National Center for Law and Economic Justice
50 Broadway, Suite 1500
New York, NY 10004
Phone: (212) 633-6967
Email: info@nclej.org

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David Nocenti, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 10th Fl.
New York, NY 10004

Re: Public Comment on Office of Court Administration's Proposed Rule of the Chief Judge to Establish a Judicial Accommodations Request Process

Dear David Nocenti,

The National Center for Law and Economic Justice ("NCLEJ") appreciates the opportunity to submit comments on the Office of Court Administration's ("OCA") proposed Rule of the Chief Judge (Part 52, 22 NYCRR § 52). NCLEJ advances racial, economic, and disability justice for low-income families, individuals, and communities. Our advocacy focuses on preserving and maintaining access to government benefits; advancing the rights of lower wage workers; combatting abusive debt collection and wealth extraction; and advocating for disability justice. For decades, NCLEJ has represented individuals with disabilities and advocated for their due process rights and rights under the Americans with Disabilities Act ("ADA").

Courts have an affirmative duty to remove obstacles to equal participation for people with disabilities. Many such obstacles exist in courtroom settings for disabled parties, and we commend OCA for seeking to create a process for disabled litigants and attorneys to request reasonable accommodations. As the proposal acknowledges, many disabled people choose not to disclose their status as disabled due to stigma and discrimination, among other reasons.

Although the intentions behind the proposed rule are good, the rule itself falls short in numerous important ways and risks perpetuating disability discrimination rather than eliminating it. We are deeply concerned that the proposed "judicial accommodation" process would impose needless obstacles and increase opportunities for discrimination and breach of confidentiality. As the proposal acknowledges, many disabled people choose not to disclose their status as disabled due to stigma and discrimination, among other reasons. We urge OCA not to enact this rule as written, and instead convene with disability rights organizations to create a different, more accessible mechanism for disabled people to request the types of accommodations contemplated by this proposed rule. Below, we detail why we believe this rule may harm parties with disabilities and remind OCA of the ADA's mandates in order to guide the redrafting.

I. Courts' Duty to Ensure Access and Non-Discrimination Under the ADA

a. Broad Definition of Disability and Reach of ADA Protections

The Americans with Disabilities Act ("ADA") was passed in order "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). At the time, Congress noted that "discrimination against individuals with disabilities continues to be a serious and pervasive social problem." *Id.* § 12101(a)(2). Although the ADA was meant to be broad in coverage and scope, numerous Supreme Court rulings after its passing interpreted the ADA's language narrowly. In response to such restrictive interpretation and application by courts, Congress passed the ADA Amendments Act ("ADAAA") in 2008 to "make it easier for people with disabilities to obtain protection under the ADA." 28 CFR § 35.101(b). Per the ADAAA, the term "disability"[1] must be construed broadly so individuals can receive as much protection against discrimination as possible. *Id.* Similarly, the standard for considering whether an impairment is "substantially limit[ing]" is not demanding, nor does it merit extensive analysis. *Id.* § 35.108(d)(1)(i-ii).

Title II of the ADA applies to public entities, including State governments and departments, agencies, and other instrumentalities of a State or local government. *Id.* § 12131. Thus, OCA must comply with the ADA and may not exclude anyone with a disability, by reason of such disability, or deny disabled people "the benefits of the eservices, programs, or activities" of state courts. *Id.* § 12132; 28 CFR § 35.130(b)(1)(i-iii). Unfortunately, the proposed rule does not comport with the broad language and intent of the ADA and ADAAA.

b. Requesting a Reasonable Accommodation

Pursuant to Title II of the ADA, state courts must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability[.]" 28 CFR § 35.130(b)(7)(i). OCA's proposed rule, at § (a)(2), requires that someone requesting a reasonable accommodation specify how their disability limits them, as opposed to the modification needed in order to enjoy equal access to the courts. This is not the correct standard. The ADA primarily focuses on public entities *eliminating* discriminatory practices and providing reasonable accommodations, not on individuals having to prove they are disabled. *See* 28 CFR § 35.101(b); *see also* 29 C.F.R. § 1630.2(o). We strongly urge OCA to omit this requirement from the final rule and conform to the standard set by federal law.

The proposed rule does not suggest whether the process for requesting reasonable accommodations is interactive, as is the case in Title I employment contexts. Under Title I, a

[1] The ADAAA defines "disability" as "A physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment[.]" 28 CFR § 35.108(a)(1). For a non-comprehensive list of physical and mental impairments, see *id.* (b)(2).

reasonable accommodation is a change "in the way things are customarily done that enables an individual with a disability to enjoy equal … opportunities." 29 CFR § 1630(2)(o). We strongly believe the final rule should contemplate an interactive process, with a requirement for the decisionmaker to affirmatively engage in a collaborative approach with the requester. The rule should also require the court to create and maintain written documentation of any back-and-forth to create a record in case further accommodations are needed or an appeal is necessary. At the same time, the final rule should permit oral requests for accommodations and should ***not*** require that the litigant make accommodation requests in writing, as this itself could impose an unlawful barrier under the ADA, particularly for disabled people who also have limited written English proficiency.

c. Making a Determination

Entities considering requests for reasonable accommodations may request supporting documentation only when a disability and/or the need for accommodation is not obvious or apparent.[2] Further, "[a] public entity may not make unnecessary inquiries into the existence of a disability."[3] However, the proposed rule allows judges to request additional information in their "discretion and only as may be reasonably necessary to determine the application." This conflicts with the ADA's safeguards. Section (c) of the proposed rule places no limit on the type of information that judges may request, nor on when judges may request information to begin with, because "reasonably necessary" is an extraordinarily vague standard. Such an open-ended provision raises serious concerns that different judges will apply different standards and require differing levels of "proof" to establish disability. This risks creating a system where a requester is pressured to demonstrate they are "disabled enough" to warrant receiving an accommodation, in violation of the ADA. *See* 28 CFR § 35.101(b) ("The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.").

The proposed rule also does not require the decisionmaker to offer an alternative to the requested reasonable accommodation should the request be denied or only granted in part. OCA must rectify this oversight in the final rule to ensure people with disabilities have equal access to the courts. Further, the proposed rule does not restrict the decisionmaker from categorically rejecting requests for specific types of reasonable accommodations, such as appointment of an attorney. It is essential that the language of the final rule forbid such categorical exclusions in order to comply with the ADA's individualized determination mandate.

Finally, under the ADA, a decisionmaker may deny a request for a reasonable accommodation for only three reasons: (1) the requester is not a qualified individual with a disability under the ADA; (2) the request would create an undue financial or administrative burden on the court; and (3) the request would fundamentally alter the nature of the service, program, or activity. OCA's proposed rule again strays from the ADA by failing to incorporate these

[2] Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada (last accessed Sept. 28, 2023).
[3] Title II Technical Assistance Manual, https://archive.ada.gov/taman2.htm (last accessed Sept. 28, 2023).

limitations on denials. The final rule should incorporate limitations on denials, taking into account the principles below:

First, while a decisionmaker may deny a request for a reasonable accommodation if the individual does not meet the definition of disabled under the ADA, such a finding ought to be rare, and investigation into whether an individual is disabled must be limited. The focus of the reasonable accommodations process is not on whether the requester is disabled, but on what modification(s) the entity must make to ensure equal participation.

Second, and of particular concern here, a decisionmaker may deny a request if granting it would create an undue financial or administrational or administrative burden on the court. NCLEJ worries that some courts might rely on this provision to deny requests purely due to staffing constraints, which would create an uneven implementation of the final rule across the state. However, the "undue burden" provision does not create an absolute defense or relieve the court from its obligations to people with disabilities. If a decisionmaker denies a request because it would result in an undue burden, they must still take "any other steps necessary to ensure that individuals with disabilities receive the benefits or services provided by the public entity."[4] The final rule must contain robust safeguards, mirroring the ADA and implementing regulations, to ensure individuals with disabilities can participate "*in all but the most unusual cases*."[5]

II. Accommodation Request Process

a. Bifurcation of Judicial and Administrative Accommodations

We are concerned that the proposed bifurcated request process for reasonable accommodations, where some accommodations can be granted by court staff and others must be approved by a judge, will cause confusion for litigants and increase the difficulty of obtaining the accommodations required for disabled individuals to equally participate in, or receive equal benefits from, the court's proceedings. The proposed rule applies to "accommodation[s] that can be granted only by a judge or judicial officer," but does not delineate the types of accommodations included in this category.[6] "Administrative" accommodations that can be granted by court staff are not covered by the proposed rule.[7] Although OCA's ADA website provides some guidance on the distinction between "judicial" and "administrative" accommodations,[8] the rule itself does not. Litigants are likely to be unsure which process to follow for a given accommodation request, especially *pro se* litigants. This may cause delays in getting accommodations approved or dissuade

[4] Americans with Disabilities Act Title II Regulations, U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, https://www.ada.gov/law-and-regs/title-ii-2010-regulations/ (last accessed Sept. 7, 2023) (emphasis added).
[5] *Id.* (emphasis added).
[6] New York State Unified Court System Office of Court Administration, Request for Public Comment on Adopting a New Rule of the Chief Judge to Facilitate Requests for Judicial Accommodations Under the Americans with Disabilities Act (August 17, 2023) (hereinafter "Request for Public Comment"), Exhibit A (Proposed Rule), § (a).
[7] Request for Public Comment; *see Reasonable Accommodations for Court Users*, NEW YORK STATE UNIFIED COURT SYSTEM, https://ww2.nycourts.gov/Accessibility/CourtUsers_Guidelines.shtml (last visited Sept. 28, 2023).
[8] *How to Request an ADA Accommodation*, NEW YORK STATE UNIFIED COURT SYSTEM, https://ww2.nycourts.gov/ada-accommodation-request-process-32956#how1 (last visited Sept. 28, 2023).

litigants from requesting accommodations at all. The accommodations request process should be as simple and streamlined as possible, and having two different processes frustrates that goal.

Additionally, some administrative accommodations may be ineffective if not coupled with accommodations that are currently categorized as "judicial." For example, a litigant can receive an administrative accommodation to receive court documents in an alternative format like Braille or audio, but if it takes time to convert the documents into the necessary format, the litigant may also require an extension of filing deadlines—a judicial accommodation under the proposed rule. The proposed rule does not address these situations. Overall, the bifurcated accommodation request process contemplated by the proposed rule will likely make accommodations less accessible and less effective.

b. Provision of Forms

The final rule should be accompanied by a form or template for accommodation requests in order to make the request process more accessible and streamlined. OCA has created a form for administrative accommodations requests as part of a pilot program in a limited number of courts.[9] Many other states provide a standard form for litigants in all state courts to use to request accommodations.[10] Michigan's form provides a good example of language that is consistent with the proper construction of the ADA discussed in Part I, *supra*, presented in an easy-to-understand format.[11] OCA should make a form available for all kinds of accommodations requests in all courts statewide. The form should be easily accessible on OCA's ADA website and in court buildings.

Without a template, *pro se* litigants in particular may not know what information to include in their request. A form would reduce the administrative burden of requesting accommodations and prevent delays caused by the omission of necessary information. A form also reduces the risk of misunderstanding what the ADA allows in requesting and granting reasonable accommodations. With a form, applicants are less likely to share more information than is necessary, and courts are less likely to violate the process laid out in the ADA, as discussed in Part I, *supra*.

c. Assistance Requesting Accommodations

Section (b) of the proposed rule states that litigants who are "unable to put their request in written form" due to a disability may receive assistance from court staff.[12] This language is unduly restrictive. Litigants who have difficulty drafting a written request should be permitted to receive assistance even if they are not completely "unable" to do so. Assistance drafting a written request can itself be a reasonable accommodation, and accommodations must be provided whenever they

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[9] *Accommodation Request Form*, NEW YORK STATE UNIFIED COURT SYSTEM, https://portal.nycourts.gov/ada-wizard/ (last visited Sept. 28, 2023).
[10] *See, e.g.*, *Request for Reasonable Accommodations and Response*, https://www.courts.michigan.gov/4a5644/siteassets/court-administration/policiesprocedures/mc70.pdf (last visited Sept. 28, 2023).
[11] *Id.*
[12] Request for Public Comment, Exhibit A (Proposed Rule), § (b).

are "necessary to avoid discrimination on the basis of disability,"[13] a significantly broader standard than "inability."[14] Additionally, litigants with disabilities may require assistance submitting accommodations requests for reasons unrelated to their disability, such as low English proficiency or unfamiliarity with court processes; these litigants should also receive the help they need to obtain equal participation in court proceedings. It is also worth noting that Title I of the ADA does not require requests for reasonable accommodations to be in writing; any form of communication suffices.[15] A general statement that people who require assistance compiling an accommodations request may obtain help from court personnel would better address litigants' needs.

d. Notices

Notices should be posted prominently in courthouses and on OCA's ADA website stating that an accommodations request form is available and that court staff can provide parties with assistance in completing it. Notices should also be available describing the process for contesting a decision to deny an accommodation or grant it only in part. Notices and any form or template for accommodations requests should be handed out in the court clerk's office for individuals who appear with questions and should be shared with legal services offices throughout the State. Such notices and forms must also be made available in Braille and online versions must be fully accessible.

e. Affidavit Requirement

The affidavit requirement in § (a)(5) of the proposed rule is also likely to be a barrier for many litigants.[16] The proposed rule requires litigants to follow the process for *ex parte* motions provided for in CPLR 2217(b), which dictates that such motions must be accompanied by a sworn affidavit. Complying with the formalities of an affidavit is highly burdensome for *pro se* and low-income litigants. OCA should consider whether any alternative process could be used.

f. Subsequent Requests for Accommodations

If a litigant's request for an accommodation is granted—whether by a judge or by court staff—and the litigant subsequently asks for additional accommodations in the same matter or another matter in the same court, any final rule should make clear that litigants cannot be required to start from scratch. Litigants should be permitted to rely on previously submitted information and

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[13] 28 C.F.R. § 35.130(b)(7)(i).
[14] *Id.* § 35.108(d)(1)(v) ("An impairment does not need to prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting."); *id.* § 35.108(d)(ii) ("The primary object of attention in cases brought under title II of the ADA should be whether public entities have complied with their obligations and whether discrimination has occurred, not the extent to which an individual's impairment substantially limits a major life activity."); *see also, e.g.*, *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1134-35 (9th Cir. 2012).
[15] Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada (last accessed Sept. 28, 2023).
[16] Request for Public Comment, Exhibit A (Proposed Rule), § (a)(5).

any prior determinations to support the new request.

g. Contesting a Denial

If an accommodations request made through the proposed *ex parte* process is denied, it appears that the only way to contest this determination is through an appeal under CPLR 5704. Filing an appeal is a daunting prospect for a *pro se* litigant, and disabled parties may experience particular difficulties. OCA should consider an alternative accommodations request scheme that would allow litigants to contest a denial of accommodations in a faster, more accessible way.

III. Confidentiality Concerns

Section (d)(2) of the proposed rule allows judges to disclose information contained in an accommodation request to the opposing party based on their belief that the information is "germane to and necessary for" determination of the merits of the underlying matter.[17] This exception will cause many litigants to be justifiably reluctant to request accommodations out of concern that the request will harm their litigation position. A chilling effect is especially likely in family law matters where parental fitness is at issue. Litigants with disabilities should be able to request accommodations without fear that it will harm their litigation position. The exception to confidentiality contained in § (d)(2) should be eliminated, and any final rule should state that information contained in a request for accommodation cannot be used in the underlying matter or in any future matter.

Again, we thank OCA for the opportunity to comment on this proposed rule, and strongly encourage the Chief Judge's Advisory Committee on Access for People with Disabilities not to adopt this rule as written.

The following organizations also sign on to NCLEJ's comments regarding the proposed rule:

Johns Hopkins University Disability Health Research Center
National Pain Advocacy Center
Tzedek DC

[17] Request for Public Comment, Exhibit A (Proposed Rule), § (d)(2).