "to examine the contents of his case file for the matter pending, together with those portions of other public assistance or social services case files that pertain to the appeal," etcetera, including documents or records which the county and the Department of Social Services intend to use at the hearing that would pertain, of course.

The local and similar language exists almost, almost identical language exits with respect to de novo state hearings. Well, you know, just as there are risks related with requiring appellants and agency staff to attend in-person hearings, there are risks imposed by requiring these individuals to visit DSS or state offices in Raleigh to examine a case file.

We've already had at least a couple cases in which state hearing officers have refused to provide documents that they relied upon in reaching their decision. They said, "Oh, you can come to Raleigh to look," or "You can come to an office to look at it."

Well, that's seems a bit arbitrary to me and a little bit inconsistent if you're ordering a remote hearing, and then, refusing to provide copies of the documents upon which you're relying to render a decision, that is no good.

So, in our view, it's important that the rule here, while providing full remote hearings, also protect the statutory rights of the appellant to review the case documents and the documents that are going to be used that pertain to the appeal.

That is something that, again, we've already seen the practical negative consequence of failing to do so. I think the rule ought to be amended, you know, augmented again here within a provision that is - makes it good. Those rights ought to be preserved through some mechanisms during the remote hearing.

So, for example, as we've suggested in our comment letter, there could be an initial paragraph to the rule that makes it clear that when there is to be a remote hearing, a copy of those case files, of those items described in the statute, is to be provided for examination electronically in some manner.

Or perhaps even mailed out if there's not an ability to transmit or receive, like, an encrypted email, for example. But we know the Department does have, generally speaking, the capability to provide documents electronically. At least, I've seen that myself to be the case.

And so, we think that there needs to be something here in this rule that reminds hearing officers and anyone involved in these proceedings, that it's not just a matter of scheduling a phone call and having folks talk a bit, and then, going home.

That review of the case file and review of documents piece of the statute has to be honored. So that's what we are emphasizing here as a need in this rule in this context.

You know, the rule, basically - this rule should not be used to abrogate the appellant's statutory rights.

And then, finally, in kind of a related note perhaps, I want to emphasize the need for flexibility here. There are going to be situations where the appellant and their witnesses or other folks who have relevant testimony may be not be able to participate by phone.

They may not be able to participate even, you know, even, for example, there might have been times where they could have gone to the office of their representative to utilize the facilities of the representative for a phone or even, you know, a video conference or whatever it might have been.

But in the current climate and COVID-19 emergency situation, even that is not necessarily an option.

So, there are going to be situations which the individuals who are needed to make sure the proceeding is conducted appropriately cannot necessarily participate in that manner.

And so, one thing we're asking is that the rule be reevaluated to make sure that it addresses those situations. So, it might that for persons who need to provide additional fact witnesses in their proceedings, those be rescheduled until such a time that something can be done in person or until such a time that they're able to obtain the means to participate remotely.

At present, it's seems to be matter of or the practice seems to be that the hearing officer sends out a notice by mail, and that it does encourage or invite the representative or the appellant to contact the hearing officer to provide telephone information.

But there's really not a clear sort of policy on what to do when other parties, witnesses for example, are needed, but are not able to participate by phone.

So we think this rule is an opportunity to make that policy manifest to insure that, again, the due process that's protected by the constitution and, of course, by the statute, 108-79, make sure that's preserved in the language of this rule and so that it operates in a way that preserves those protections.

So those are, effectively, all of my comments. Again, I am urging a reference again to our written comments from, I think, April 29. And I am happy and eager to answer any questions.

Adjournment

The entire hearing was monitored for additional members of the public who may have joined later in the meeting (during or after Mr. Cochran's comments) who also wished to comment on the proposed rule. Announcements were made to confirm whether new member of the public had joined at 10:44 a.m. , 11:02a.m., 11:15am, 11:3,a.m. and 11:56 a.m. No additional members had joined the meeting. The public hearing was adjourned at noon. DHB will accept additional written comments through May 22, 2020. All comments will be fully considered.