Q&A
Due Process & Medicaid Notice & Hearing Standards[1]

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Q: My client, a Medicaid enrollee, received a hearing notice but missed the hearing due to a significant snow storm. The state agency has entered a default and terminated benefits. This happened to a number of people. Our office filed a case in federal court seeking to challenge these automatic terminations, but the state is arguing that we have not established a due process violation. How can we respond?

A: You should argue due process and statutory violations of the clients' notice and hearing rights. Even assuming for the sake of argument, that there is not a constitutional claim, there could still be a statutory claim. While advocates and courts sometimes treat them the same, the constitutional and statutory standards differ from one another. A couple of recent appellate court cases remind us to consider the constitutional and Medicaid standards separately.

Discussion

Medicaid beneficiaries have constitutional and/or statutory rights when their benefits are denied, reduced, or terminated.

The constitutional due process requirements

The Supreme Court has long-recognized that the Due Process Clause of U.S. Constitution ensures procedural due process rights to prior notice and a meaningful opportunity to be heard when an individual is in jeopardy of losing benefits, such as

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medical care.[2] Specifically, "a recipient [must] have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend…."[3] At a minimum, this requires the agency "to explain, in terms comprehensible to the claimant, exactly what the agency proposes to do and why the agency is taking this action." [4]

Goldberg v. Kelly recognizes five constitutional protections when state action is being taken to deny, reduce or terminate Medicaid: (1) a meaningful notice stating the basis for the action and, when coverage is to be reduced or terminated, a pre-termination notice informing the claimant of the right to continue benefits pending a final administrative decision; (2) the opportunity for a fair hearing during which the claimant can confront and cross-examine the witnesses and evidence relied on by the agency; (3) the right of the claimant to be represented by counsel; (4) an impartial decision maker; and (5) a reasoned decision, based solely on evidence adduced at the hearing.[5] Over the years, a number of courts have applied these constitutional requirements for due process when Medicaid services are denied, reduced, or terminated.[6]

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[2] U.S. Const. amend. XIV, § 1.*See Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (holding due process rights vary among property interests and the specific dictates require consideration of, first, the private interest affected by the action; second, the risk of an erroneous deprivation of that interest through the procedures being used and the probable value of additional procedures; and third, the government's interest, including the fiscal and administrative burdens the additional procedural requirement would entail); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that when welfare benefits are terminated, the recipient has due process rights to a meaningful notice and pre-termination hearing); *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314-15 (1950) (holding that, when threatened with loss of a property interest, due process under the Fourteenth Amendment requires that a state must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"). *See generally Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (noting that property interests subject to due process are created by "existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits").

[3] *Goldberg,* 397 U.S. at 267–68.

[4] *Ortiz v. Eichler*, 616 F. Supp. 1046, 1061 (D. Del. 1985), *aff'd*, 794 F.2d 889 (3d Cir. 1986).

[5] *Goldberg*, 397 U.S. at 269-71; *id*. at 270 (quoting *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959) (providing that when government action may injure an individual and the reasonableness of the action depends on a finding of fact, "the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.").

[6] For in-depth discussion and citations, *see* NATIONAL HEALTH LAW PROGRAM, THE ADVOCATE'S GUIDE TO THE MEDICAID PROGRAM at 2.23-2.25 and accompanying endnotes (May 2011 and Oct. 2012 Supp.) (comprehensive update forthcoming 2016).

Constitutional due process also includes a substantive component that prohibits the government and its agents from acting in an irrational, arbitrary or capricious manner that deprives an individual of a property interest (such a Medicaid).[7] Courts have relied on this aspect of due process to require states to use "ascertainable standards" in gauging eligibility for a public program or benefit. [8]

The Medicaid Act and implementing regulations

The Medicaid Act includes overlapping, but separately enforceable standards when benefits are denied, reduced, or terminated. The Act requires the state to

> provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness.[9]

Regulations implement the statute.[10] Briefly, these rules require the Medicaid agency to provide written notice when services are being denied, reduced, suspended, or terminated. The agency must give prior notice of an intended action that will suspend, terminate or reduce Medicaid coverage. The notice must contain a statement of the intended action, specific legal support for the action, and an explanation of the individual's hearing rights, and rights to representation and continued benefits.[11] With some stated exceptions, the notice must be sent at least ten days before the date of the intended action.[12] The individual must be allowed a reasonable time to request a fair

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[7] *See, e.g., Daniels v. Williams*, 474 U.S. 327, 337 (1986) (Stevens, J., concurring)
[8] *Holmes v. New York City Hous. Auth.*, 398 F.2d 262, 265 (2d Cir. 1968); *see also*, *e.g. Casey v. Quern*, 588 F.2d 230, 232 (7th Cir. 1978) ("[D]ue process requires at least that the assistance program be administered in such a way as to insure fairness and to avoid the risk of arbitrary decision making…. Typically this requirement is met through the adoption and implementation of ascertainable standards of eligibility."); *Strouchler v. Shah*, 891 F. Supp. 2d 504, 515-16 (S.D. N.Y. 2012) ("[D]ecisions regarding entitlements to government benefits [must] be made according to ascertainable standards that are applied in a rational and consistent manner.") (citation omitted). *But see Lightfoot v. District of Columbia*, 448 F.3d 392, 401 (D.C. Cir. 2006) (refusing to extend *Holmes*).
[9] 42 U.S.C. § 1396a(a)(3)
[1010] For in-depth discussion of the regulatory requirements and case law interpreting them, *see* NATIONAL HEALTH LAW PROGRAM, THE ADVOCATE'S GUIDE TO THE MEDICAID PROGRAM at 2.23-2.25 and accompanying endnotes (May 2011 and Oct. 2012 Supp.) (comprehensive update forthcoming 2016).
[11] 42 C.F.R. §§ 431.206, 431.210.
[12] *Id*. at §§ 431.206, 431.213, 431.214.

hearing.[13] Prior to the hearing, the claimant must have an opportunity to examine the case file, as well as all documents and records that will be used against his claim.[14]

The hearing must be conducted at a reasonable time, date, and place by an impartial hearing official.[15] At the hearing, the claimant must be allowed to present witnesses and evidence and cross-examine adverse witnesses.[16] The fair hearing decision can be based only on the evidence presented at the hearing, and a decision must be provided in writing to the claimant, generally within 90 days of the request for hearing.[17] When the Medicaid beneficiary is enrolled in a managed care organization, there are additional requirements for the MCO to provide written notice and the opportunity for the enrollee to file a grievance with the MCO.[18]

The recent appellate court opinions

When there is a dispute over the denial or termination of Medicaid benefits, advocates and courts sometimes treat due process and Medicaid statutory protections as equivalents. Perhaps this is because a Medicaid regulation requires the hearing process to comply with *Goldberg*.[19] But while they do overlap, the constitutional and statutory standards are not the same. Two recent cases, *Fishman v. Paolucci* from the Second Circuit and *N.B. ex rel. Peacock v. District of Columbia* from the D.C. Circuit, remind us to evaluate and, as appropriate, present constitutional and statutory claims separately.

Fishman v. Paolucci[20]—In this case, Medicaid beneficiaries requested a fair hearing and continued benefits when services were terminated. New York's Medicaid rules required the state agency to acknowledge the appeal in writing and follow up with a scheduling notice advising the claimant of the date, time and place for the hearing. The plaintiffs failed to appear for their hearings, and the agency

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[13] *Id*. at § 431.221(d).
[14] *Id*. at § 431.242(a).
[15] *Id*. at § 431.240(a). *See also Id.* at § 431.205(d) (requiring hearing system to comply with *Goldberg*).
[16] *Id*. at § 431.242(b)-(c).
[17] *Id*. at § 431.244(a), (f).
[18] 42 C.F.R. part 438.
[19] *Id*. at § 431.205(d).
[20] *Fishman v. Paolucci*, _. F. App'x _, 2015 WL 5999318 (2d Cir. Oct. 15, 2015). *Accord Nozzi v. Hous. Auth. of City of Los Angeles*, 806 F.3d 1178, 1192-92 (9th Cir. 2015) ("Once a substantive right has been created, it is the Due Process Clause which provides the procedural minimum, and not a statute or regulation. For this reason, in analyzing the plaintiffs' due process claim, we do not address whether the Housing Authority complied with the requirements of 24 C.F.R. § 982.505(c)(3), but whether the Housing Authority complied with the requirements of the due process clause.").

immediately dismissed their appeals and terminated continued benefits. The plaintiffs brought suit in federal court, arguing that they did not receive notice of the government actions and, as a result, the agency had violated their due process rights and 42 U.S.C. § 1396a(a)(3). In its opinion, the district court assumed that the analysis under the Due Process Clause and § 1396a(a)(3) were the same and, after conducting a due process analysis, denied the plaintiffs' motion for a preliminary injunction.[21]

The Second Circuit Court of Appeals vacated the district court's memorandum and order holding:

> [T]he district court applied the incorrect legal standard in considering plaintiffs' likelihood of success on the merits. The district court concluded that the due process and § 1369a(a)(3) standards are "the same," assuming that it was sufficient for New York to comply with due process standards. This is not so.[22]

According to the appellate court, when a federal statute, such as § 1396a(a)(3), creates an enforceable right, federal regulations can be relevant to determining the scope of the right.[23] The court noted that a federal regulation, 42 C.F.R. § 431.223, provides that the state "may deny or dismiss a request for a hearing if … [t]he applicant or beneficiary fails to appear at a scheduled hearing *without good cause*."[24] Thus, the court concluded that "the question here is whether the federal § 1396a(a)(3) right is broader than the due process right with respect to immediate dismissal of appeals and termination of benefits following default."[25] The court remanded the case to the district court to provide it the first opportunity to separately conduct an analysis of the plaintiffs' rights under § 1396a(a)(3) as defined further by any relevant federal regulations, including § 431.233.[26]

NB ex rel. Peacock v. District of Columbia[27]—This case involves a complaint filed by Medicaid recipients who did not receive written notices when their requests for prescription drugs were denied at the pharmacy and, as a result, either paid out of

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[21] *Fishman v. Daines*, No. 09-cv-5248, 2014 WL 4638962, at *7 (E.D.N.Y. Sept. 16, 2014) (reasoning that all risk of non-receipt need not be eliminated because due process does not require "actual notice" but rather a "method of notice" that is reasonably calculated, under the circumstances, to apprise interested individuals of the pending of the action).
[22] *Fishman*, 2015 WL 5999318, at *3 (record citation omitted).
[23] *Id*. (citing *Shakhnes v. Berlin*, 689 F.3d 244, 251 (2d Cir. 2012).
[24] *Id*. (emphasis added).
[25] *Id*.
[26] *Id*. at *4.
[27] *NB ex rel. Peacock v. District of Columbia,* 794 F.3d 31 (2015)*, rev'g, in part & aff'g in part,* 34 F. Supp. 3d 146 (D.D.C. 2014).

pocket for the prescription or left empty handed.[28] According to the complaint, Medicaid pharmacy claims in the District of Columbia (as in many states) are handled through a third party contractor, in this case Xerox. Upon receipt of an electronic claim from the pharmacist, Xerox provides an immediate computerized decision on whether Medicaid will cover the drug. When coverage is denied, the pharmacist may convey the reason based on the rejection code received from Xerox (*e.g.*, ineligibility for Medicaid or lack or prior authorization), or the pharmacist may give no reason at all.

On these facts, the district court found a violation of neither the Medicaid statute nor the Constitution. It its opinion, the court divided the plaintiffs into two groups: those denied coverage due to the failure to meet a precondition, such as prior authorization, and those denied coverage for some other reason. With respect to the first group, the court accepted the rejection code as correct and concluded that Medicaid and due process protections did not apply because notice and hearing rights extend only to those who have already met preconditions for coverage. As for the plaintiffs whose prescriptions were denied for other reasons, the court concluded that the denials occurred at the hands of a private actor, Xerox, and not government action.[29]

On appeal, the District of Columbia Court of Appeals affirmed dismissal of the Medicaid claim (albeit on different grounds) but reversed and remanded for re-examination of the due process claim. With respect to the Medicaid claim, the circuit court concluded: "Title XIX [the Medicaid title of the Social Security Act] and its implementing regulations do not afford the plaintiffs the notice they seek whenever a claim for prescription drug coverage is denied."[30] Reading the law quite literally, the court reasoned as follows: The Medicaid Act, 42 U.S.C. § 1396a(a)(3), requires the District of Columbia to provide for a fair hearing but "contains no obligation to afford *notice* of an opportunity to request a hearing."[31] Regulations implementing the statute set forth hearing requirements and do incorporate requirements for notice. Those regulations require the District to grant an opportunity for a hearing to, among others, "[a]ny applicant who requests it because his claim for services is denied or is not acted upon with reasonable promptness" and to "[a]ny beneficiary who requests it because he or she believes the agency has taken an *action* erroneously."[32] Other regulations define an "action" as a "termination, suspension, or reduction of Medicaid eligibility or covered

[28] Data show that approximately 6000 claims for drug coverage are submitted daily in the District of Columbia, and up to half can be denied. *See* 974 F.3d at 43 (citing Pls.' Amended Compl.)
[29] 794 F.3d at 37-38 (summarizing district court memorandum and order).
[30] *Id*. at 38.
[31] *Id*. (emphasis in original).
[32] *Id*. at 39 (quoting 42 C.F.R. § 431.220) (emphasis added).

services,"[33] and thereafter set forth the required content of the notice when an action is going to occur.[34] From here, the court concluded:

> The result is that the District must grant a *hearing* to (1) an applicant whose "claim for services is denied" and also to (2) a beneficiary who believes that he has been subjected to an erroneous "termination, suspension, or reduction" of Medicaid eligibility or covered services. … Significantly, those regulations call for notice only with regard to the second of the above categories of individuals for whom a hearing is available (*i.e*., persons against whom the District takes an "action" as defined by the regulations), not the first category (*i.e.*, persons as to whom a claim for services is "denied").[35]

The court supported its conclusion by noting that dictionary definitions distinguish "denial," on the one hand, and "termination, suspension, or reduction," on the other. A denial maintains the status quo, while the other actions end, stop, or reduce something. The reasoning was buttressed by citation to the 10-day advance notice regulation, which attaches to an "action" and the court's observation that the advance-notice requirement would make "little sense in the context of a garden-variety denial of prescription drug coverage at point-of-sale in a pharmacy, which need not manifest any alternation of the status quo."[36]

Of significance, the circuit court reviewed the plaintiffs' due process claim separately and concluded that the district court erroneously dismissed that claim. The appellate court applied a three-step assessment.

First, the court asked whether the plaintiffs had been deprived of a protected interest in liberty or property, noting that to have a protected interest,

> a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[37]

The district court had concluded that some plaintiffs had no legitimate claim of entitlement because they failed to meet preconditions for prescription drug benefits, such as valid Medicaid enrollment or prior authorization. The circuit court found this reasoning "incorrectly skip[s] ahead to the plaintiffs' ultimate eligibility for a government

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[33] *Id*. (quoting 42 C.F.R. § 431.201).
[34] *Id*. (citing 42 C.F.R. § 431.210).
[35] *Id*. (emphasis in original).
[36] *Id*. at 40. The court dismissed the plaintiffs' citation to the regulation that incorporates *Goldberg*, because it does not specifically refer to notice. *Id*. at 39 (quoting 42 42 C.F.R. § 431.205(d)).
[37] *Id*. at 41 (quoting *Bd. of Regents*, 408 U.S. at 577).

benefit" instead of asking whether the person would be entitled to the benefit *if* she were to satisfy the preconditions.[38] The circuit court clarified that a legitimate claim of entitlement "means that a person would be entitled to receive the government benefit *assuming* she satisfied the preconditions to obtaining it."[39] And to determine whether a legitimate claim exists, if the government has "unfettered discretion" to withhold benefits, there is no legitimate claim; however, if the statute or implementing regulations place "substantive limitations on official discretion to withhold award of the benefit upon satisfaction of the eligibility criteria," then there is a legitimate claim of entitlement.[40] In this instance, the circuit court found that the plaintiffs had a legitimate claim of entitlement to any drug not completely excluded from coverage under Medicaid.[41]

Thus, the second question: Due process offers no protection against purely private conduct, so the second question was whether the alleged deprivation of the property interest occurred at the hands of the government. The district court and Medicaid agency said the decision was made by a private company, Xerox. The circuit court did not agree. Applying the state action test announced in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, the court found a "such a close nexus" between the State Medicaid agency and the challenged action, Xerox's decisions on Medicaid drug claims, that the "challenged action" … may be fairly treated as that of the State itself."[42]

The final step in the due process inquiry called for the court to assess whether the plaintiffs received constitutionally adequate process. Citing *Mathews*' instruction that "due process is flexible and calls for such procedural protections as the particular situation demands," the court remanded to case to allow the district court to conduct the inquiry in the first instance into what process is due.[43]

Conclusion and recommendations

When Medicaid benefits are denied, reduced, or terminated, some procedural protections arise. Both the Medicaid Act, 42 U.S.C. § 1396a(a)(3), and the Due Process Clause of the Constitution establish procedural protections. The statutory and due process standards are not the same, however. As a result, advocates considering a due process challenge should

(1) carefully establish the facts leading up to the denial, reduction, or termination.

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[38] *Id*. at 42.
[39] *Id*. at 41 (emphasis in original).
[40] *Id*. at 41-42 (citation omitted).
[41] *Id*. at 42.
[42] *Id*. at 43 (quoting *Brentwood Acad.*, 531 U.S. 288, 295 (2001)).
[43] *Id*. at 44 (quoting *Mathews*, 424 U.S. at 334).

In particular, it will be important to document the type of process that has been provided to the individual and, if a written notice of some sort has been given, to obtain a copy of the notice;

(2) when fashioning claims, be clear about what happened to the client, *e.g.*: Did they file a request for coverage that was denied? Were they informed that their existing benefits were being reduced or terminated?

(3) when briefing claims, brief the statutory and constitutional claims separately. Support the Medicaid claim with federal regulations that flesh out the federal right and implement the statute. Support the due process claim with argument that establishes a legitimate expectation of a property interest in the benefit in question, state action, and what process is due. Remember that the court will likely view the third part of this inquiry as a flexible test under *Mathews*, so it will be essential to justify what is needed with common sense and, if possible, case law support.