

CHAIRPERSON

Kristin Booth Glen  
Flushing, NY

Hon. Ronald B. Adrine  
Cleveland, OH

Richard B. Allen  
Chicago, IL

Myra J. Christopher  
Kansas City, MO

Stuart R. Cohen  
Washington, DC

Michelle Grant Ervin  
Washington, DC

Scott Miyake Geron  
Boston, MA

Abigail G. Kampmann  
San Antonio, TX

Jorge J. Lambrinos  
Los Angeles, CA

Leigh B. Middleditch, Jr.  
Charlottesville, VA

Mary Joy Quinn  
San Francisco, CA

Jack Schwartz  
Baltimore, MD

Anna Williams Shavers  
Lincoln, NE

Nancy G. Shor  
Englewood Cliffs, NJ

Pamela B. Teaster  
Lexington, KY

BOARD OF GOVERNORS LIAISON

Hon. Howard H. Dana, Jr.  
Portland, ME

STAFF

Nancy M. Coleman, Director  
Charles P. Sabatino  
Erica F. Wood  
Stephanie Edelstein  
Naomi Karp  
Lori A. Stiegel  
Leslie B. Fried  
Jamie Philpotts  
Sonia Arce  
Trisha Bullock  
Julia C. Bueno

February 18, 2005

The Honorable Charles E. Grassley  
United States Senate  
Hart Senate Office Building  
#135  
Washington D.C. 20510

The Honorable Max Baucus  
United States Senate  
Hart Senate Office Building  
#511  
Washington D.C. 20510

Dear Chairman Grassley and Senator Baucus:

On February 4, 2005, representatives from the American Bar Association and other Medicare beneficiary advocacy organizations met with staff members from the Senate and House committees representing both parties. At this meeting, the ABA and the other organizations expressed their concerns about the plan for the transfer for Medicare hearings from the Social Security Administration to the Department of Health and Human Services (DHHS.) Since the publication of the *Plan for the Transfer of Responsibility for Medicare Appeals*, in the Federal Register on Monday, June 28, 2004, there has been a shroud of secrecy regarding the details of the transfer of this important administrative process. The lack of details, accomplishments and interim steps regarding the transfer cause us to question the ability of DHHS to establish an appeals process that, at the minimum, will maintain the level of service the beneficiaries currently receive.

Efforts to obtain additional information regarding the transfer have been unsuccessful. In January 2005, DHHS published job announcements for the administrative law judge positions (ALJs.) This document is the only indication of DHHS plans for the ALJ hearings and it raises serious concerns about the ability of Medicare beneficiaries to have access to an in-person due process hearing. These job announcements raise a host of uncertainties, which must be clarified. The following is a list of some of the concerns raised at the February 4 meeting:

- Duties of ALJs
  - What are the duties of the ALJ positions? The job announcements indicate that the position is supervisory and that judges will manage or supervise day-to-day operations. What does that mean?
  - How will additional duties set out in the job announcements be performed without a loss of service to the beneficiaries?
  - Will these supervising ALJs be considered management and therefore subject to transfer, demotion or other sanctions?
  - As supervisors, will the ALJs be subject to pay for performance plans?
  - Who will specifically conduct hearings? If not an ALJ, under what legal authority will non-ALJs perform these hearings?
  - Are there a sufficient number of ALJs to meet the needs of the program, including Part D appeals?
  - Will the ALJs travel to hear in-person hearings?
  
- Locations of offices – geographic distribution
  - How were the geographic locations of the ALJ offices decided?
  - Why is there no ALJ office in the northeast where a majority of Medicare beneficiary appeals are filed?
  
- Staffing of Offices
  - How many staff will be assigned to each office?
  - What will their responsibilities be?
  - Will non-ALJs hold hearings?
  - Will non-ALJs write decisions?
  - How will statutory time limits to issue decisions be met if there is insufficient staff and resources?
  - Where will the staff be located?
  - Will the staff be full time, part time or contractors?
  - If the ALJs are supervisors, will they hire and fire staff and assign staff work assignments?
  - Given that there is more than one ALJ in each office, will one of these ALJs be the supervisor of the other ALJs?
  
- Video Conferencing
  - Does the new ALJ system provide only for video or telephone hearings?
  - What will be the process for a beneficiary to request an in-person hearing?
  - Will an in-person hearing be provided to every beneficiary who requests one? If not, what will be the standard for granting a request for an in-person hearing?
  - What will be the time frames for a videoconference hearing, a telephone hearing and an in-person hearing?

- For video hearings, where will the beneficiary go for the hearing?
  - Will local SSA offices be used for a tele-video hearing?
  - Will SSA Office of Hearing and Appeals (OHA) offices be used for these purposes? If so, how will SSA and DHHS coordinate the use of these offices given that in some OHA offices, there is only one courtroom with the necessary equipment for 12 judges?
  - How will beneficiaries be provided the opportunity to review the evidence file before the hearings?
  - How will evidence be submitted at the tele-video hearings?
  - What assurance will there be for adequate, quality video capacity?
- Performance Evaluations of ALJs
  - Will the ALJs have performance evaluations? If so, what will the process be and what is the effect of a positive or negative review?
  - Will reversal of the Medicare contractor decisions or favorable decisions for the beneficiaries have an adverse affect on the ALJs performance evaluation?
- Hearing Cases Procedures
  - Who will assign the cases to the ALJs?
  - What is the process? There is currently a serious problem when ALJs receive cases from Falls Church, Virginia, which are 6 months past the statutory deadline for a decision.
  - How will the files be organized?
- Independence of ALJ Corps
  - What course of action is being taken to protect the independence of the ALJ corps?
- Organization of Appeals Department
  - Is there an organizational chart of the new division at DHHS? If yes, can we be provided a copy of it?
  - When will DHHA issue procedural regulations for the Medicare appeals?
  - When will the chief ALJ, supervisory ALJs and managing ALJs be selected?
  - Would you please identify the individual(s) responsible for management of the Medicare ALJ appeals at DHHS?
  - What is the budget for the Medicare ALJ appeals offices?
  - What is the training schedule for ALJs and staff?
  - Who will be responsible for training the ALJs and staff?
  - What materials will be used to train the ALJs and staff?

The ABA has advocated for almost two decades to promote increased efficiency and fairness in the administrative adjudication process, and we have drawn upon the experience and expertise of our membership to develop a wide body of recommendations and policy in this area. We are

concerned that the lack of transparency in the transfer of the Medicare ALJs hearings to DHHA may undermine the important role qualified, independent ALJs perform in protecting the due process rights of beneficiaries. We ask for your assistance in obtaining clarification from DHHS on these issues or if the Committee deems appropriate, hold an oversight hearing

Thank you for your attention to this matter. Please feel free to contact Leslie Fried at [friedl@staff.abanet.org](mailto:friedl@staff.abanet.org) if you have any questions regarding these important issues.

Yours truly,

Nancy Coleman  
Director