

3 May 2021

Committee on Adjudication
Administrative Conference of the United States
1120 20th St NW, Suite 706 South
Washington, DC 20036

Re: Virtual Hearings in Agency Adjudications Project
Comments to Draft Recommendation for May 4, 2021

Dear Committee Members,

Thank you for the opportunity to submit comments for the Administrative Conference of the United States (ACUS), Committee on Adjudication's project to address Virtual Hearings in Agency Adjudication. We very much appreciate the Committee's transparency in allowing the public to view the meetings and the discussion by Committee members. We represent low-income New Yorkers seeking disability benefits from the Social Security Administration, and we offer now these observations based on our experience with our clients and their capacity to use and access to the relevant technologies discussed in this project.

Legal Services NYC is the largest organization exclusively devoted to the provision of free civil legal services to the poor in the nation. Legal Services NYC offices include Brooklyn Legal Services, Bronx Queens Legal Services, Manhattan Legal Services and Queens Legal Services. Each program supports a disability advocacy project, which provides free legal assistance directly to low-income residents seeking to obtain or maintain Social Security disability benefits.

The Empire Justice Center is a statewide not-for-profit law firm. Our mission is to protect and strengthen the legal rights of poor, disabled or disenfranchised people in New York through systems change advocacy, training and support to other advocates and organizations, and high quality direct civil representation. As part of our mission, we represent a number of low-income disability claimants before the Social Security Administration (SSA).

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As Co-coordinators of New York State’s Disability Advocacy Program (DAP), we work with advocates throughout New York State who provide similar services, in particular advocates who are funded by the State of New York under the DAP grant to represent low-income claimants who have been denied disability benefits. This year, the DAP program represented approximately 3,500 individuals before SSA.

We offer information about these clients, with respect to their ability to engage in virtual hearings before the Social Security Administration. Our comments relate to the Committee on Adjudication’s Draft Recommendation for May 4, 2021.

1. Comments on Lines 47-48 that “individuals often own the equipment needed to participate in virtual hearings”

Our practices serve individuals with little or no income. Clients served by New York State’s DAP grant have income that is at or below 200% of the federal poverty guidelines. More than half of our clients are people of color. At Legal Services NYC, at any given time, about 10% of our clients lack access to a telephone, either a mobile or a land line. The proposed language in the report at Lines 47-48 is consistent with our experience, but a small yet significant segment of potential participants lack the personal equipment to participate.

Low-income individuals often do have a mobile phone, but it is not consistently a smart phone or a mobile phone with a clear camera or clear (unbroken) screen. So, while the mobile phone may work for telephone calls, it is not certain that all these mobile phones will be usable for virtual or video connections. Also, low-income individuals do not necessarily own tablets or personal computers that may be used for virtual hearings. This is particularly true for our homeless clients. In our client population, those individuals with phones often do not have enough available data to support a video hearing: a one-hour meeting using the Microsoft Teams platform (used now by SSA) will use up 2.7 GB of data¹ but a typical mobile plan includes that much data for the *entire month*.²

2. Comment for Lines 78-79 “the effectiveness of virtual hearings depends on individuals’ access to a suitable internet connection ... ”

Our low-income client base does not uniformly have access to a suitable internet connection. In New York City, too many low-income individuals lack an internet connection because of poverty. One study found that nearly 42% of American seniors generally lacked even broadband access at home, and Medicaid recipients are more than two times more likely to be offline and persons with functional limitations are twice as likely to be off-line.³ Some counties in New York State simply do not have access broadband services in the entire county.

¹ See <https://www.griffith.edu.au/staff/working-remotely/data-usage>.

² See <https://www.tomsguide.com/best-picks/best-prepaid-phone-plans>.

³ See Older Adults Technology Services (OATS) and Humana Foundation, *aging Connected: Exposing the Hidden Connectivity Crisis for Older Adults*, January 2021, available at <https://oats.org/wp-content/uploads/2021/01/Aging-Connected-Exposing-the-Hidden-Connectivity-Crisis-for-Older-Adults.pdf>.

(For example, in Allegheny County, there is only 75.9% coverage; Cattaraugus County, only 80.6%; Cayuga County, 84.7%; Chenango, 82.9%; Cortland County, 89.2%; Hamilton County, 23.7%; Lewis County, 76.9%; Livingston, 87.4 Seneca County, 84.3%; Steuben County, 86.4%; Washington County, 87.1%; Wyoming County, 84.7% and Yates County, 73.2%).⁴ In New York City, where the counties have close to complete coverage, nearly one-third of households lack a broadband subscription due to poverty.⁵ More importantly, more than half of low-income New York City residents lack a home broadband subscription and about a third of Black and Hispanic individuals overall lack a home broadband subscription.⁶

Finally, adequate access to the internet includes “an individual’s ability to obtain tools such as computers and smartphones, as well as consistent connection to the internet. As such, access can be varied and does not have a one-time cost, but requires multiple recurring expenses over time. For example, an individual may have inconsistent access due to the constant need to add prepaid mobile airtime or replace and repair technologies. Families might also share a single device between multiple individuals, which limits each person’s access.”⁷

3. Comment to Line 80 “a space from which to participate”

For individuals in Social Security hearings, it is critical that they have a private space from which to participate, not just a space. Many of our low-income clients lack private space, as they live in shared spaces to save money. Our homeless clients are hard-pressed to find private space, and many must vacate any assigned shelter sleeping space during the day even if they are in the shelter system.

4. Comment to Lines 84-85 “Some individuals may have difficulty or be uncomfortable using ... internet-based videoconferencing software”

Many disabled claimants lack the capacity to download and manage the software, and they will need training and tech support in advance of a hearing. Your report envisions support in Lines 90-94, but the description may not cover agencies that will need to put in place more formally guaranteed support. As a practical matter, many clients and advocates now experience issues before a telephone-only SSA hearing, and they report it is impossible to contact the hearing office for help or alert the hearing office to an issue. Virtual hearings for many will require individuals to download the software and then set it up. For example, SSA is using a Microsoft Teams-based platform, but most of our client base does not use this format at all and may well be “seeing” it for the first time in the video hearing. One DAP provider in Manhattan,

⁴ See <https://broadbandnow.com/New-York>.

⁵ *Truth in Broadband: Access and Connectivity in New York City*, New York City Mayor’s Office of the Chief Technology Officer, April 2018.

⁶ *Id.*, p. 13-14; see also *The New York City Master Plan*, New York City Mayor’s Office of the Chief Technology Officer, January 2020.

⁷ Alexis Cherewka, Migration Policy Institute, *The Digital Divide Hits U.S. Immigrant Households Disproportionately during the COVID-19 Pandemic*, Sept. 3, 2020, available at <https://www.migrationpolicy.org/article/digital-divide-hits-us-immigrant-households-during-covid-19>, citing the Organization for Economic Cooperation and Development.

the Urban Justice Center’s Mental Health Project, arranges for all clients to come to the office for a Teams-based hearing, even though the office remains closed for general business, because clients cannot download and operate this program. This practice is being adopted in other DAP programs across the state as well. This may work for represented clients, but obviously leaves out the unrepresented populations.

The Committee has, in the past, recognized some groups of individuals whose disabilities may impede effective participation in virtual hearings.⁸ This list may be too narrow: many individuals with disabilities have cognitive limitations, processing limitations, limitations in managing frustration or in problem solving, for example, which will interfere with their capacity to download and install new technologies and programs. Research has shown that “people with mental health difficulties may be more likely to experience digital exclusion because they are also more likely to be socially excluded ... in a sample of outpatients diagnosed with schizophrenia, depression, or anxiety disorders, only 36% reported having ever used the internet, with the primary barriers to internet use including financial costs, lack of skills or knowledge, cognitive difficulties, and access.”⁹ These limitations may also impact the ability to participate in the hearing. Symptoms such as paranoia and severe anxiety can make it difficult and distracting to participate virtually in a hearing.

Finally, individuals with limited English proficiency are especially negatively impacted by the “digital divide” and can be disadvantaged if forced to participate in a virtual hearing.¹⁰ Experts have noted that “the gap in access to communications technology is often larger for people of color, those with lower incomes, and those with lesser levels of education. Immigrants who fall into these subpopulations appear to be especially vulnerable to digital inequities.”¹¹ Interpreter services also do not adequately address the challenges faced by individuals with limited English proficiency or are deaf or hard of hearing.

Conclusion. We agree with the Committee that virtual hearings will be an excellent option in many instances. There are, however, specific segments of the population who cannot participate. Such individuals fall within three primary groups: (1) low-income individuals whose poverty creates a barrier to access to high quality personal devices or to private internet services; (2) individuals whose disabilities prevent effective engagement in a virtual hearing as well as in the set-up and management of a virtual hearing; and (3) individuals with limited English proficiency. Among these populations there is a disproportionate representation of people of color, and, as a result, a disparate impact.

Previously, the Committee has recognized that agencies offering virtual hearings need to allow for reasonable accommodation requests where a claimant whose disabilities may impair

⁸ See ACUS, *Legal Considerations for Remote Hearings in Agency Adjudication*, Staff Report, June 16, 2020, p. 15.

⁹ Ben Greer, et. al. *Digital Exclusion Among Mental Health Service Users: Qualitative Investigation*, J Med Internet Res., Jan. 9, 2019, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6329420/>

¹⁰ See Cherewka, *supra*, n. 4.

¹¹¹¹ *Id.*

effective participation.¹² For virtual hearings through SSA, the agency is highly likely to have ample evidence of the disability and limitations and would not have to develop procedures to develop that aspect apart from its current process in most cases so long as potential participants know about the process to request an accommodation. Policies relating to reasonable accommodations cover only some of the individuals who may not be able to participate, however, specifically excluding individuals for whom poverty has eliminated access to necessary technological elements.¹³

Our experience with clients raises concerns that some potential participants will be left behind or left out in a shift to virtual hearings, and we thank the Committee for letting us discuss these concerns before final recommendations are made.

Sincerely,

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¹² ACUS, *Legal Considerations for Remote Hearings in Agency Adjudication*, Staff Report, June 16, 2020, pp. 10-11, 15.

¹³ See also Brennan Center for Justice, *The Impact of Video Proceedings on Fairness and Access to Justice in Courts*, September 10, 2020, available at <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court>.