



July 18, 2023

Acting Commissioner Kilolo Kijakazi  
Social Security Administration  
6401 Security Boulevard  
Baltimore, MD 21235-6401

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

Re: Setting the Manner of Appearance of Parties and Witnesses at Hearings, Docket No. SSA-2002-0013

Dear Acting Commissioner Kijakazi:

Thank you for the opportunity to submit comments on SSA's proposal related to setting the manner and appearance of parties at witnesses at hearings. These comments are submitted on behalf of the co-chairs of the Social Security Task Force (SSTF) of the Consortium for Citizens with Disabilities (CCD). CCD is the largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society. Since 1972, CCD has advocated on behalf of people of all ages with physical and mental disabilities and their families.

We greatly appreciate that the Social Security Administration (SSA) is taking steps to improve hearing efficacy and to increase flexibility for claimants. We hope that any changes implemented will improve claimants' access to adjudicative processes and ultimately, benefits. We are concerned, however, that some of these changes will have the opposite effect and instead may present obstacles to claimants, as outlined below.

**I. The Default Manner of Appearance Should Remain In-Person, With an Opt-In for a Hearing via Technological Alternatives.**

We appreciate the benefits of expanded options for hearings before ALJs. Providing multiple manners of appearance is critical to making hearings as accessible as possible and will be a boon to claimants. However, we believe that while expanding the means of appearance is a worthwhile goal, changing the default means of appearance is misguided and will hurt at-risk claimants.

As SSA acknowledged in its proposal an alarming 30% of claimants did not respond to the audio notices sent during the pandemic. Instead of justifying shifting the default, this data supports the opposite: it indicates that many claimants are not receiving the notice or do not understand their options. The manner of appearance form is extremely confusing. A change in the default manner of appearance could create a class of claimants who would have elected an in-person hearing, but

because of housing insecurity or physical or behavioral deficits in their ability to read and understand this complicated form, are forced into a manner of appearance which they did not choose.

The harm that could come to claimants is not merely conjectural. Many lower-income claimants lack reliable access to the technology necessary that makes audio and video hearings convenient. For example, in 2021, a BroadbandNow study found that 42 million people in the United States lack access to broadband internet.<sup>1</sup> The people most impacted by this divide are those who have “less education and lower incomes; communities of color, such as Black and Latino; older adults; rural residents (and most acutely in Native communities); the physically disabled; the LGBTQ community; and those falling in the intersections of these groups.”<sup>2</sup> Pew Research also found that even as technology becomes more widespread and accessible, internet and cellphone adoption rates in low-income households are still much lower than middle and upper class households.<sup>3</sup> Thirteen percent of adults earning under \$30,000 a year have no access to any kind of internet or cellphone technology at home.<sup>4</sup>

This divide is not limited to income. A study by Marketplace found that 70% of Black and 60% of Hispanic respondents reported being “underprepared with digital skills.” Perhaps most significant is the divide between people with disabilities and those without. While 76.3% of people without disabilities have both high-speed internet and a computing device, only 62% of people with disabilities do.<sup>5</sup> People with disabilities are three times more likely than people without disabilities to have never used the internet.<sup>6</sup>

While we acknowledge that many claimants would benefit from expanded options for hearing attendance, we think it's paramount to ensure all hearing formats are available to all claimants. Since the claimants who would most benefit from remote hearing formats are also those who are best positioned to elect an alternative form of appearance, the default should remain that hearings are scheduled in-person. The default manner of appearance should not be set in such a way that the most at-risk claimants are unnecessarily harmed.

## **II. SSA Should Ask Claimants About Hearing Opportunities at the Earliest Opportunity—on Appeal Forms.**

SSA should ask claimants to identify their hearing format preferences at the earliest stage possible, on the appeal form requesting a hearing (e.g., SSA HA-501).

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<sup>1</sup> John Busby et al., *FCC Reports Broadband Unavailable to 21.3 Million Americans, BroadbandNow Study Indicates 42 Million Do Not Have Access*, (May 6, 2022), <https://broadbandnow.com/research/fcc-underestimates-unserved-by-50-percent>.

<sup>2</sup> Phela Townsend, *Disconnected: How the Digital Divide Harms Workers and What We Can Do about It*, (Oct. 22, 2020), <https://tcf.org/content/report/disconnected-digital-divide-harms-workers-can/>.

<sup>3</sup> Emily A. Vogels, *Digital divide persists even as Americans with lower incomes make gains in tech adoption*, (June 22, 2021), <https://www.pewresearch.org/short-reads/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/>.

<sup>4</sup> Id.

<sup>5</sup> United States Department of Labor, *Disability and the Digital Divide: Internet Subscriptions, Internet Use and Employment Outcomes*, (June, 2022) at 1, <https://www.dol.gov/sites/dolgov/files/ODEP/pdf/disability-digital-divide-brief.pdf>.

<sup>6</sup> Andrew Perrin and Sara Atske, *How Can We Ensure That More People With Disabilities Have Access to Digital Devices?*, (Sep. 16, 2021), <https://www.weforum.org/agenda/2021/09/disability-barrier-to-digital-device-ownership>

Under SSA's proposal it would expand SSA's policy regarding electing VTC hearings to all remote hearings: that is, sometime after a request of hearing is received SSA send the claimant a letter asking them to notify SSA if they want to appear in person within thirty days, or they will be scheduled for a remote hearing. As SSA has acknowledged, 30% of respondents do not return hearing acknowledgement forms. That non-response rate may be caused by a number of factors know to the agency: (1) many applicants, particularly for SSI, are low-income and possibly have unstable housing preventing them from receiving and returning notices timely; and (2) many applicants may have limited English proficiency or disorder that impact literacy and comprehension, preventing comprehension of these forms.

One recommendation worth considering is adding a non-mandatory question on the SSA HA-501 (and any other forms to request for hearing) to solicit a hearing format preference. That way claimants who may struggle to comply with mail correspondence can provide hearing format feedback. This may also allow people to give hearing feedback when they are in SSA field offices completing the appeal, with the assistance of Field Office staff who can answer questions about format, or when assisted by community assisters (social workers etc.) who may be helping them appeal but may not be present a month later when the hearing election notice is received. If successful, SSA might consider soliciting hearing format preferences at additional points in the disability process, even potentially in the initial application process.

We are not suggestion that SSA eliminate its later correspondence regarding hearing format, but by adding earlier questions in the appeal process SSA may be able to more effectively and efficiently get the information it needs to schedule hearing in a format most accessible to a particular claimant. Then if claimants do not respond to later correspondence, the default can be relying on their earlier articulated preference.

### **III. SSA Should Revise its Hearing Election Form.**

It is essential to assure that claimants have the information they need to make an informed decision about the option for appearing before an Administrative Law Judge (ALJ). We note that many claimants are confused by the COVID-19 election form, which may be a contributing factor for the high non-response rate to the form. Going forward, we urge SSA to make the process for electing a manner of appearance more user-friendly and written in plain language. CCD endorses the proposed election form submitted by NADR, or SSA making a similar form, to make this selection process much easier.

### **IV. SSA Should Expand Opportunities for Claimants to Change their Election of Manner of Appearance.**

Under the current proposal, claimants would be allowed one opportunity to object to being scheduled by video or audio hearing, within 30 days of the scheduling notice. The only way to change the form of hearing after that time is for a claimant to convince an ALJ that there is "good cause" for the change. In conjunction with SSA's goal of expanding flexibility for clients appearing before ALJs, the administration should consider expanding the circumstances in which a claimant can request a change in the time or manner of a hearing, without needing to prove good cause. Additionally, these applications should be processed by OHO staff and not personally by an ALJ.

We urge SSA to investigate and create a policy which would provide a non-exhaustive list of circumstances would warrant an elective change in the manner of hearing that must be accepted

by a hearing office. At a minimum, we believe claimants should be entitled to change their manner of appearance in the following circumstances, up until the date of the hearing:

- If the claimant obtains counsel for their disability hearing. Many claimants, particularly low-income claimants, begin or proceed through much of their journey seeking Social Security disability benefits unrepresented. Representation may include offering claimants' new guidance on the hearing formats, and opinions on the most efficient ways to conduct the hearing. SSA should prioritize allowing claimants to benefit from counsel by allowing them a right to change their hearing election after a representative enters their appearance in the case.
- If claimants change or get new counsel, for the same reasons listed above.
- If there is a change of address. Accessibility to hearing offices is often related to geography, and if a claimant moves it may change the extent to which a hearing office is accessible.
- If there is a change in medical condition, some of these changes may impact accessibility to certain hearing formats.
- If the custody or guardianship of a child changes. When a child applies for SSI, the parent or guardian is often electing the form of hearing. If custody or guardianship changes, there may be new considerations that would warrant allowing that family to change the format of hearing.

Because many other, and sometime unusual circumstances may come up, we also recommend SSA also maintain the policy that claimants can elect hearing format changes if they meet the good cause standard. But, for common circumstances that might change hearing accessibility, it is important that claimants be able to change the format of their hearings, and not be subject to the ALJ's discretion.

Respectfully submitted,

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Jeanne Morin, National Association of Disability Representatives  
Darcy Milburn, the Arc of the United States  
Tracey Gronniger, Justice in Aging