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VIA E-MAIL (medicaidrulescomments@dhhs.nc.gov)

Ms. Shazia A. Keller
Rulemaking Coordinator
Division of Health Benefits
N.C. Department of Health & Human Services
2501 Mail Service Center
Raleigh, N.C. 27699-2001

RE: Comments to Proposed Emergency and Temporary Rule (10A N.C.A.C. 21A.0304)

Dear Ms. Keller:

I write to comment on the above-referenced emergency and temporary rule circulated via your memorandum dated April 24, 2020. My firm assists in connection with the pursuit of Medicaid benefits by many thousands of individuals annually. Through these activities, we regularly interact with local Departments of Social Services ("DSS") in many counties across the state regarding Medicaid eligibility. When the agency denies these individuals' Medicaid benefits, the eligibility dispute is frequently resolved through one or more administrative hearings governed by N.C.G.S. § 108A-79 and pertinent federal regulations.

In light of the unique challenges imposed by COVID-19, it is important that Medicaid hearings and appeals efficiently utilize available telephonic and electronic procedural tools. Nevertheless, any regulations affecting this appellate process should be unmistakable in their meaning and scope. Moreover, they should remain sufficiently comprehensive with respect to the due process required by the U.S. Constitution as well as other rights set forth in state law. These issues are addressed in turn below.

Clarity Regarding Scope/Applicability

Section 108A-79 describes two distinct types of administrative hearings that are available to Medicaid applicants and recipients wishing to dispute decisions made concerning their eligibility. The first type is the "local appeal hearing" in which the presiding agency official is "the county director or a designated representative of the county director." N.C.G.S. § 108A-79(d) (emphasis added). The second is the "de novo administrative hearing" conducted by a hearing officer designated by the Department. *Id.* § 108A-79(i) (emphasis added). Both types of hearings ordinarily take place at the local DSS office.

Unfortunately, the proposed rule does not track the above distinctions and, as a result, is unclear in its scope. It refers both to "in county appeal hearings" and "in county hearings." It is impossible to discern whether these labels refer to local hearings, de novo hearings, or both, given that both types of

hearings mandated by statute ordinarily occur within the walls of a county DSS office. The structural context of the proposed rule does not aid in interpretation, either. Although the rule would be included among the group of regulations appearing under Section .0300 (labeled "appeals"), the other rules contained in that section do not uniformly apply to one or both types of hearing. In short, the phrase "in county" is not effective as shorthand for either of the proceedings described in subsections 108A-79(d) and (i).

To address this ambiguity correctly, the rule should abandon the phrases "in county appeal hearings" and "in county hearings." In lieu of each, the rule should simply reference "the requested hearing." This will clarify that telephonic or electronic means may be used for both types of hearings that can be "filed pursuant to G.S. 108A-79" (to quote the rule's introductory phrase).

Standard for Requiring Telephone or Electronic Hearings

In its current form, the proposed rule appears to grant the agency unbridled discretion as to whether to require that any given hearing be conducted by telephone or electronically. Although many of the Department's hearing officers recognize when hearings ought to be conducted remotely in light of COVID-19, this is not uniform throughout the agency—particularly among DSS personnel. The proposed rule does not provide any standard by which the agency is to determine whether telephonic/electronic hearings are to be required. Absent that standard, the rule is impermissibly vague and invites arbitrary decision-making to the detriment of vulnerable populations.

To address these problems, the rule should include a bright-line triggering mechanism. Specifically, during the current health emergency, hearings should be conducted by telephone or electronic means not only when the agency deems it necessary, but also when the appellant requests it. After all, these are due process rights granted by the Constitution to the appellant, not the state. The enclosed redline copy of the rule proposes a revision to paragraph (1) to clarify that telephonic/electronic hearings are to be triggered not only by "the Department" but also by the request of the appellant.

Hearing Documents, Appellant's Case File

State law requires that individuals be provided robust access to their Medicaid case information in connection with both local and de novo hearings:

> Prior to and during the [**local**] hearing, the appellant or his personal representative shall have adequate opportunity 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 which pertain to the appeal, and all documents and records which the county department of social services intends to use at the hearing.[1]
>
> Prior to and during the [**de novo**] 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.[2]

1 N.C.G.S. § 108A-79(e)(4).

2 *Id.* § 108A-79(i)(1).

Just as there are COVID-19 related risks associated with requiring appellants and agency personnel to attend hearings in person on DSS premises, unnecessary health risks would be created if appellants or their representatives were required to visit DSS in order to examine their case file and review hearing documents.

To ensure the agency honors the appellant's right to examine his or her case files and related documents pursuant to subsections 108A-79(e)(4) and 108A-79(i)(1), the proposed rule should be modified to require that those items be delivered electronically to the appellant and his or her representative prior to the hearing. Although encrypted e-mail is an ideal means of transmitting such materials, the rule should provide that the agency may transmit them using any other means agreed upon by the appellant or his or her representative. The enclosed redline copy of the rule proposes a new paragraph (3) to address these issues.

Needs of Appellant and Witnesses

Some appellants or their fact witnesses will not have access to telephone service or electronic communication technologies. If the agency were to insist upon a remote hearing despite the fact that these persons do not have such means, the result could be a violation of the appellant's constitutional and statutory rights. And in no case should the agency dismiss an appeal (or otherwise unfavorably dispose of it) simply because the appellant cannot be reached remotely. For these individuals, the agency should consider rescheduling the hearing for a date on which COVID-19 related considerations do not prevent an in-person proceeding. Although the language of proposed paragraph (2) seems to encourage hearing officers to be attentive to the parties' needs, it remains critical that relevant agency personnel fully honor due process requirements in determining the appropriate time, place, and method for hearings.

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Thank you in advance for your careful consideration of these comments. I look forward to further discussion of the issues, including during the public meeting currently set for May 20, 2020 at 10:00am. Please contact me at any time if I can be of assistance as this process moves forward.

Sincerely,

OTT CONE & REDPATH, P.A.

Matthew Jordan Cochran

Enclosure

Recommended Changes for Emergency/Temporary Rule

10A NCAC 21A .0304 CONDUCTING ~~IN COUNTY APPEAL~~ HEARINGS BY TELEPHONE OR ELECTRONIC MEANS

For public assistance and social services appeals filed pursuant to G.S. 108A-79:

(1) The Department may, and upon request of the appellant or his or her representative shall, require conducting ~~in county appeal hearings~~ the requested hearing by telephone or feasible electronic means.

(2) The Department shall notify the appellant and his or her representative by First Class U.S. Mail when ~~in county hearings are~~ the requested hearing is required to be conducted in this manner ~~by First Class U.S. Mail~~ and shall make hearing arrangements considering ~~the technology medium~~ means of communication available to the appellant the appellant's witnesses, and the appellant's representative.

(3) When a hearing is required to be conducted by telephone or electronic means, a copy of the case files, documents, and records that the appellant is entitled to examine under G.S. 108A-79(e)(4) or G.S. 108A-79(i)(1), as applicable, must be delivered to the appellant and his or her representative prior to the day of the hearing via encrypted e-mail or other means upon which the parties agree.