NATIONAL HEALTH LAW PROGRAM

101 E Weaver St Suite G-7
Carrboro, NC 27510
(919) 968-6308
Fax (919) 968-8855

Q & A
The Burden of Proof in Administrative Hearings[1]

Produced by Sarah Somers and Celine Lefebvre[2]
National Health Law Program

July 2011

Q: I am representing a client at a Medicaid administrative hearing who has been denied eligibility for Medicaid. Does federal Medicaid law indicate whether she bears the burden of proof?

A: The Medicaid statute and regulations do not address burden of proof, with the exception of a requirement related to transfers of assets. Cases and some state laws do discuss the issue and the burden of proof generally rests on the party seeking to change the status quo.

Discussion

If an individual is denied eligibility for Medicaid or if coverage for Medicaid services is denied or reduced, she may request an administrative hearing to contest these determinations. Individuals who are already receiving benefits may have their eligibility or services terminated. Because the Medicaid statute and regulations do not address the issue, questions may arise regarding the burden of proof.[3]

---

[1] Produced by the National Health Law Program with a grant from the Nathan Cummings Foundation, NC IOLTA, and the Training Advocacy Support Center (TASC), which is sponsored by the Administration on Developmental Disabilities, the Center for Mental Health Services, the Rehabilitation Services Administration, the Social Security Administration, and the HealthResources Services Administration. TASC is a division of the National Disabilities Rights Network (NDRN).

[2] Carolina Law School 2L.

[3] At least one court has noted specifically that "neither federal statutes nor regulations establish the standard of proof required . . . ." *Dillingham v. N.C. Dep't of Human Resources*, 132 N.C. App. 704, 711 (1999). *See also Bonnie L. by and through Hadsock v. Bush*, 180 F. Supp. 2d 1321, 1329 (S.D. Fla. 2001) (noting that the Medicaid statute does not impose a particular burden of proof), *rev'd on other grounds sub nom 31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2001).

The Medicaid statute requires that state Medicaid plans "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."[4] Regulations flesh out this requirement. Among other things, if a state Medicaid agency intends to take action that is adverse to an individual, he or she must receive written notice of the intended action that is both adequate and timely.[5] An adverse action is a termination, suspension or reduction of Medicaid eligibility or covered services.[6] Administrative hearings must be conducted at a reasonable time, date and place by an impartial hearing official.[7] At the hearing, the applicant or recipient must be allowed to present witnesses, establish facts, present argument and cross-examine adverse witnesses.[8] The burden of proof at the hearing is not addressed.

A number of federal and state decisions address the issue.[9] Moreover, every state and the District of Columbia have Administrative Procedure Acts (APAs) that govern the conduct of administrative hearings. With only a few exceptions, such as Virginia, state laws require the Medicaid agency to comply with APA requirements.[10] Legal authority for the administrative burden of proof might also be found in state common law. These sources are discussed more fully below.

Burden when Eligibility for Benefits is at Issue

When an individual appeals an action of a state Medicaid agency, the burden is usually placed upon the party attempting to change the status quo. Those initially applying for eligibility usually bear the burden of proof, while the state Medicaid agency generally bears this burden when attempting to terminate eligibility.

The Supreme Court, in *Lavine v. Milne*, stated that applicants for most

---

[4] 42 U.S.C. § 1396a(a)(3).

[5] 42 C.F.R. §§ 431.206(b), 431.201, 431.210, 435.912, 435.919.

[6] *Id.* § 431.210.

[7] *Id.* § 431.240(a).

[8] *Id.* § 431.242(b)-(e).

[9] For additional background about administrative hearings and pre-2002 burden of proof cases, s*ee* Jane Perkins and Sarah Somers, *Representing Clients who Need Medicaid Early and Periodic Screening, Diagnosis and Treatment* (Sept. 2001); Jane Perkins, *Q & A, Medicaid Fair Hearings* (Dec. 23, 2002), both available from NDRN.

[10] Va. Code Anno. § 2.2-4018.3.

government benefits "bear the burden of showing their eligibility *in all respects*."[11] At issue in *Lavine* was the constitutionality of a New York statute that established a rebuttable presumption that any person who had voluntarily terminated employment or reduced earning capacity within 75 days had done so with the intent of qualifying for benefits.[12] Thus, the burden of proof was on the applicant to show that he had no such intent in order to qualify for benefits. The plaintiffs argued that this presumption violated their constitutional due process rights. The Court disagreed and upheld the presumption, noting that "the provision carries no procedural consequence; it shifts to the applicant neither the burden of going forward nor the burden of proof, for he appears to carry that burden from the outset."[13]

Numerous decisions have involved rules governing transfers of assets. The Medicaid statute provides that transfers of assets for less than fair market value may result in a penalty period in which an otherwise eligible person becomes ineligible for Medicaid long term care services.[14] When Medicaid agencies consider whether transfers of assets should disqualify applicants from eligibility, the statute requires that the burden of proof be placed upon the applicant. Applicants must make "a satisfactory showing" that: (1) the applicant intended to dispose of the assets whether at fair market value or for other valuable consideration; (2) the assets were transferred exclusively for a purpose other than to qualify for medical assistance; or (3) all assets transferred for less than fair market value have been returned to the individual.[15] The statute also provides that, even if the above factors are not satisfied, the disqualification may be waived if "the State determines . . . that the denial of eligibility would work an undue hardship."[16]

In *Wild v. Dept. of Health and Hospitals,* an applicant for Medicaid coverage of long term care services challenged a Medicaid agency determination that a transfer of resources by an institutionalized spouse into a living trust for her husband, who was still living in the community, disqualified the applicant from eligibility.[17] Because the conveyance was for less than fair market value, the

---

[11] 424 U.S. 577, 582-83 (1976) (emphasis added).

[12] *Id.* at 578.

[13] *Id.* at 584.

[14] 42 U.S.C. § 1396p.

[15] *Id.* § 1396p(c)(2)(C).

[16] *Id.* § 1396p(c)(2)(D). *See Randall v. Lukhard*, 729 F.2d 966, 967 (4th Cir. 1984) (upholding a Virginia provision establishing a rebuttable presumption of ineligibility for individuals who transferred financial assets before applying for Medicaid benefits). *Randall* also includes a discussion of the necessary standard of proof.

[17] 7 So.3d 1 (La. App. 2008).

agency presumed that the transfer was done with the intent to qualify for Medicaid benefits. The Louisiana Court of Appeals reversed, holding that the applicant rebutted the presumption by showing that the trust was established for the purpose of estate planning.[18]

Termination or Reduction of Eligibility for Services

The burden of proof showing that services are not warranted generally rests with the state Medicaid agency when the appeal involves a decision to terminate or reduce services. When adverse action is taken, the burden of proof question implicates constitutional concerns. In *Goldberg v. Kelly,* the Supreme Court held that a pre-termination hearing was required before public benefits could be terminated.[19] In that decision, the Court set forth requirements for a constitutionally adequate hearing. These include the right of the claimant to confront witnesses and rebut adverse evidence "in a meaningful manner."[20]

The due process requirements also have implications for assigning the burden of proof. The party with the burden of proof typically presents its evidence first. Therefore, if the claimant whose benefits have been terminated bears the burden of proof, then that individual will be forced to present evidence anticipating the state agency's justification, evidence and testimony for the termination before the state's evidence has been placed in the record. Practically speaking, such a hearing does not allow an individual to confront adverse witnesses and testimony in a meaningful way.

State court decisions, while not necessarily discussing the constitutional issues, generally recognize that the burden of proof rests with the state Medicaid agency when eligibility and/or services are being terminated or reduced.[21] There are, however, exceptions. For example, the court in *Greely v. Comm'r* imposed the burden of proof on a Medicaid enrollee when the agency imposed a change on his eligibility status.[22] The enrollee was categorically eligible for Medicaid, but an increase in his income brought him above the eligibility threshold, meaning that he could only qualify for as medically needy and would be required to "spend down" his income to continue to qualify for Medicaid. He

---

[18] *See also Christensen v. N.D. Dep't of Human Servs.* 796 N.W.2d 390 (N.D. 2011) (holding plaintiff failed to demonstrate that interest in real property and sale proceeds therefrom were not available assets); *Reinholdt v. N.D. Dep't of Human Servs,* 760 N.W.2d 101 (2009).

[19] 397 U.S. 254 (1970).

[20] *Id.* at 267.

[21] *See, e.g., Kegel v. N.M,* 113 N.M. 563 (N.M. Ct. App. 1992) (holding state bore burden of showing that trust was available asset before terminating eligibility); *Simmons v. Van Alstyne,* 410 N.Y.S. 2d 400 (N.Y. Sup. Ct. 1978) (holding "burden of proof when discontinuing aid is upon the local agency [and] hearsay and conjectural evidence introduced by [agency] does not meet this burden.")

[22] 748 A.2d 472 (2000).

argued that he should not bear the burden of proof to show that his income did not disqualify him from coverage as categorically needy. The court disagreed, holding that the party seeking review of agency action has the burden of showing that the decision of the agency is not supported by competent evidence. [23]

Coverage of Services

Most states require that, in order for services to be covered under Medicaid they must be medically necessary. A number of courts have found the burden rests with the agency to show that a service is not medically necessary, regardless of whether a particular level of services are being reduced or being requested for the first time.[24] For example, in *Kennedy ex rel. Kennedy v. Agency for Health Care Admin.,* the Florida Court of Appeals held that the agency failed to meet its burden of proof and demonstrate that the initially-recommended hours of private duty nursing services were not medically necessary. [25] In another case dealing with new authorization for services, *Cook ex rel. Cook v. Agency for Persons with Disabilities Dist.*, the court held that the agency demonstrated that its approval of six hours of personal care assistance rather than the requested nine hours was justified. [26] The burden of proof was also placed on the state in a case involving a reduction of coverage of personal care assistance in *C.F. v. Dep't of Children & Families.* In that case, the court held that the agency did not meet its burden of showing that the reduction in hours of personal care was justified. [27]

In *In re D'Antonio*, a Medicaid enrollee sought reimbursement for travel to obtain out-of-state specialist's services. [28] Pursuant to state Medicaid regulations and policy, the "burden of production" was placed upon the enrollee to present a physician's certification that the trip was necessary.[29] At that point, the burden shifted to the state to show either that the out-of-state services were not medically necessary or that there were local providers with the unique combination of qualifications necessary to address child's complex medical needs.[30] The court held that the state did not meet its burden and reversed the denial of reimbursement.[31]

---

[23] *Id.* at 474.

[24] 954 So.2d 710 (Ct. App. Fla. 2007).

[25] 954 So.2d 710, 711 (Fl. Dist. Ct. App. 2007).

[26] 967 So.2d 1002 (Fla. Dist. Ct. App. 2007).

[27] 934 So.2d 1, 6 (Fla. Dist. Ct. App. 2005).

[28] 939 A.2d 493 (Vt. 2007).

[29] *Id.* at 601.

[30] *Id.* at 602.

State Administrative Procedures Acts

The United States Administrative Procedures Act, 5 U.S.C. § 556(d) provides that "except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." Similarly, a number of state APAs include provisions placing the burden of proof on the party who brings forward the matter for litigation. For example, Delaware's APA provides that "the burden of proof will always be on the applicant or proponent."[32] APAs with similar provisions include Colorado, New York, and the District of Columbia.[33]

Though not all state APAs address burden of proof, certain states, notably Texas, Tennessee and Kentucky, provide detailed information. The Texas APA sets forth a number of factors to determine which party bears the burden:

> In determining which party bears the burden of proof, the judge shall first consider the applicable statute, the referring agency's rules, and the referring agency's policy . . . . After considering those sources, the judge may consider additional factors, including: (1) the status of the parties; (2) the parties' relative access to and control over information pertinent to the merits of the case; (3) the party seeking affirmative relief; (4) the party seeking to change the status quo; and (5) whether a party would be required to prove a negative.[34]

Under some regulatory schemes, the burden of proof may shift. The Tennessee regulation provides that the party who initiated contested case proceedings has the ultimate burden of proof but notes that "[i]n some cases the party who initiated the proceedings will not be the party with the burden of proof on all issues."[35] Kentucky's APA states that:

> In all administrative hearings, unless otherwise provided by statute or federal law, the party proposing that the agency take action or

---

[31] *Id.* at 498.

[32] Del. Code Ann. tit. 29-10125(c). *Cf. In re: Colleen Rivers,* No. 00061422M (undated) (holding that the burden rests upon a managed care plan to show that services are "medically unnecessary" once they have been recommended by physician). (Available from NHeLP).

[33] Colo. Rev. Stat. § 24-4-105(7) (providing that "[e]xcept as otherwise provided by statute, the proponent of an order shall have the burden of proof . . . "); D.C. Code § 2-509 (same); N.Y. A.P.A. § 306 (providing that "[e]xcept as otherwise provided by statute, the burden of proof shall be on the party who initiated the proceeding."

[34] 1 Tex. Admin. Code § 155.427.

[35] Tenn. Comp. R. & Regs. 1360-04-01-.02.

> grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought. The agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted. The party asserting an affirmative defense has the burden to establish that defense. The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue.[36]

Conclusion

Despite the fact that the federal Medicaid statute and regulations do not generally address burden of proof, advocates can obtain guidance from federal and state decisions, state APAs and state common law. Advocates should first review their state's APA to determine whether it addresses the burden of proof. In addition, Medicaid fair hearing decisions are required by law to be available to the public.[37] Accordingly, advocates should be able to obtain them and review the Medicaid decisions that administrative law judges in their states have issued to see whether they discuss the burden of proof. If the state in which you practice does not have a clear answer, sources from other states can help you to construct the argument.

---

[36] Ky. Rev. Stat. Ann. § 13B.090(7).

[37] 42 C.F.R. § 431.244(g).