



**CONSORTIUM FOR CITIZENS  
WITH DISABILITIES**

January 14, 2019

Nancy Berryhill  
Acting Commissioner  
Social Security Administration  
6401 Security Boulevard  
Baltimore, MD 21235-6401

**Submitted via [www.regulations.gov](http://www.regulations.gov)**

**Re: Notice of Proposed Rulemaking on Setting the Manner for the Appearance of Parties and Witnesses at a Hearing, 83 Fed. Reg. 57368 (November 15, 2018), Docket No. SSA-2017-0015**

Dear Acting Commissioner Berryhill:

These comments are submitted on behalf of the Co-Chairs of the Social Security Task Force of the Consortium for Citizens with Disabilities (CCD). CCD is a working coalition of national consumer, advocacy, provider, and professional organizations working together with and on behalf of the 57 million children and adults with disabilities and their families living in the United States. CCD's Social Security Task Force ("CCD Task Force") focuses on disability policy issues in the Title II disability programs and the Title XVI Supplemental Security Income (SSI) program.

The undersigned CCD Task Force Co-Chairs (Co-Chairs) write to express our strong opposition to the changes proposed in this Notice of Proposed Rulemaking (NPRM). It is our position that every individual with a disability should have a right to an in person hearing before an Administrative Law Judge (ALJ) or Disability Hearing Officer (DHO) if she determines that would be the best manner to appear to establish that she qualifies for or to continue to receive Social Security disability benefits. We urge the agency to retain its current opt-out system for video hearings and allow claimants to retain this right.

The agency fails to make the case in this NPRM that the current opt-out system prevents the efficient administration of the disability programs or that the changes proposed will lead to a more efficient system. Although a video hearing can be appropriate and lead to a statutory compliant eligibility determination in many cases, it is not appropriate for certain individuals and mandatory video hearings might lead to inappropriate denials and unnecessary appeals as a result.

## **Current opt-out system does not need to be changed**

SSA's current policy generally allows claimants to opt out of ALJ video hearings by submitting a written objection. After SSA sends a claimant a notification about the possibility of a video hearing, the claimant has 30 days, with some exceptions, to object. SSA already encourages claimants to keep the video hearing option to speed up their processing time, but still many claimants believe it is more appropriate for them to have an in-person hearing. Claimants have the right to a hearing and should keep their right to choose the type of hearing they receive.

Most claimants awaiting an ALJ hearing do not object to video hearings. In Fiscal Year 2018, SSA received 620,164 requests for ALJ hearings and only 216,484 video hearing opt-outs.<sup>1</sup> This is similar to the approximately 30% of opt-outs the NPRM reports in Fiscal Year 2015 and approximately 32% in Fiscal Year 2017. SSA, therefore, can schedule hundreds of thousands of cases for video hearings each year under its current rules. SSA has not published any data on video hearing opt-outs by claimants' geographic location or their assigned hearing office.

SSA met its goal of performing 28% of ALJ hearings via video in Fiscal Year 2014. SSA's goal for Fiscal Year 2015 was to perform 30% of hearings by VTC but they only performed 27% of their hearings by VTC that year.<sup>2</sup> SSA has chosen not to set any goals about the percentage of hearings performed by VTC in subsequent Annual Performance Plans. There is no indication that SSA has significantly increased its capacity to perform a greater percentage of hearings by VTC. In Fiscal Year 2018, 28.5% of hearings were performed by VTC.<sup>3</sup> Given that approximately two-thirds of claimants are willing to have video hearings and SSA appears to have the capacity to schedule fewer than one-third of hearings via VTC, there is no apparent reason for SSA to remove the opportunity for claimants to opt out.

## **NPRM fails to make the case that removing choice from claimants increases efficiency**

Although SSA claims in the NPRM that video hearings are more efficient, it fails to provide recent data to support that claim. SSA has also not provided data to support the argument that opting out of a video hearing increases the time a claimant will wait for a hearing. Three of the eight hearing offices with the longest average processing times so far this fiscal year are National Hearing Centers (NHCs), which perform nearly all of their hearings via VTC, while none of them have a lower processing time than the national average.<sup>4</sup> In addition, the most recent data which SSA includes in the preamble to support its efficiency arguments to demonstrate that video hearings reduce processing time is quite old, with the most recent being from a 2012 Office of the Inspector General Report that looked at hearings data from 2009 -2012.<sup>5</sup> In

---

<sup>1</sup> Caseload Analysis Report supplied to National Organization of Social Security Claimants' Representatives by SSA via FOIA request.

<sup>2</sup> <https://www.ssa.gov/budget/FY17Files/2017APP.pdf> p.43.

<sup>3</sup> [https://www.ssa.gov/appeals/DataSets/06\\_Hearings\\_Held\\_InPerson\\_Video\\_Report.html](https://www.ssa.gov/appeals/DataSets/06_Hearings_Held_InPerson_Video_Report.html) (FY18 data downloaded and retained by NOSSCR staff).

<sup>4</sup> [https://www.ssa.gov/appeals/DataSets/02\\_HO\\_Workload\\_Data.html](https://www.ssa.gov/appeals/DataSets/02_HO_Workload_Data.html) as of 10/26/18.

<sup>5</sup> OIG, Congressional Response Report: Current and Expanded Use of Video Hearings, A-05-12-21287, at 3 (June 18, 2012), available at: <https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-12-21287.pdf>; OIG, Use of Video Hearings to Reduce the Hearing Case Backlog, A-05-08018079,

addition, even that report could not say for certain than any reduction it found in hearing processing time during the time period it studied could be attributed to video hearings<sup>6</sup> Furthermore, even if the hearing is scheduled faster, the decision may not arrive quicker, given SSA's lengthy and unevenly-distributed decision-writing backlog.

Efficiency is also hampered when a video hearing is disrupted due to technical difficulties. According to the same Office of Inspector General report, 236 video hearings needed to be rescheduled in FY 2011 due to technical problems.<sup>7</sup> It is unclear how many hearings have needed to be rescheduled in fiscal years since that time, but it is unlikely that any claimants who had their hearings rescheduled due to technical difficulties had their hearings sooner than they would have if they had been scheduled for in-person hearings in the first place.

### **Section 504 of the Rehabilitation Act requires a claimant to be able to have an in person hearing as a reasonable modification**

Of particular concern to the undersigned Co-Chairs, some claimants will not be able to meaningfully participate in a video hearing, potentially preventing SSA from making an accurate determination and violating Section 504 of the Rehabilitation Act (Section 504). The proposed rule does not provide a process for claimants or other participants in a hearing (ALJs, experts and other witnesses, representatives, etc.) to request the reasonable modification of an in-person hearing.

Section 504 of the Rehabilitation Act of 1973, as amended ("Section 504") "prohibits Federal agencies and programs that receive Federal funding from discriminating against qualified individuals with disabilities."<sup>8</sup> A qualified individual is defined as someone with a physical or mental impairment that substantially limits one or more major life activities.

Many people involved in the disability determination process are qualified individuals. Every beneficiary receiving a continuing disability review, and every claimant who is awarded benefits after an ALJ hearing, has at one point been found by SSA to have a severe impairment or combination of impairments, meaning that the impairment(s) "significantly limits [his or her]

---

at 3 (April 22, 2011), available at: <https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-08-18070.pdf>.  
23 SSA, OIG, Use of Video

<sup>6</sup> See OIG Congressional Response Report, p. 7 "Determining the exact contribution of VTC to the improved hearing timeliness versus other Agency actions is difficult. While national average processing times for hearing cases has declined (see Figure 3),<sup>14</sup> this may relate to a number of factors. For instance, during FYs 2010 and 2011, ODAR added or expanded 28 hearing offices, satellite offices, and National Case Assistance Centers (NCAC).<sup>15</sup> As a result, in addition to video hearings, individuals in otherwise remote and backlogged regions were being served through in-person hearings at new hearing offices."

<sup>7</sup> OIG Congressional Response, page 11, footnote 25

<sup>8</sup> [https://www.ssa.gov/accessibility/504\\_overview.html](https://www.ssa.gov/accessibility/504_overview.html). It is also unclear how the proposed rule will fit with SSA's existing subregulatory guidance about requesting accommodations under Section 504, which allows field offices and hearing offices to grant certain accommodations by themselves; see POMS GN 00211.001

<https://secure.ssa.gov/poms.nsf/lnx/0200211001>. This appears to be in conflict with the proposed rule, which would not allow ALJs to grant the modification of an in-person hearing.

physical or mental ability to do basic work activities.”<sup>9</sup> This makes it very likely they are qualified individuals. Many claimants who are not awarded benefits after an ALJ hearing, as well as some representatives, medical and vocational experts, interpreters, witnesses, ALJs, DHOs, and support staff may also be qualified individuals within the definition of Section 504.

Federal agencies have an affirmative duty to make “reasonable modifications” for qualified individuals.<sup>10</sup> Some qualified individuals would need the modification of an in-person hearing. Given that SSA currently conducts approximately 70% of hearings in person, the modification of providing in-person hearing appears to be reasonable. Yet the proposed rule does not indicate any process by which such a modification would be requested or granted. The prefatory matter to the proposed rule says that for ALJ hearings “we...will determine how parties and witnesses will appear at the hearing...an ALJ may continue to identify case-specific facts that affect which manner of appearance is most efficient. However, the agency will have the final responsibility to determine in which manner the individual must appear.” For CDR hearings before DHOs, “the State agency or the Associate Commissioner for Disability Determinations, or his or her delegate” will do so. This is not precise enough to allow claimants and their representatives (or others, such as an ALJ or witness) to communicate with SSA or state agencies about the need for a reasonable modification. Although SSA has a Center for Section 504 Compliance,<sup>11</sup> it is unclear what role the Center had in developing this proposed rule and what role it might play in administering this rule if it were finalized.

The prefatory matter to the proposed rule states “we will evaluate the specific circumstances of each claimant’s or beneficiary’s case to determine what is the most efficient and appropriate manner of hearing” and “whether there are circumstances in the case that provide a good reason to schedule an individual to appear by VTC or in person” but this is not feasible. The proposed rule does not explain what a “good reason” for scheduling a video or in-person hearing might be, or how claimants and other participants in a hearing might communicate with SSA or state agencies about their good reasons.

SSA and state agencies cannot simply look at the evidence in the file at the time a hearing is scheduled, because hearings must be scheduled 75 days in advance and evidence can be submitted up to 5 business days before hearings in most cases—and submission closer to the hearing date is allowed under certain circumstances and in certain claim types.

Even if all the evidence was submitted when the hearing was scheduled, it would not necessarily be sufficient to show if a reasonable modification were needed. People with the same impairment might need different modifications: some people with epilepsy have seizures triggered by television screens, while others do not. Some people with intellectual disability can understand a VTC proceeding while others—even others with the same IQ test scores—cannot.

Claimants may have impairments that are not considered severe or are not included in their applications, such as mild hearing loss or vision changes, but which, in combination with other

---

<sup>9</sup> 20 CFR §404.1520; a slightly different definition applies to children.

<sup>10</sup> See *Alexander v. Choate*, 469 U.S. 287 (1985).

<sup>11</sup> [https://www.ssa.gov/accessibility/504\\_overview.html](https://www.ssa.gov/accessibility/504_overview.html)

impairments, may necessitate the reasonable modification of an in-person hearing. According to the National Institutes of Health’s National Institute of Deafness and Other Communications Disorders, “about 2 percent of adults aged 45 to 54 have disabling hearing loss. The rate increases to 8.5 percent for adults aged 55 to 64. Nearly 25 percent of those aged 65 to 74 and 50 percent of those who are 75 and older have disabling hearing loss.”<sup>12</sup> People in their 40s and older also often begin to experience vision changes that lead to difficulties reading and performing other close work, decreased color perception, and difficulty handling glare.<sup>13</sup>

Furthermore, evidence in a claimant or beneficiary’s file generally only relates to that person’s impairments. It does not indicate whether a witness, representative, adjudicator, interpreter or other participant in the hearing has a disability requiring a reasonable modification and the proposed rule describes no way for such participant to indicate their need for modification.

The prefatory matter to the proposed rule says “all video hearings rooms are section 504 compliant based on the capacity for individuals attending a hearing, providing equal access to hearings for claimants with disabilities.” This sentence is not grammatical or clear, but to the extent it can be understood, it is not accurate. Stating that a room is “section 504 compliant” does not make it so, because as described below, many of the rooms used for video hearings are too small to accommodate power wheelchairs or to be comfortable for a person with severe claustrophobia, as just two examples of their potential noncompliance. Even if a claimant can get into a room, that does not make a video hearing conducted in such a room compliant: a person with a hearing impairment may not be able to hear proceedings if there is an echo or background noise; a person with a cognitive impairment may not be able to understand that the person on the screen can see her and is determining her eligibility for benefits.<sup>14</sup> People with different disabilities have different needs and Section 504 requires individualized modifications.

If SSA were to create a Section 504-compliant process for accepting and deciding on requests for the reasonable modification of an in-person hearing, the process would need to be individualized and responsive to the qualified individual’s specific needs. Such a process might be different for ALJ hearings versus those conducted by DHOs at state agencies; state agencies are staffed by state government employees and as such their proceedings could also be required to comply with the Americans with Disabilities Act.<sup>15</sup> Creating a Section 504-compliant process is likely less efficient than the current process of allowing people to opt out of video hearings. The current process does not require individuals to identify their disabilities but allows them to opt out of a video hearing if their disabilities make having an in person hearing a reasonable modification.

If SSA does not create a Section 504-compliant process, the agency could be sued both in individual cases and in class actions. SSA has already indicated to the Administrative

---

<sup>12</sup> National Institutes of Health, National Institute of Deafness and Other Communications Disorders. “Quick Statistics” <http://www.nidcd.nih.gov/health/statistics/pages/quick.aspx>

<sup>13</sup> American Optometric Association, “Adult Vision: 41 to 60 Years of Age” <http://www.aoa.org/patients-and-public/good-vision-throughout-life/adult-vision-19-to-40-years-of-age/adult-vision-41-to-60-years-of-age?sso=y>. See also National Eye Institute “Age Related Eye Diseases” [https://nei.nih.gov/healthyeyes/aging\\_eye](https://nei.nih.gov/healthyeyes/aging_eye)

<sup>14</sup> A claimant’s representative from Georgia noted that her client, who had a traumatic brain injury, believed she was on a movie set when she arrived for her video hearing.

<sup>15</sup> See [https://www.ada.gov/ada\\_title\\_II.htm](https://www.ada.gov/ada_title_II.htm)

Conference of the United States and the Judicial Conference that the agency struggles to handle its current federal court caseload; SSA has already dealt with class actions involving 504 violations, like *American Council of the Blind v. Astrue*,<sup>16</sup> which enmeshed the agency in nearly seven years of litigation and settlement activity.<sup>17</sup> Creating a situation where the agency must defend itself against additional suits seems unwise.

### **Claimants should retain choice because of space and technological problems with video hearing sites**

Despite some progress in making SSA video hearing sites “state of the art,” many video hearing locations remain far from it. Claimants and their representatives report a litany of technical difficulties including but not limited to: the physical space assigned for video hearings (e.g. too small, not soundproofed), inaudible parts of the hearing transcripts, audio dropping out, tiny video screens, screens positioned behind hearing participants, lack of anyone available to assist with technological problems, makeshift rooms being used resulting in temperature control issues (some way too hot, some way too cold), inability to hear the judge over hearing monitor typing (if one is present in the room), muffled and incoherent testimony, video and audio feeds that drop, and equipment that routinely malfunctions, just to name a few.<sup>18</sup>

Problems with remote hearings are compounded when additional participants, such as vocational and medical experts and interpreters, are also participating remotely. When the claimant, ALJ, interpreter, and expert are all in different locations, technological problems are more frequent and participants’ ability to observe and understand each other are limited. Therefore, the proposal to make remote participation by experts the default is concerning and inappropriate.

Although we support having video hearings as an option for claimants who want a video hearing despite these potential problems, we oppose requiring someone to have a video hearing and subjecting them to these potential problems against their will, especially when it might not decrease a claimant’s wait time at all.

### **Video hearings are inappropriate for some claimants**

The prefatory matter to the proposed rule says “VTC technologies offer expanded service options for parties, especially for geographically and otherwise isolated claimants.” However, some of these claimants are willing to travel for an in-person hearing. If “isolated claimants” are more likely to be scheduled for VTC hearings than claimants in more densely populated areas, this negates the idea of nationwide program uniformity. Additionally, some claimants, both in

---

<sup>16</sup> Case No. 05-04696 (N.D. Cal. Oct. 3, 2008)

<sup>17</sup> See <https://www.clearinghouse.net/detail.php?id=10899>

<sup>18</sup> See National Organization of Social Security Claimants’ Representatives, Comments Re: Notice of Proposed Rulemaking on Setting the Manner for the Appearance of Parties and Witnesses at a Hearing, 83 Fed. Reg. 57368 (November 15, 2018), Docket No. SSA-2017-0015, December 21, 2018, Appendix 1, for a more complete discussion of technological problems with hearing sites, available at <https://www.regulations.gov/document?D=SSA-2017-0015-0041>.

urban and rural settings, may find that the video hearing site is in fact further from their home,<sup>19</sup> or a more difficult journey (perhaps with less accessibility via public transportation, or fewer nearby parking spaces) than what they would have experienced traveling to their local hearing office. The claimant's individual circumstances, from their precise address to their preferred mode of transportation, could affect whether a video or in-person hearing is more appropriate, and the person most capable of making that determination is the claimant. Although SSA says it will make case-specific determinations based on the facts in the file, it would be impossible for the unnamed SSA official who will be making these determinations to be aware of many of these considerations and hence include them in determining the most appropriate and efficient manner of appearance for many claimants.

There are some aspects of a claimant's appearance that can never be adequately conveyed by video or telephone, such as odor. Grooming and hygiene are among the "activities of daily living" SSA considers when evaluating claimants under several listing categories, including hematological, immune, neurological, musculoskeletal, and mental disorders.<sup>20</sup> Body odor can also be present and useful for assessing the severity of disorders such as Phenylketonuria (PKU) or hidradenitis suppurativa. The decisionmaker's ability to assess the claimant's body odor can therefore be important in cases where the claimant's limitations in performing activities of daily living affect whether a claimant meets a listing, or the claimant's residual functional capacity. Such a claimant may reasonably prefer a hearing where the decisionmaker can smell him or her. Additionally, ALJs who turn on the cameras when the claimant is already seated and turn them off immediately after the hearing concludes miss seeing how the claimant walks, sits, and rises. Video hearings also make it more difficult to notice facial expressions (such as wincing of pain), a claimant who mutters under his or her breath, skin lesions, or other subtle indications that can be important to the decision-making process.<sup>21</sup>

Social Security Ruling 16-3p requires adjudicators to evaluate whether claimants have medically determinable impairments that could reasonably be expected to produce the individual's alleged symptoms, and then to determine whether the intensity, persistence, and limiting effects of an individual's symptoms limit the ability to perform work-related activities for adults and ability to function independently, appropriately, and effectively in an age-appropriate manner for children.<sup>22</sup> As SSR 16-3p notes, an ALJ should "consider an individual's statements about the intensity, persistence, and limiting effects of symptoms, and [then] evaluate whether the

---

<sup>19</sup> For example, a claimants' representative from New Jersey reported in December 2018 that his client, who lives in Millville, New Jersey, was scheduled for a remote hearing where the client would need to travel to Egg Harbor, "a substantially longer drive than going to the South Jersey office [the claimant's assigned hearing office based on address] which is in Pennsauken, New Jersey....When I asked if the remote ALJ would be willing to simply hold the hearing with us in Pennsauken, we were met by various objections."

<sup>20</sup> 20 C.F.R., Appendix 1 to Subpart P of Part 404.

<sup>21</sup> As a claimants' representative wrote, "People who would be negatively impacted by a video hearing include anyone with a gait disturbance or shuffling gait; anyone with a tremor; anyone with unusual mannerisms or tics; anyone disheveled, malodorous or dirty; anyone with anxiety that may be tapping or shaking their legs; anyone with a hearing problem, even if that is not the basis of their disability claim; anyone whose disability can be visually observed. Depending on the set up of a VTC hearing, the ALJ sees only the claimant's face or, at the most, the claimant from the waist up."

<sup>22</sup> Social Security Ruling 16-3p, [https://www.ssa.gov/OP\\_Home/rulings/di/01/SSR2016-03-di-01.html](https://www.ssa.gov/OP_Home/rulings/di/01/SSR2016-03-di-01.html)

statements are consistent with objective medical evidence and the other evidence.”<sup>23</sup> Although these determinations are not assessments of the claimant’s character and truthfulness, an ALJ must still evaluate the claimant’s testimony and decide whether it comports with other evidence in the case. Decisionmakers may make different findings on this topic in remote hearings versus in-person ones. Research shows that in court proceedings, “live observers rated the witnesses’ appearance in a more positive way and perceived them as being more honest than did video observers.”<sup>24</sup> Therefore, in cases where decisionmakers must determine whether a claimant’s statements about the intensity, persistence, and limiting effects of symptoms are consistent with other evidence, remote hearings are substantively different than in-person ones and could reasonably impede the decisionmaker’s ability to issue a policy compliant decision.

Other aspects of SSA’s policy require knowledge of local conditions. For example, SSR 18-3p (and SSR 82-59, which was rescinded and replaced by SSR 18-3p on October 29, 2018) allows for good cause exceptions to SSA’s requirement that claimants must comply with prescribed treatment if it would be expected to restore the individual’s ability to engage in substantial gainful activity if followed. SSR 18-3p indicates one such good cause situation is when the “individual is unable to afford prescribed treatment, which he or she is willing to follow, but for which affordable or free community resources are unavailable.” SSR 82-59 had slightly different text, allowing for good cause exemptions when an “individual is unable to afford prescribed treatment which he or she is willing to accept, but for which free community resources are unavailable.” Claimants whose communities do not have affordable resources for a prescribed treatment might reasonably choose an in-person hearing with an ALJ familiar with local health care options rather than a remote hearing performed by someone who lacks this local knowledge.

### **Hearing notice should not be shortened for an amended or supplemental hearing unless 75 days’ notice is waived**

SSA should not finalize its proposal to shorten the length of time given when a hearing notice is amended or a supplemental hearing is scheduled.

SSA changed the amount of notice claimants are entitled to from 20 days to 75 days in a rule that became effective on January 17, 2017.<sup>25</sup> In the notice of rulemaking, SSA said “In order to minimize the burden on claimants, we have decided to adopt the commenters’ suggestion that we continue to provide at least 75-day advance notice of a hearing, as we have done under the rules

---

<sup>23</sup> *Id.*

<sup>24</sup> Sara Landström et al., “Witnesses Appearing Live Versus on Video: Effects on Observers’ Perception, Veracity Assessments and Memory” *Appl. Cognit. Psychol.* 19: 913–933 (2005). *See also* Landström, S., Ask, K. & Sommar, C. (2015). The emotional male victim: Effects of presentation mode on judged credibility. *Scandinavian Journal of Psychology*, 56, 99–104 (finding that “The complainant was perceived as more truthful when communicating live, as opposed to via video”); Landström, S., Granhag, P. A. and Hartwig, M. (2007), Children's live and videotaped testimonies: How presentation mode affects observers' perception, assessment and memory. *Legal and Criminological Psychology*, 12: 333-348. doi:[10.1348/135532506X133607](https://doi.org/10.1348/135532506X133607) (“The live observers perceived the children in more positive terms and rated the statements as being more convincing than did video observers....Live observers had a better subjective, as well as objective, memory of the children's statements than video observers.”)

<sup>25</sup> 81 Fed. Reg. 90987 (December 16, 2016)

we have been applying in the Boston region since 2006.” Circumstances have not changed in the less than two years since this rule went into effect and SSA should not change the amount of notice provided to claimants.

It is worth noting that when SSA proposes to send amended notices or notices of supplemental hearings “at least 20 days prior” to a hearing, claimants and appointed representatives may receive the notice fewer than 20 days before the hearing. SSA generally allows 5 days mailing time for notices to arrive,<sup>26</sup> meaning that in some cases notices will not be received until 15 days before the hearing.

It would be inappropriate for SSA to only provide 20 days’ notice about a change to the date or time of a hearing. Whether a hearing is performed via VTC or in person, claimants often need to arrange transportation (paratransit, ride from friend or relative, etc.), arrange childcare, reschedule medical appointments, or meet other needs. Allowing 15 days to perform these tasks once the notice is received is not sufficient in many circumstances.

Reducing notice time to just 20 days will lead to difficulties when hearings are rescheduled at a time that the claimant or representative cannot attend—for example, when the representative has already been scheduled for a hearing in another hearing office or in court, or when the claimant already has an important medical appointment. Given SSA’s staffing challenges, it can take several days or weeks to receive a response to a request to reschedule a hearing, even when good cause exists. Providing a minimum of 15 days once the notice is received is not workable.

The proposed rule is especially troubling because of how it interacts with SSA’s program uniformity rule, which imposes a deadline of 5 business days before the hearing for the submission of evidence, pre-hearing briefs, or objections to issues raised in the notice of hearing, and a 10 business day deadline for subpoena requests.<sup>27</sup> It may be impossible for a claimant who receives an amended notice of hearing 15 calendar days before the hearing to make a subpoena request 10 business days before the hearing, and it may be challenging to meet the 5-day deadlines as well. If the proposed rule is finalized, ALJs (and eventually the Appeals Council and federal courts) may be tasked with determining in more cases whether evidence, subpoena requests, and other materials submitted after the deadline meet good cause exceptions for late submission. This is not efficient.

Sending notices changing the manner of the hearing less than 75 days before the hearing is inappropriate unless the claimant agrees to waive his or her notice rights. The problems discussed above with mandatory video hearings are amplified when a claimant receives so little notice. Claimants may have to arrange transportation to a different location, representatives will need to prepare their clients for a different type of hearing, and SSA will need to respond to Section 504 requests for reasonable modification, all within scarcely more than two weeks once

---

<sup>26</sup> See, e.g., HALLEX I-3-1-1 (“The AC presumes the claimant received the notice of the ALJ’s decision or dismissal five (5) days after the date of the notice, unless there is a reasonable showing to the contrary”); POMS DI 12027.008 (“Presume that the notice was received 5 days from the actual notice date, unless there is reason to believe otherwise.”)

<sup>27</sup> See note 45, *supra*.

mailing time is taken into consideration. While SSA should continue to allow claimants to opt out of video hearings, claimants who are willing to participate in VTC should still be provided 75 days' notice that they will receive such a hearing.

SSA can already, and often does, ask claimants if they will waive 75 days' notice for a rescheduled or supplemental hearing, or an amended notice of hearing. For example, SSA is currently testing a Voluntary Standby List as part of its CARES plan for reducing the hearings-level backlog. Most claimants who have the ability to attend a rescheduled or otherwise modified hearing on short notice will do so because of their profound interest in obtaining a decision for which they have already waited years. But to require claimants to act on very short notice because of factors that are often completely outside of their control, such as SSA incorrectly describing the issues to be addressed at a hearing or an ALJ making last-minute changes to his or her schedule is unfair and ultimately inefficient for the agency.

## **Conclusion**

The undersigned Co-Chairs urge SSA to rescind this NPRM and retain the current policy of allowing claimants to decide the manner in which they appear for a hearing. For many claimants, the outcome of a hearing before an ALJ can mean the difference between being able to put food on the table or going hungry, keeping a roof over one's head or being homeless, and getting needed medical treatment and worsening health, and, in some cases, death. Because of the critical importance of the outcome to claimants, claimants should retain the right to determine which manner of appearance is the most beneficial in each case. The claimant, with counsel from his or her representative, is in the best position to determine whether appearing before an ALJ by video will allow the ALJ to accurately access the claimant's impairments (and their impact on the ability to work) and, as importantly, whether the claimant can meaningfully participate in the hearing if conducted by video.

A claimant should be able to have an in person hearing even if it means that it might take a little longer for the hearing to occur. This is especially the case because SSA fails to establish in this NPRM that scheduling a hearing via video will occur more quickly or make the process more efficient. SSA completely fails to demonstrate that there is a need to make the changes outlined in this NPRM. SSA has more than enough claimants willing to have a hearing via VTC to meet its goals and rebalance its workloads without denying claimants their rights under Section 504 of the Rehabilitation Act. Given the technological problems with many hearing sites, the likelihood of increased appeals to the Appeals Council and Federal Court, and the clear violation of Section 504 of the Rehabilitation Act created by this proposal, the changes if enacted could actually lead to increased processing times and inefficiency.

Thank you for the opportunity to comment on these proposed regulations.

Respectfully submitted,

**Lisa Ekman**

National Organization of Social  
Security Claimants' Representatives (NOSSCR)

**Jeanne Morin**

National Association of  
Disability Representatives

**TJ Sutcliffe**

The Arc of the United States

**Tracey Gronniger**

Justice in Aging

**Web Phillips**

National Committee to  
Protect Social Security and  
Medicare