Q & A: The State of Medicaid Due Process[[1]](#footnote-1)

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**Introduction**

On March 14, 2013, the National Disability Rights Network held a webinar, *The State of Medicaid Due Process*, at which Jane Perkins and Sarah Somers of NHeLP presented. This Q&A responds to questions asked by participants in the webinar.

**Q1:** Has the federal government proposed regulations to govern notice and hearings provided by state Exchanges? Do those regulations impose the same due process requirements on Exchanges that they do on state Medicaid agencies?

**A:**  Yes. The proposed regulations were published at 78 Fed. Reg. 4594 (Jan. 22, 2013). They require that decisions related to eligibility for Qualified Health Plans (QHPs) or determination of the amount of advance premium tax credits or cost sharing give rise to the same notice and hearing rules as those that apply to Medicaid. This includes advance notice of termination, suspension, or reduction of coverage and the right to continuing coverage pending appeal. NHeLP’s detailed comments on these regulations can be found on NHeLP’s website, at [www.healthlaw.org](http://www.healthlaw.org), and are included as supporting materials with the March 14 webinar.

**Q2:** Will different notice and hearing rights apply to decisions made by federally-facilitated Exchanges (FFEs) than to state-run Exchanges?

**A:** No. The notice and hearing regulations will be applicable to all Exchanges, whether they are operated by the state or federal government. *See* 45 C.F.R. § 155.20 (defining “Exchanges” subject to the regulations as including FFEs).

**Q3:** Our state would like to have telephone or web-based hearings and provide the opportunity for in- person hearings only if there is a disability related reason. Does this violate Medicaid requirements or constitutional due process?

**A:** It is likely that, if there are sufficient procedural safeguards and accommodations are made for disabilities, the use of telephonic hearings would not violate Medicaid or constitutional requirements. There are not, however, many published cases to address the issue. In *Murphy v. Terrell,* the Indiana Court of Appeals held that telephonic hearings did not violate constitutional due process.[[2]](#footnote-2) Applying *Mathews v. Eldridge,* the court balanced the interest of the applicants against the government’s interest and also considered the potential of erroneous deprivation of benefits.[[3]](#footnote-3) It held that the government’s interest outweighed those of the individual beneficiaries/applicants and found insufficient evidence of potential for wrongful deprivation. The court also cited several cases reaching similar conclusions. While this case constitutes controlling precedent only in Indiana, given the lack of cases on this issue, other courts may well find it persuasive.

In that case, however, there was no claim that individuals were prevented from meaningful participation in a telephone hearing because of a disability. Notably, the Indiana Supreme Court has also held that the ADA was violated when reasonable accommodations were not made to provide in-person eligibility interviews people with hearing impairments. *Perdue v. Gargano,* 964 N.E.2d 825 (Ind. 2012). It is likely that courts would apply similar logic in the hearing context, particularly given the constitutional interests implicated by a hearing.

An older case, N.M. ex. rel. Human Servs. Dep’t v. Gomez, held that conducting telephone AFDC hearing over claimant’s objection and failing to observe the demeanor of witnesses denied a claimant due process of law. It seems unlikely, however, that courts in 2013, given the increasing prevalence of phone and on-line communication, would place as much importance on in-person contact.[[4]](#footnote-4)

**Q4:** My state uses an assessment tool to categorize home and community based waiver recipients into groups based on their score on the tool. The service budget for each individual is determined by the group in which they are placed. Can the tool itself be challenged? Also, after the score is decided, the state uses other factors to determine group assignment, including a determination by the state's waiver manager, using her discretion. Can this determination be challenged?

**A:** Individuals who have been denied services based on the use of assessment tools have filed challenges to their use. These cases include claims that the use of these tools violates Medicaid’s comparability requirement, reasonable standards requirement, and Medicaid and constitutional due process. For examples, *see Oster v. Lightbourne* discussed below in the response to Q8. The practice of using a manager to make discretionary adjustments can be challenged on similar grounds, if it results in the wrongful denial or termination of eligibility or services.

**Q5:** My client received a notice informing him that he is eligible for a home and community based waiver and is liable for a share of cost. The notice states what his share of cost will be but provides no information regarding what income was counted. More importantly, it does not indicate what medical expenses were approved as deductions, which were denied, and why. What are arguments that this notice does not conform to due process requirements?

**A:** Current regulations provide that a notice must contain “a statement of action the State” intends to take. 42 C.F.R. § 431.210. The proposed due process regulations require “clear” notice of “the specific reasons” supporting an action. The proposed regs also define an action as the determination of the amount of medical expenses which must be incurred to establish income eligibility for the medically needy and those eligible through a spend down. Proposed § 431.201, 78 Fed. Reg. 4652. The proposed requirements also provide that the matters to be considered at a hearing include the determination of the amount of medical expenses that must be incurred to qualify as medically needy or eligible through a spend down. *Id.,* Proposed § 431.21(a)(1). This is solid support for the argument that the notice must contain the information underlying this determination, in order to enable an individual to properly present his case.

Even in the unlikely event that these proposed regulations do not become final, CMS made it clear in the preamble that the changes to the notice and hearing provisions were intended only to clarify, not change the meaning of the existing requirements. Proposed 42 C.F.R. § 431.210; 78 Fed. Reg. 4600.

One of the fundamental requirements of procedural due process is notice must be reasonably calculated, under all circumstances, to inform interested parties of the pendency of the action and afford them opportunity to present their objections. *See, e.g., Strouchler v. Shah,* 891 F. Supp. 2d 504 (S.D.N.Y. 2012). This supports an argument that the information upon which the spend down decision is based must be contained in the notice, because without it, the applicant could not adequately make his case that he is entitled to a spend down in a certain amount.

There are also a number of cases that would support your argument. For example, in Baker v. Dep’t of Health & Soc. Servs., the Supreme Court of Alaska held that notice must show how and why the state decided to reduce services, including providing a copy of the assessment tool used to reduce services.[[5]](#footnote-5) Also, in *Ortiz v. Eichler,* the court stated that “[i]f calculations of a claimant's income or resources are involved, DES must set forth the calculations it used to arrive at its decision, i.e., explain what funds it considers the claimant to have and what the relevant eligibility limits are.”[[6]](#footnote-6)

In addition, see *K.W*. ex rel. D.W. v. Armstrong, No. 1:12-cv-22, 2012 WL 3201172 (D. Idaho Aug. 2, 2012) (requiring notice of change in Medicaid home and community waiver services to include brief statement explaining changes in assigned budget amount); Oster v. Lightbourne, 2012 WL 691833 (N.D. Cal. March 2, 2012) (preliminary injunction) (finding notices of reductions insufficient because, among other things, they did not inform recipients of the role of functional rankings in determining the level of in-home services or inform recipients who have visual and cognitive disabilities, read at a low reading level, nor were they linguistically diverse), same case, V.L. v. Wagner, 669 F. Supp. 2d 1106 (N.D. Cal. 2009) (preliminary injunction) (finding notices were deficient and difficult to read).

**Q6:** We have had difficulty raising claims of ineffective notice in administrative hearings. In response to our arguments, administrative law judges have disregarded claims regarding inadequacy of notice on the grounds that our clients were able to request a hearing, so there is no harm to the client. We would like a remedy that voids the action and requires the agency to start the hearing again. Are there cases supporting this argument?

**A:** There is authority to support your argument, but also cases supporting the opposite position. One significant supporting case is *Ortiz v. Eichler*, in which the court found the agency’s termination and denial notices did not satisfy due process. The court also rejected the defendants’ argument that plaintiffs’ claims should be disregarded because they did not show that the agency decision was actually wrong. It stated that

type of “harmless error” argument, is without merit in this context. Plaintiffs are not seeking to relitigate each illustrative case, and it is irrelevant that adequate grounds may have existed in individual cases to reach the same decision. The point is that defendants regularly follow a practice that is inconsistent with plaintiffs' due process rights. Fundamental due process requires that a person be informed in advance of the issues to be addressed at a hearing, so that he or she can be prepared to present evidence and arguments that address those issues.[[7]](#footnote-7)

On the other hand, there are a number of decisions holding that, if no prejudice to the claimant is shown, there is no due process violation. See Mundell v. Bd. of Cnty. Comm’rs, No. 05-cv-00585, 2007 WL 128805 (D. Colo. Jan. 12, 2007) (finding no violation where plaintiff did not show prejudice as result of insufficient notice); Bonville v. Dep’t of Human Servs., No. AP-01-074, 2002 WL 31367230 (Me. Super. Ct. Sept. 11, 2002) (same); Hopkins v. Dep’t of Human Servs., 802 A.2d 999 (Me. 2002) (same); Kocher v. Dep’t of Health & Soc. Servs., 448 N.W.2d 8 (Wis. Ct. App. 1989) (finding no prejudice from failure to notify where claimant’s counsel had already requested hearing).

**Q7:** Can you list the significant Medicaid due process cases that you discussed during the webinar?

**A:**

***Private enforcement of Medicaid due process requirements***

*Shaknes v. Berlin,* 689 F.3d 244 (2d Cir. 2012), *cert den. Proud v. Shakhnes,* 2013 WL 171081 (2012) (finding 42 U.S.C. § 1396a(a)(3), the Medicaid fair hearing provision, creates privately enforceable right to decision within 90 days of the hearing request).

*Romano v. Greenstein,* 2012 WL 1745526 (E.D. La. May 16, 2012) (finding statute enforceable)

*Detgen v. Janek,* \_\_ Fed. Supp. 2d \_\_, 2013 WL 961506 (N.D. Tex. March 3, 2013) (holding that there is no legitimate claim of entitlement to a service that the federal agency says is not covered, therefore claimants were not entitled to hearings for categorical denial of the service)

***Notice requirements***

*K.W. ex rel. D.W. v. Armstrong,* 2012 WL 3201172 (D. Idaho Aug. 2, 2012) (holding notices must include brief statement explaining justification for determination of budget amounts).

*L.S. v. Delia*, U.S. Dist. LEXIS 43882 (E.D.N.C. Mar. 29, 2012) (granting PI, holding plaintiffs likely to succeed on claim that state and MCO were engaged in “action” when reducing service budgets using needs assessment criteria).

*Oster v. Lightbourne,* 2012 WL 691833 (N.D. Cal. Mar. 2, 2012) (granting PI, holding plaintiffs likely to succeed on claim notices were inadequate because they did not inform application of role of functional ranks in determination of eligibility for in-home services).

*Purdue v. Gargano,* 964 N.E.2d 825 (Ind. 2012) (holding that it is a due process violation to include a code that represents reasons for a denial without explaining it).

*Mocznianski v. Ohio Dep’t of Jobs & Fam. Servs.,* 960 N.E.2d 522 (Ohio Ct. App. 2011) (holding that it is “simply unimaginable” that scoring for HCBW eligibility would not be released to claimants who are being denied as a result of that scoring).

***Requirements governing mass changes***

*Pashby v. Delia,* 709 F.3d 307 (4th Cir. 2013) (notice provided as a result of a mass change did not need to give individualized reasons why PCS being reduced, when the notice contained adequate detail about how to request a hearing).

*Knapp v. Armstrong*, 2012 WL 640890 (D. Idaho Feb. 26, 2012) (no right to hearing when there is a mass change that doesn’t include any individualized determination).

*Kuehl v. Dep’t of Soc. & Health Servs*., 2011 WL 4830182 (Wash. Ct. App. Oct. 12, 2011) (finding notice adequate even though it did not contain details from assessment about reasons for individual decisions).

***Hearing Requirements***

*Shakhnes v. Berlin*, 689 F.3d 244 (2d Cir. 2012) (regulations impose a 90 day deadline for a hearing decision, not for implementation of relief).

*Koenning v. Suehs*, 897 F. Supp. 2d 528 (S.D. Tex. 2012) (holding that due process was violated by policy that only authorized hearing officer to determine whether a denial of service complied with state policy even if the allegation was that it violated federal law) (on appeal).

*Robinson v. N.C. Dep’t of Health & Human Servs.*, 715 S.E.2d 569 (N.C. Ct. App. 2012) (holding hearing officer can consider evidence that was not made available to agency at the time of individual decision).

*Matter of Godfrey v. Shah*, 937 N.Y.S.2d 779 (N.Y. App. Civ. 2012) (allowing state professional testimony to take precedence over treating provider more experienced in the area).

*Mocznianski v. Ohio Dep’t of Jobs & Fam. Servs.*,960 N.E.2d 522 (Ohio Ct. App. 2011) (holding that a decision must be based solely on evidence adduced at hearing).

*Lehmann v. Dep’t of Pub. Welfare*, 30 A.3d 580 (Pa. Commw. Ct. 2011) (agency can reverse HO findings of fact under state APA).

***Requirements in managed care settings***

*Shakhnes v. Berlin*, 689 F.3d 244 (2d Cir. 2012) (rejecting argument that 90 day deadline for issuing final decision applied only to individuals enrolled in managed care organizations (MCOs)).

*L.S. v. Delia*, 2012 U.S. Dist. LEXIS 43822 (E.D. N.C. Mar. 29, 2012) (holding that the generally applicable notice and hearing regulations at 42 C.F.R. pt. 431 also apply to individuals enrolled in MCOs).

***Requirements for accessible procedures***

*Oster v. Lightbourne,* 2012 WL 691833 (N.D. Cal. Mar. 2, 2012) (preliminary injunction) (finding notices not accessible to people with disabilities, limited English proficiency or low literacy likely violated due process).

*Perdue v. Gargano,* 964 N.E.2d 825 (Ind. 2012) (requiring state agency to make some reasonable accommodation under ADA for hearing impaired individuals).

**Conclusion**

Additional information and authorities can be found in NHeLP’s *Advocate’s Guide to the Medicaid Program,* Chapter II: Administration, Part T: Notice and Hearing (2011, upd. 2013), available from NHeLP. NHeLP has also written various Q&As and Fact Sheets on due process, which are available from NHeLP.

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2. 938 N.E. 2d 823 (Ind. Ct. App. 2010). [↑](#footnote-ref-2)
3. 424 U.S. 319 (1976). [↑](#footnote-ref-3)
4. 657 P.2d 117, 119 (N.M. 1982), [↑](#footnote-ref-4)
5. 191 P.3d 1005 (Alaska 2008). [↑](#footnote-ref-5)
6. 616 F. Supp. 1046, 1062 (D. Del.), *on reargument*, 616 F. Supp. 1066 (D. Del. 1985), *aff’d*, 794 F.2d 889 (3d Cir. 1986). [↑](#footnote-ref-6)
7. 616 F. Supp. 1046, 1062 (D. Del. 1985). [↑](#footnote-ref-7)