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NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES

October 19, 2021

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

Dear Ms. Mancini,

Thank you for the opportunity for NOSSCR staff to observe the proceedings for the committee's project on public access to agency adjudicative proceedings. The National Organization of Social Security Claimants' Representatives (NOSSCR) is a membership organization of attorneys and non-attorneys who represent people applying for Social Security disability benefits. As such, NOSSCR's comments on the draft recommendation are based on our members' experiences representing claimants in adjudications before the Social Security Administration (SSA) and in federal courts. We hope that these comments are helpful to the Committee and can be shared with the Assembly if the Committee places a recommendation on its agenda.

SSA hearings involve personally identifiable information including claimants' Social Security numbers, as well as details about claimants' medical conditions and treatments. In some cases, claimants testify about traumatic experiences that led to their physical or mental impairments or provide details about their functional limitations (for example, urinary or fecal incontinence) that they would prefer to keep private. There are also Social Security cases where financial information, such as the claimant or beneficiary's income and assets and the accounts in which they are kept, are at issue. The potential for identity theft were such details to become public is significant. NOSSCR strongly believes that SSA hearings should remain closed to the public. It therefore would be useful for the recommendation to clarify that in situations where a party is an individual (as opposed to a business entity) and their financial or medical information is at issue in the agency determination about their eligibility for a federally provided personal benefit or service (Social Security, veterans' benefits, Medicare, etc.), the presumption should be that the participant's privacy outweighs the public interest in open proceedings.

We do wish to draw a distinction, however, between proceedings being closed to the public and agency adjudicators prohibiting attendance from non-party participants who are invited by a party to participate or view a proceeding. Too often, SSA Administrative Law Judges (ALJs) prohibit claimants from having a friend, relative, personal care attendant, case worker, or other person a disability claimant requests be present at a hearing, even when that person's presence is necessary for the claimant to meet their medical needs or remain calm enough to understand and participate in a hearing, and there is no issue regarding that person later serving as a witness. ALJs vary tremendously in their

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decisions about who can attend a hearing, but those who deny participation by someone invited by the claimant often appear to do so in arbitrary ways that pose potential Rehabilitation Act (Section 504) concerns. Similarly, some ALJs refuse to allow more than one representative to participate in a hearing, even when the claimant has appointed multiple representatives. This threatens the claimant's due process rights and is especially common in pro bono cases where a small team of representatives may work together to represent a disability claimant. Although we believe that SSA hearings should remain closed to the public as is the agency's current practice, the recommendation should indicate that people appointed by a party as a representative, or that a party deems necessary to accommodate their physical or mental needs, are not members of the public and should be allowed to attend proceedings.

We also note that SSA is unlike many federal agencies in the sheer volume of its proceedings: hundreds of thousands of ALJ hearings per year, in well over 150 different hearing offices and Naional Hearing Centers from Hawaii to Maine. It would be a titanic undertaking for SSA to announce all upcoming proceedings (especially given that hearings must sometimes be rescheduled due to claimants' medical conditions or other exigent circumstances), manage attendance at hearings (when SSA begins holding in-person hearings again) given limited space in hearing rooms, allow remote access to hearings (SSA has such bandwidth issues on video hearings that even interpreters and expert witnesses generally must testify by phone rather than appearing on a Teams video), and ensure that there are no improper recordings of hearings. Managing this workload would detract from SSA's existing responsibilities and increase hearing backlogs, in addition to the tremendous risk to claimants' privacy that it would cause. We therefore suggest that the list of exceptions to open proceedings in section 5 of the draft recommendation include "timely and efficient management of agency workloads."

Thank you for your consideration of these comments.

Sincerely,

Barbara Silverstone
Executive Director