



**Minutes of Rulemaking Public Hearings
June 17, 2021, 10:00 am-10:30 am**

Staff Present

Shazia Keller, DHB Rulemaking Coordinator
Lori Anne Caskey, DHB, Hearings and Appeals
Eva Fulcher, DHB, Eligibility and Enrollment
Kim Harron, DHB, Paralegal

Others Present

Matthew Cochran, Ott Cone & Redpath PA

1. Purpose of Hearings

A. Proposed Amendment to 10A NCAC 21A .0304 and 10A NCAC 23B .0102

The purpose of this public 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 adoption and amendment of 10A NCAC 21A .0304 and 10A NCAC 23B .0102 published in the North Carolina Register on June 1, 2021.

2. Hearing Summary and Transcript of Comments

The public hearing was opened by Shazia Keller at 10:00 am. There was 1 member of the public present for the hearing. One oral comment (from one speaker) was recorded for the amendment of rule 10A NCAC 21A .0304. No comments were provided regarding the amendment of rule 10A NCAC 23B .0102. The following is a transcript of these public comments:

A. Adoption and Amendment of rule 10A NCAC 21A .0304

(1) Matthew Cochran, Ott Cone & Redpath PA

That's right. Thank you for your time this morning. Obviously, I understand this rule, the proposed rule is sort of a carryover in part from the temporary rule, which was put together last year when COVID struck.

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And in many respects, I think the rule is okay. There are questions though in the sense that it appears to be focused exclusively on the convenience of the hearing officers and the perceived savings of their continuing to be able to attend and conduct hearings remotely which is all fine except that the language of the rule seems to extend that flexibility solely to the hearing officers and not to the individual whose rights give rise to the hearing to begin with, which is the applicant or recipient.

So the most fundamental concern that we have at present is that the rule seems to, depending on how it is interpreted, it could be read to require that the individual who is appealing the Medicaid determination require that they go to DSS even though the hearing officer will be operating remotely. This would also seem to indicate that the individual's representative would have to appear at DSS notwithstanding the remote attendance of the hearing officer.

I would be - I know this is not supposed to be a discussion, to the extent that that perception is accurate or inaccurate, it would be useful to know that before other parts of the Administrative Procedures Act are implemented, such as rules review commission. But knowing - not knowing exactly the intent, I have to say that it is concerning that the rule would purport to extend that remote flexibility only to the hearing officer. And I will pause here in case it's possible for someone to respond to that point.

>> I think we will stick to the purpose of today's hearing that is set out in statute, which is to collect comments today.

>>All right. In that case, I will proceed just a bit more assuming...

>>Okay.

>>...that - unfortunately, that's going to require that I put words in the mouth of the agency to a degree. But if fundamentally the statute that we're dealing with here is one that requires hearings to be held in the county. It's NC - you know, statues section 108A-79 Subparagraph I basically says that if there's an appeal for example, in a case involving disability, the county director shall notify the department, et cetera. The department shall designate a hearing officer who shall promptly hold a de novo administrative hearing in the county.

I think there is a good case to be made that the statute requires things to be conducted in the county. After that prepositional phrase, it would be a lot easier to, you know, implement something that is considerably more flexible.

However, if the rule is going to exempt the physical participation of the hearing officer, it is just manifestly unjust to demand that an applicant or their representative be there physically. It has the impact - because so many of these individuals, by the way, are not able to secure their own legal counsel, but instead must rely upon the counsel being provided to them at no cost or the service of representatives.

It is critical that they be allowed the same flexibility as the state when it comes to scheduling and the means and place and location and manner of the hearings. The way the rule's set up right now, it does not accommodate that, that if it's what is intended by the department is problematic, not only unduly one-sided but also in violation of CMS standards, Centers for Medicare and Medicaid Services, the standards that pertain to how the due process rights of the individual ought to be honored.

And CMS guidance points out that the proceedings have to basically go out of their way here. And I'm paraphrasing provisions from the state Medicaid manual, among other things. But these mechanisms have to be reasonable from the perspective of the enrollee or the applicant or the beneficiary, the appellant basically, and their representative.

Because As I mentioned so many of these individuals rely upon representative services being provided at no cost to them, that means that those representatives must generally be many places at once, which it is - if the rule is interpreted or enforced as prohibiting the participation of representatives, these individuals will be denied the assistance of their representative because the representative simply cannot be in the DSS office.

So I would caution the agency against implementing something that is patently one-sided and extending flexibilities, particularly in light of the fact that we are still needing to confront the overriding mandate of the general statutes regarding the hearing happening in the county.

If there is a concern about hearing officers not liking having to dial in numerous parties and so that's a complaint, okay fine. There are ways around that problem. But if

the idea here is to ensure that only the state retains the flexibility that were crafted during the crisis that's just wrong. It's not useful to the well regulated public. It is strictly a move that seems to be related around - from savings and that is not a sufficient basis for a due process impact, at least not according to CMS.

So I would strongly caution or urge the agency to think about that. And if I'm - again, if I'm putting words in the mouth of the department here that are inappropriate because that's not what the department intends, then good. But ultimately yes, our position is that this rule is not going to be within the agency's authority to the extent that it is outside of the parameters for the implementation of due process as set forth by CMS.

And if it is indeed a one-sided deal where only the hearing officers get to participate remotely, it's going to fail the standards that are imposed by CMS. So for that, I will - that's essentially the concern that is in place right now.

The remaining - I should mention this is as well. The main concern is that although the fiscal note is largely correct in pointing out that other states have allowed certain things to happen by phone, et cetera, as a matter of due process principles, it's worth remembering that every single hearing decision that's issued every single tentative decision, for example, has language in it, like the following, the boilerplate. You know, it says, taking into account the appropriate factors for judging credibility, including but not limited to demeanor of the witnesses, et cetera.

Well, that's not going to be there anymore if it's all being done remotely by telephone certainly. But video conference that was - that's another matter. But it's fictitious or it's farcical to continue to claim that the individual presiding over the evidentiary hearing has the ability to observe the demeanor of the witness, for example.

This is going to be particularly significant in dealing with disability related appeals, individuals who are seeking medical assistance on the basis of a disability that has been denied by DDS who are then seeking review about the hearing officers. It very well may be that a very significant part of that, not just credibility analysis, but also factual analysis involves the observation of an individual and to see how they present to see the difficulties which they may move about or other similar factors.

So a process that does - that essentially excludes the possibility of an individual having their physical attributes, their demeanor, et cetera, observed visually by the hearing officer is problematic, is going to require that the hearing officers no longer can claim to have observed any demeanor because this is not happening. So that's just - that's the other area.

So those two main issues, I think they need to be addressed. Thus far in our experience with these, the department's rules, there's not been very much of the transparency as far as intent.

But I would like to know a little bit more about the intent of the department through some mechanism, maybe not today, but somehow because if indeed we are imputing to the department an intent that's not there, we certainly want to know that to ensure that we're not tilting at windmills. In any case, I appreciate the opportunity to provide these comments. Thank you.

3. Adjournment

The hearing was adjourned at 10:30 a.m. The North Carolina Department of Health and Human Services, Division of Health Benefits will take all comments received into consideration.