

August 14, 2006

Via Email and Regular Mail

Department of Health and Human Services
Room 404E
200 Independence Avenue, SW
Washington, DC 20201

Attention: DES RFI Response

Dear Sir/Madam:

The National Center for Law and Economic Justice (“NCLEJ”), the National Disability Rights Network (“NDRN”) and the National Consumer Law Center (“NCLC”) all represent low-income potential users of disaster relief. We appreciate the opportunity to provide comments in response to the Request For Information regarding the development and implementation of an electronic benefits transfer (“EBT”) system for victims of disasters to receive federal and state benefits.

The NCLEJ advances the cause of economic justice for low-income families, individuals and communities across the country. Since our founding 40 years ago, we have worked to ensure that eligible people receive vital benefits, including food stamps, Medicaid and cash assistance. We have also opened new vistas in advocacy for persons with disabilities entitled to these vital benefits. More recently, we have advocated for the rights of victims of hurricanes Katrina and Rita, including those with disabilities who were entitled to accessible housing.

The NDRN, formerly the National Association of Protection & Advocacy Systems (“NAPAS”), is the membership association of protection and advocacy (“P&A”) agencies that are located in all 50 states, the District of Columbia, Puerto Rico and the territories (the Virgin Islands, Guam, American Samoa and the Northern Marianas Islands). P&As are authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings. In fiscal year 2005, P&As served over 73,000 persons with disabilities through individual case representation and systemic advocacy. The P&A system comprises the nation’s largest provider of legally based advocacy services for persons with disabilities.

The NCLC is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys, as

well as community groups and organizations, from all states who represent low-income and elderly individuals on consumer issues. We have led the effort to ensure that electronic transactions subject to both federal and state laws provide an appropriate level of consumer protections, by testifying often before Congress on electronic benefit issues. We publish and annually supplement fifteen practice treatises which describe the law currently applicable to all types of consumer transactions, including *Consumer Banking and Payments Law* (3rd Ed. 2005) (hereinafter referred to as “*Consumer Payments Law*”),¹ which includes a comprehensive chapter on electronic benefits issues affecting low income people.

All three organizations believe the development of a reliable and accessible system for delivering disaster and other benefits via an EBT system merits high priority. We believe such a system, coupled with alternative means of obtaining benefits, could help ameliorate the suffering that comes with disasters. In designing such a system, we urge you to consider and address the EBT issues discussed in *Consumer Payments Law*. We highlight some of those issues here, and based upon our experience and knowledge, we offer the comments below.²

1. Government Responsibility and Oversight of Private Contractors

In the event private contractors are engaged to help develop and potentially operate an EBT system for the delivery of disaster benefits, it will be important to identify in detail the responsibilities that the parties must fulfill, including the necessity for ensuring contract compliance. We recognize that many governmental functions not only require the use of private contractors but also that private contractors can bring innovative and improved functionality to the delivery of various forms of government assistance. Nevertheless, it is critical that governmental agencies take all steps necessary to ensure that the contractors have the capability of fulfilling the terms of their contracts and that the agencies closely monitor and supervise the contractors throughout the benefit delivery process. In the end, the government agencies are responsible for ensuring that benefits are provided timely and accurately to all eligible people.

Unfortunately, many examples exist where private contractors and the contracting governmental agencies have failed to perform, to the extreme detriment of thousands of persons entitled to critical assistance. For example, tens of thousands of Colorado’s poorest residents lost critical food stamps, cash assistance and health care coverage following the premature roll-out of a deeply flawed computer system for the administration of public benefits in 2004. A sweeping

¹This manual is available from the National Consumer Law Center, 77 Summer Street, Boston, Ma. 02110, 617 546-8010, www.consumerlaw.org.

²Our responses are primarily in response to Question 3 (design requirements), Question 5 (EBT delivery requirements) and Question 6 (EBT Pilot testing).

preliminary injunction against the state was required order to restore the benefits.³ Texas recently stopped the roll-out of its Integrated Eligibility and Enrollment Services project because of poor performance of the private contractor. Large numbers of callers could not get through on the phone, many of those that got through were provided misinformation and there was a precipitous drop in benefit rolls. Many State legislators and others are now calling for the State to terminate the contract.

Failures by government contractors and government agencies in the aftermath of Hurricane Katrina and Rita are legion. Other disasters have yielded additional examples of failures by the agencies and contractors to deliver critical benefits. For example, in the case of Hurricane Wilma, the vendor responsible for issuing and mailing EBT cards to disaster victims in Florida was oblivious to the fact that thousands of victims had not received their cards until thousands of victims called state customer service phone lines with complaints.

Lessons learned from these recent examples of failures in the privatization of certain functions of public assistance programs include the need for the governmental agency to critically evaluate the capabilities of the vendor, test performance, require vendors and agencies alike to carefully monitor the actual delivery and use of the benefits and to maintain proper levels of staffing to meet expected needs of recipients and unforeseen problems.

2. Alternative Ways To Receive Benefits

As discussed in *Consumer Payments Law*, some benefit recipients are better served by receiving their benefits via a direct deposit program. Thus, although we support the development of an EBT system for delivering benefits, we believe it essential that alternative ways of receiving benefits be fully developed. Disaster victims should be able to choose whether to receive their benefits via EBT or via a direct deposit system.

Advantages of direct deposit include allowing the recipient to receive funds through their own bank account where greater privacy is afforded and legal safeguards are available regarding error resolution, transaction statements and fraudulent usage. Being able to write checks drawing on such funds not only provides greater payment security but may also be advantageous to those who live in rural or other areas with fewer ATMs and Point of Sale (“POS”) devices. Moreover, access to those benefits may be enhanced in the event the victim is evacuated to another state.

Persons with disabilities and the elderly may also only have adequate access to their benefits if direct deposit is available. Persons with certain mental illnesses may be able to manage money in their own bank accounts but not an electronic payment system. Those persons

³*Hawthorne-Bey v. Reinertson*, No. 04 CV 7059 (D. Ct. City and County of Denver Jan. 14, 2005) (corrected order granting preliminary injunction in part).

who are functionally illiterate are also likely to have difficulties reading prompts on ATM and POS devices. Difficulties that others might experience operating ATMs and POS devices could be exacerbated in a disaster environment.

We understand that Florida has been working on a method of preregistering disaster victims. Among the advantages of preregistration is the fact that it would provide affected persons with the opportunity to select whether they prefer receiving benefits via EBT or direct deposit. Preregistration should also be provided to those already receive public assistance and who are likely to be most vulnerable during and after a disaster.

Any new system, privatized or otherwise, must be supported with a backup system. Given the vulnerability of phone and electrical systems during disasters and the potential for blackouts, this is critical. To the extent that the EBT system will be coordinated with existing EBT systems used for the delivery of ongoing benefits, backups must be coordinated at the level at which existing systems are currently maintained. In many areas, the systems are maintained at the county level. Additionally, a manual voucher and delivery system must be included in anticipation of extended blackouts.

Additionally, it will be critical to permit people to apply for benefits telephonically and via the internet. Persons with physical and/or mental disabilities may be unable to go to a disaster recovery center to apply for benefits. Providing visits to such individuals is important but it should not be the only means by which such individuals apply. We are advised that home visits were promised to homebound individuals following Hurricane Wilma but were not always provided. In turn, benefits were not provided.

Although permitting persons to authorize others to apply for them may work for some people, it does not work for all. As discussed in *Consumer Payments Law*, such an alternative, as in the alternative payee scenario, could leave recipients dependent on third parties and vulnerable to paying fees to the payees in order to receive benefits. Thus, provision must be made to permit people to apply both telephonically and on-line.

3. Access to Benefits for Persons With Disabilities

Title II of the Americans with Disabilities Act provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. §12132. “Public entity” is defined as a state or local government, or its agencies or departments. 42 U.S.C. § 12131(1). Section 504 of the Rehabilitation Act provides that “no qualified individual with a disability . . . shall, solely by reason of . . . disability be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or any program or activity conducted by an executive agency.” 29 U.S.C. §794(a). Thus, federal disaster benefits, and disaster benefits provided through state programs, must comply with the

ADA and Section 504. Moreover, these requirements apply whether the services are provided directly by the state or local government or recipient of federal financial assistance “or through contractual, licensing, or other arrangements.” 28 C.F.R. § 35.130(b)(1). *See also* 28 C.F.R. § 35.130(b)(3) and 28 C.F.R. § 41.51(b)(1) and (3).

Discrimination is defined broadly under these laws. Programs subject to the ADA and Section 504 must provide an opportunity to participate in and benefit from programs that is equal to the opportunity provided to others (28 C.F.R. § 35.130(b)(1)(ii); 28 C.F.R. § 41.51(b)(2)), cannot use methods of program administration that have a discriminatory effect or that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity’s program (28 C.F.R. 35.130(b)(3); 28 C.F.R. § 41.51(b)(3)) and must make reasonable modifications in policies, practices and procedures when necessary to avoid discrimination against people with disabilities (28 C.F.R. § 35.130(b)(7)). Moreover, the Supreme Court has made clear that programs must provide meaningful access to people with disabilities, and that to provide such access, reasonable accommodations must be made. *Alexander v. Choate*, 469 U.S. 287, 301 (1985). Programs must be operated so that the program as a whole is “readily accessible to and usable by individuals with disabilities.” 28 C.F.R. § 35.150(a). *See also* 28 C.F.R. § 41.57.

These requirements apply to the disaster benefits programs and have many implications for disaster benefits delivered through POS or ATM systems.

A. Site Selection - Architectural Accessibility

Public entities may not, in determining the site or location of a facility, make selections “(I) [t]hat have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or (ii) [t]hat have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.” 28 C.F.R. §35.130(b)(4). *See also* 28 C.F.R. § 41.51(b)(4).

Therefore, in developing a new or modified system to distribute disaster assistance through an EBT system using ATMs and or POS devices, states or localities must ensure that in selecting sites, they are located in facilities that are accessible for individuals with mobility impairments. Appendix A to Part 36 of 28 C.F.R. ADA Accessibility Guidelines (ADAAG) for Buildings and Facilities.

The facilities in which the ATMs and POS machines are located must have accessible loading areas and parking, an accessible exterior path of travel, curb ramps where required, accessible entrances and an accessible interior path of travel. The ATMs and POS devices themselves must be located to provide accessible clear floor space and have controls placed within the minimum and maximum heights and reaches required by ADAAG.

B. Effective Communication with People with Disabilities

ADA implementing regulations require public entities to “take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communication with others.” 28 C.F.R. §35.160(a); *see also* 28 C.F.R. § 41.51(4)(e). The regulations require that visually and aurally delivered information be made available to persons who need alternative formats for such information. 28 C.F.R. §35.160(b)(1). *See also* 28 C.F.R. §36.303 for effective communication requirement in places of public accommodation.

The ATMs or POS devices themselves must provide the same benefits and advantages to people with disabilities. For example, the ability to pay for products with a debit card in a confidential and secure manner at a POS device is a service offered by retailers nationwide to people without visual impairments. People who are blind cannot independently enter a Personal Identification Number (PIN) on POS devices that only have a touch screen. However, POS devices with “tactile keys” are in use that allow a person who is blind to be able to enter his or her PIN on the device in a confidential and secure manner just like a person without a visual impairment. Manufacturers of POS devices that have tactile keypads include Handheld: www.handheld.com; IBM www.IMB.com; Ingenico www.ingenico.com; NCR www.ncr.com; and Symbol www.symbol.com.

Similarly, the ability to check balances, transfer funds and make other transactions on an ATM are services offered by the owners of the ATMs to individuals without visual impairments. People who are blind or have severe vision impairments cannot read the video screens on ATMs so do not have the same ability to check balances, transfer funds or perform the same range of transactions as a person without a visual impairment. “Talking” ATMs that allow a person who is blind or has severe vision impairments to plug headphones into an audio jack in the ATM, which then provides aural information and confirmation of tasks being performed, are available. All major manufacturers use “talking ATMs,” and many major banks have installed them. Wells Fargo bank has over 3,000 “talking” ATMs and Bank of America recently installed its 10,000th “talking” ATM. www.bankofamerica.com/accessiblebanking/pdf/talk_atm_broch.pdf. Thus, if and when federal, state, or local agencies plan and implement an EBT system using ATMs and POS devices to deliver disaster benefits, the networks selected must use POS devices with “tactile keys” and “talking” ATMs that are accessible to individuals with disabilities.

C. Effective Training on Use of the Technology for People with Disabilities

Implementing an EBT system to distribute disaster assistance will require effective public information and training by public entities. Whether the system is completely new or uses an existing state Food Stamp EBT system using POS devices and/or ATMs, applicants and recipients will require training to learn how to use the system.

As noted above, the ADA Title II regulations require public entities to take appropriate steps to ensure effective communications including furnishing appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, enjoy the benefits of, a service, program or activity conducted by a public entity. 28 C.F.R. §35.160; 28 C.F.R. § 41.51(4)(e). Thus, training on the use of POS Devices or ATMs must be accessible to people with communication impairments.

For example, if training or information about using an EBT system is provided on video, the video should contain captioning. If the information is provided in print the information must also be available on alternative formats. Training and public information to disaster victims must also be effective for individuals with learning or cognitive disabilities. Reasonable modifications in the way training and public information is provided may be necessary to allow individuals with learning or cognitive disabilities to have the same opportunity to learn to use an EBT system to obtain disaster assistance. Agencies may need to simplify training for people with learning and cognitive disabilities, provide additional training for these individuals, or both.

D. Meaningful Access to “Help Desks” for People with Disabilities

Assuming the “Help Desk” envisioned to assist providers and recipients with the replacement of lost or stolen cards/documents is through a telephone call center, it must be designed and operated to ensure effective communication with people with disabilities.

A call center help line must have sufficient telephone lines with equipment (such as TTYs) with staff trained in communications skills and the use of Relay operators to permit effective communication by individuals with disabilities. 28 C.F.R. § 35.161.

Typically, telephone call centers use an introductory interactive greeting and menu and may have voicemail. The Federal Communications Commission accessibility requirements implementing Section 255 of the Telecommunications Act of 1996 apply to voicemail and interactive menu services. The applicable FCC regulations, 47 C.F.R. Part 7, require that input, control and mechanical functions shall be locatable, identifiable and operable by having modes that can be used by persons without vision, without hearing, with limited manual dexterity (including reach, strength and use of prosthetic devices), without time-dependent controls, without speech and operable with limited cognitive skills. A telephone “help desk” using

voicemail or interactive menu services must comply with these new regulations if readily achievable.

For example, a help desk telephone call center interface must provide alternative access for people whose speech may not be recognized by speech recognition software in an interactive voice response system, or who call using a TDD or have cognitive or dexterity impairments and may need more time to respond to timed responses on an interactive menu.

E. Planning and Monitoring to Ensure Contractor Compliance With The ADA and Section 504

To ensure contractor compliance with the ADA and Section 504 of the Rehabilitation Act, HHS should insist that the government agencies and contractors involved in providing benefits via EBT have plans that specify the following:

- Processes by which the agency and/or contractor will identify clients with disabilities, including those with hidden and previously undiagnosed disabilities;
- How the agency and contractor will accommodate the disabilities of individuals who cannot use the EBT process or need accommodations to do so;
- How notice will be provided to all applicants for and recipients of benefits on their right to: 1) accommodations; 2) disclose a disability; and 3) screening to identify likely disabilities;
- How the agency and/or contractor, as appropriate, will meet the needs of clients with disabilities in rural or other areas where there may be few ATMs or POS devices connected to the EBT system; and
- How the agency and contractor will ensure effective communication with individuals with speech, language visual, hearing, or cognitive impairments.

HHS should also require the agency and contractor to keep data on the number of clients who received accommodations for their disabilities during the application process and the type of accommodations provided, the number of clients screened for disabilities and the percentage of those individuals identified as likely to have disability, by type of disability.

4. Meaningful Access to Benefits for Individuals with Limited English Proficiency (LEP)

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, provides that no person shall “on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” In *Lau v. Nichols*, 414 U.S. 563 (1974), the Court ruled that Title VI prohibits conduct that has a disproportionate effect on individuals with Limited English Proficiency (LEP) because such conduct discriminates on the basis of national origin. As HHS has recognized, it “must ensure that federally assisted programs aimed at the American public do not leave some behind because they face challenges communicating in English.”⁴ HHS also recognizes that “failure of a recipient of Federal financial assistance to take reasonable steps to provide LEP persons with meaningful opportunity to participate in HHS-funded programs may constitute a violate of Title VI and HHS’s implementing regulations.”⁵

HHS Guidance also recognizes the value of written implementation plans articulating how recipients will provide meaningful access to persons with LEP. Plans for delivery of EBT disaster benefits should, at a minimum, specify the following:

- Language assistance measures (e.g. types of language services available, including translation of forms into languages other than English; bilingual staff; provision of interpreters; how staff can obtain these services; and how they will respond to callers with LEP);
- Processes to identify those who need language assistance;
- Training for contractor staff on LEP policies and effective communication with individuals with LEP and interpreters; and
- Notice to persons with LEP of services available and how to obtain them.

Further, HHS should require the agency and contractor to keep data on the number of LEP individuals served, by type of language assistance required, and primary language; the number of bilingual staff and interpreter staff employed by the contractor, disaggregated by language translated or interpreted; and whether proper language determinations are made and whether required services are provided.

⁴ Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 47311 (Aug. 8, 2003) (“HHS Guidance”).

⁵*Id.*

5. Other Planning and Resource Issues

HHS, the other government agencies responsible for the delivery of government benefits and the EBT contractor should be knowledgeable of resources on the ground who may be of assistance during a disaster. In this regard, we refer HHS to FEMA's Report on Special Needs—Issues, Efforts and Lessons Learned dated February 8, 2002. This report addresses the attacks on the World Trade Center and the “special needs” of certain population groups, including older adults, persons with disabilities and persons with LEP.⁶ Among the lessons learned and reported on in FEMA's report were the value in identifying local resources, hiring persons with knowledge of the special need communities and interpreters, working with local advocacy groups, establishing methods for identifying persons with special needs, testing the teleregistration system and monitoring data, hiring interpreters, devising special programs to ensure eligible immigrants are educated about available resources and addressing and resolving accessibility issues.

We also urge HHS to involve qualified persons with disabilities to participate in the planning process and to meet with senior officials to discuss issues and challenges. More information about involving such persons can be found in the National Council on Disability's report, “Saving Lives: Including People With Disabilities in Emergency Planning,” transmitted to President Bush on April 15, 2005.⁷

6. Other Information And Training Issues

Providing adequate information and training about the EBT and alternative payment systems will be key to effective delivery and use of the benefits for the general public as well as for persons with disabilities and other special needs. Extensive use of public service announcements and advisories will be necessary. Additionally, training sessions on enrollment and use of ATMs and POS devices should be widely announced and offered.

Information about the EBT system, including all public service announcements, training materials, ATM and POS screen prompts, telephone and internet access points must be presented in the languages spoken by people in the communities being served.

The EBT information must also be presented in a clear and straightforward manner that explains both how the system works as well as the process for resolving any issues about the benefits. This is especially important for persons with less education and lower reading skills and who are likely to have a greater need for assistance.

⁶ This report is not on-line and is available from FEMA.

⁷http://www.ncd.gov/newsroom/publications/2005/saving_lives.htm

We are available to answer any questions you have or to provide additional information or clarification.

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