

**STATEMENT OF
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BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
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Chairwoman Luria, Ranking Member Nehls, and members of the Subcommittee, on behalf of the New York Legal Assistance Group ("NYLAG"), thank you for the opportunity to testify today on my veteran clients' experiences with VA benefits examinations conducted by independent contractors.

My name is Samantha Kubek, and I am the Coordinating Attorney of the Veterans Initiative in the LegalHealth division of the New York Legal Assistance Group, a nonprofit law office dedicated to providing free legal services in civil law matters to low-income New Yorkers. NYLAG addresses emerging and urgent needs with comprehensive, free civil legal services, direct representation, impact litigation, policy advocacy, financial counseling, medical-legal partnerships, and community education. This past year, NYLAG served 89,160 clients.

LegalHealth, a division of NYLAG, partners with medical professionals to address the nonmedical needs of low-income individuals with serious health problems. This past year, we served 6,884 clients, including nearly 1,310 veterans through our partnership with three New York VA Hospitals. Working closely with veterans' healthcare providers, we expand access to needed veterans' services by upgrading bad paper discharges, stabilize incomes for veterans with significant health needs, and help to reduce veteran homelessness by preventing evictions.

In addition to LegalHealth, our office also has a community-based Veterans Project, which focuses on veterans who are often ineligible for VA care due to their discharge status. They staff regular offsite clinics at locations including residential addiction and mental health treatment programs, veterans' shelters, and the American Legion. Recognizing that it can be very difficult for individuals to seek help, especially veterans, NYLAG provides multiple avenues to receive that request and answer the call.

Our clients have served in every military branch, from WWII until just months ago. They come from a wide variety of backgrounds, races, and life experiences. They have served in combat and they have served stateside. Roughly 63% of our veteran clients screened for race/ethnicity identify as non-white, with the largest minority populations being comprised of Black or Hispanic veterans. 18% of our clients identify as women. 89% of our veterans' income is below 400% of the Federal Poverty Level, and more than half (52%) have income below 200% of the Federal Poverty Level.

Over the past nine years, NYLAG has worked on 2,795 VA benefit claims for 2,146 unique veteran clients. Many of these veterans experienced severe trauma while in the military, and

come to us suffering from traumatic brain injuries, post-traumatic stress disorder, depression, and anxiety. Far too many are survivors of sexual assault in the military, or victims of pervasive racism or homophobia. These cases are emotional, complicated, and often difficult for the veteran to navigate alone.

As I stated in my previous testimony before another Subcommittee, the impact of service-connected benefits on traumatized veterans is far more than simply increasing their income; VA benefits are life-changing and transformative. Yet the process to obtain these benefits is far too difficult. Along the way, veterans are repeatedly re-traumatized and held to evidentiary standards that are far too high given the realities of trauma. I offer this testimony to share the experiences of my clients and the ways this system often re-traumatizes survivors, the heavy burden placed on veterans and their representatives, and changes that could help alleviate this situation.

After a veteran files a claim for service-connected benefits—whether that be a first-time application, a request for an increase in compensation, or an appeal—the VA typically asks them to undergo a medical examination related to that claim, commonly known as a Compensation and Pension, or C&P, exam. According to the VA, the express purpose of these exams is to help the “VA determine if your disability is service connected, the level of your disability, or if your condition should receive an increased rating due to it worsening.”¹ The VA advises veterans that a mental health exam can last anywhere from two to four hours.²

For some veterans, this exam will be scheduled at the VA. For others, it will be scheduled with an independent contractor outside the VA. There is seemingly no rhyme or reason to when veterans are scheduled at the VA versus with an independent contractor.

These exams are a step in a larger process that is very difficult and often overwhelming for veterans, and the exam itself is frequently more burdensome, traumatizing, and confusing than any other aspect of this process. While this is true regardless of where or by whom the exam is conducted, independent contractors’ lack of cultural competency and familiarity with veterans’ experience and claims, and inability to coordinate care the veteran may need in connection with the exam, tends to make experiences with these contractors much worse for veterans.

When a veteran is to be scheduled with an independent contractor, they are first contacted directly by the contractor over the phone. There is no forewarning about whether this exam will be done in-house or by these contractors, so veterans are unable to prepare for this call. Many veterans do not answer the call as they believe it is spam. Many older veterans have been advised repeatedly to not answer unknown numbers, as they are often the targets of scams. If the veteran answers the call, they are given a date and time and location for this exam. Oftentimes, however, the examination office will leave a message on the answering machine for the veteran. We have had clients report the examiner leaving sensitive information in these messages, including disclosing the particular medical condition for which the veteran is applying for compensation. Many veterans do not live alone, but

¹ “VA Claim Exam Fact Sheet,” available at <https://www.benefits.va.gov/COMPENSATION/docs/claimexam-factsheet.pdf#> (accessed on March 11, 2021).

² *Id.*

regardless of whether they live with family or roommates, it is unacceptable for highly sensitive information to be left in voicemails.

Veterans scheduled for independent contractor exams are often surprised to realize that the office they have been scheduled with is far from where they live. Our clients, who primarily live in the five boroughs of New York City, have been scheduled for appointments in Pennsylvania and New Jersey. For a veteran without a car, who is struggling to pay their bills, the cost of transportation to a contractor site (even if the veteran learns they may be reimbursed for costs later) is a major hurdle, as is the extra time they may need to take off work to travel to the exam. When veterans attempt to call the contractor back to reschedule the exam at either another time or place, they are often placed on long holds or simply given another appointment at the same problematic location. Veterans who have been waiting months to hear anything from the VA feel pressured to accept appointments they cannot realistically get to, for fear of negative consequences to their claim.

When an exam is scheduled at a time and place that works for the veteran, independent contractors frequently fail to note the specific needs of the veterans. For example, a client of mine is a Spanish-speaking veteran from Puerto Rico whose English, even at the time of service, was very minimal—in fact, her service records note multiple times the fact that the military had difficulty communicating with her. She has applied for service-connected benefits for her mental health condition stemming from a traumatic incident in the military which caused her to have a mental break. She was scheduled for an exam with an independent contractor. The contractor provided no information as to whether she would be meeting with a Spanish-speaking provider, or whether an interpreter line would be made available if not. I spoke numerous times with the local VA Regional Office, who attempted to put various flags in her file to indicate the need for a Spanish speaking doctor. Meanwhile, I worked with the veteran to prepare her for her exam, knowing that talking about what happened to her causes a spike in her symptoms. She readied herself for weeks, during which time her mental health symptoms worsened. Her exam date came and went, and I did not hear from her. A few days later, I learned that she had in fact appeared for her exam, but the examiner did *not* speak Spanish. As a result, she is now waiting to be rescheduled for yet another appointment, where I will yet again be unable to ensure the contract examiner can communicate with her. This veteran suffered a mental health breakdown while in the military and has been unable to hold a job since she was discharged over thirty years ago. This entire process has not only severely and unnecessarily re-traumatized her, but has caused undue delays in adjudication of her claim.

Another area of concern with all exams, both those handled by the Veterans Health Administration and those given to independent contractors, revolves around the VA's treatment of appointed representatives. My ability to advocate for clients facing failures of the VA's duty to assist and the resulting lack of due process related to their C&P exams is seriously impeded by the VA's practice of excluding appointed representatives from all aspects of the claims process. Regardless of whether the exam is conducted by an independent contractor or the VHA, the examination site makes direct contact with the veteran, and no written confirmation of the exam date and time is provided to the representative. If our clients do not inform us of the exam being scheduled or held, we have no knowledge of its occurrence. Given the high importance of this exam and the weight it is given in the ultimate decision made by the VA, it is imperative that the VA ensure due process

is afforded to all veterans. In pursuit of this, appointed representatives must not only carefully guard their clients' rights throughout the exam process, but substantively prepare their veteran clients for the exams by ensuring they understand which parts of their personal and medical history are most legally salient to their claim. As such, in any other legal proceeding, the agency would speak with the appointed representative directly, rather than with the individual. There is no reason the VA and its contractors should not have the same obligation, especially recognizing the severe mental health conditions that may prevent veterans from navigating the exam process effectively on their own.

Presuming that the veteran receives the call or a follow-up letter, is accurately informed of their exam time, and is able to attend, the veteran will then go to a location they have never been before, to meet with a doctor who is a complete stranger to them. They will be asked detailed questions regarding their military service, the traumatic event that occurred, how it impacted them, and what their symptoms and treatment have been from the initial trauma through the present.

Veterans we represent in service-connected claims always submit a personal statement along with their application or appeal if the claim involves a traumatic event. Oftentimes in cases involving sexual assault, racism, homophobia, or transphobia, there is little to no documentation of the event that occurred. No notes will be found in their file to indicate that something happened, so we must put together a written retelling by them of the incidents that occurred to them in the military, and the ways in which those incidents have caused them pain—pain that they still feel today.

Putting together these statements is incredibly difficult for our clients. The re-telling of a survivor's story requires re-living the experience. Oftentimes clients do not sleep the night before they have to share their story. They report increased symptoms before and after describing what happened—in a sense, the re-telling triggers an acute episode of their condition. Sometimes re-telling a story of trauma results in suicidal ideations or periods of relapse into addictions. As their representatives, we do everything we can to ensure that this difficult process is as trauma-informed as possible. We allow clients to work with their therapists to put statements together, to sit down with us in person, to work alone—whatever they feel is the best way to endure this process.

Yet regardless of the specificity and depth provided by this statement and other evidence of record, and regardless of the years and years of medical evidence provided to the VBA along with their application or appeal, they are scheduled for yet another re-telling. Except this time, they have no power or control over how or when it occurs.

For example, a client of mine, Gabriella, was raped after a night out while serving in the Marines in 2015. She had been drinking heavily and blacked out. She woke up to a man on top of her, raping her. After the assault, she sought medical care. However, like most survivors, she denied that what had occurred was rape. She didn't want to admit what had happened. But soon after, Gabriella learned she was pregnant. Unable to bear the idea of carrying her rapist's child, she had an abortion. Gabriella left the military five years ago. She is 27 years old, and should be at an exciting time in her life—starting a new career, and gaining her independence. Instead, Gabriella came to realize she could not handle living on her own—her PTSD and depression made functioning in her daily life all but impossible. She

moved home to live with her parents, and is currently receiving inpatient mental health treatment.

Gabriella put in a claim for service-connected compensation for her PTSD and depression relating to the MST she experienced. She was scheduled with an independent contractor. Prior to her exam, I spoke with her at length about the fact that this examiner would likely require her to walk through what happened to her again, and I provided mental health resources to ensure that she felt safe. I asked her to call me after the exam so that we could debrief.

I didn't hear from her for several days after her exam. When I finally did, she was in tears. Her examination had been a nightmare she said, and she felt wholly disbelieved and disrespected. She told me that she had a panic attack during the exam. Despite this, she had been allowed to leave the exam with no expectation of any follow up from the VA, nor any coordination of care with her mental health team at the VA. No follow up ever occurred.

As her representative, I have access to her VA claims file, which includes the notes submitted by her examiner. After speaking with Gabriella, I went to look at what had been submitted. The examiner quoted Gabriella as saying, "in "2015", she was with a group of 3 Marines...had drinks and "I started feeling like I was blacking out...went to the bathroom...started vomiting... I blacked out again...I remember being in the car... then I was in my room...then the next thing I remember was him on top of me..." Yet in describing what had occurred, the examiner went on to opine that this experience was not adequate to support the diagnosis of PTSD. She then stated that the veteran did not meet the criteria for having experienced military sexual trauma, and supported this by quoting a single doctor who had treated the veteran before she was able to even say out loud that she had been raped. The examiner stated in her notes that she had provided Gabriella with the Crisis Hotline number because she cried during the exam, but provided no further care or coordination with Gabriella's mental healthcare team.

This contracting examiner's report contains inappropriate non-medical fact-finding, which examiners are prohibited from engaging in, and reflects that she does not understand the very definition of military sexual trauma – which includes incidents where the victim does not or *cannot* consent, as when unconscious – despite ostensibly completing VA training for contractors providing MST-related exams. Naturally, we have appealed Gabriella's denial of service-connected compensation as a result of this exam. But independent contractor exams like these are unfortunately not uncommon.

Independent contractors are not required to have any VA or military connection. They are often completely unaware of the nature of the military experience and the traumatic events that too often transpire.

It is true that the Compensation & Pension system, even when administered through the VHA, is an imperfect system. I have accompanied veterans to their exams, and waited outside the room, only for them to emerge in tears. One client of mine actually fled her exam and had a panic attack in the halls of the VA hospital. But because she was inside the VA, I was able to walk her down to her therapist so she could get help. And I felt assured that had I not been there, a doctor or nurse or administrative staff member would have noticed her and been

able to ensure she got the help she needed, not just that day, but in the following weeks, too. This is because the notes from C&P exams conducted within VA become part of the veteran's health record and are viewable by their treating providers. If issues arise during a C&P exam, veterans' treating psychiatrists, psychologists, and other providers can follow up as needed.

When veterans receive their C&P exam through an independent contractor, however, these protections do not exist. The exam notes do not become part of their health record. When they leave the exam, they find themselves in a building in which they have not been before, and in which their doctor does not practice. They are alone.

While we share the VA's goal to provide timely decisions to veterans, and we recognize and agree with the need to work through the backlog of VA claims, the current system is failing our veterans, particularly those who are experiencing PTSD, depression, other mental health conditions due to military sexual trauma, or TBIs. The Office of the Inspector General's recent report regarding Compensation & Pension exams indicates that there are likely far too many stories like Gabriella's.

Considering all of this, I respectfully propose the following recommendations:

1. Independent Contractors should not conduct examinations for claims related to military sexual trauma or involving mental health diagnoses such as PTSD, depression, or traumatic brain injuries.
2. The VA should prioritize using the Acceptable Clinical Evidence (ACE) process in cases where the veteran has provided sufficient evidence to merit an award of disability benefits without a C&P exam.
 - The process eliminates the need for unnecessary C&P examinations, resulting in faster decisions, while also avoiding re-traumatization when veterans have already provided personal statements and opinions from their treating doctors.
3. Both independent contractors and VHA Examiners should be required to review a veteran's statement *prior to the exam*.
 - Currently, VA examiners are required to state whether they reviewed the veteran's electronic file before writing their report. However, they are not required to do so prior to meeting the veteran—if this was required, the doctor (from either VHA or an independent examiner) could avoid rehashing details that are already stated in the record and that are agonizing to relate.
4. Clear processes should be put forth to allow veterans and their appointed representatives to report problematic examiners or exam-related processes.
5. As in any other legal proceeding, the VA should respect veteran-appointed representatives and speak directly with *them* when coordinating examinations, rather than with the veteran.
 - The VA should be required to contact a veteran's representative when explicitly asked to by the veteran, as is my office's practice when filing 21-22as and claim cover letters. To do otherwise is a failure of VA's duty to assist.
6. The VA must establish trauma-informed language and protocols to be used across the VA and independent contractors to ensure the VA is not creating further trauma.

Chairwoman Luria, Ranking Member Nehls, and members of the Subcommittee, in closing, I want to thank you and the Subcommittee for your continued interest in improving the VA's Compensation & Pension examination process. Now is the time to address the ways in which, even after service, the very system intended to help our veterans is often causing additional stress and harm. Please know that NYLAG is ready to assist you in these efforts. This completes my statement. I will be happy to respond to any questions you may have.