



California Policy Needs During COVID: Due Process

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Introduction

Medi-Cal is a lifeline for Californians during the COVID-19 public health crisis. Among the many crucial benefits of Medi-Cal, beneficiaries have strong due process protections including the right to written notices, an appeal of denials, and a hearing. These protections ensure that beneficiaries have meaningful rights to challenge negative Medi-Cal decisions made by the county, managed care plans, and the state agency that administers the Medi-Cal programs.

California has sought flexibility of federal rules through the pandemic Public Health Emergency (PHE) declaration related waiver and State Plan Amendment (SPAs) authorities. These authorities temporarily modify due process rules, including for the state fair hearing system, exhaustion of internal plan grievances, and access to state fair hearing locations.¹ While some flexibilities promote accessibility to Medi-Cal benefits at a time when Californians need these life-saving benefits more than ever, others have raised challenges. These temporary changes provide an opportunity to improve access and due process protections. The following policy recommendations would improve and streamline due process rights for Medi-Cal beneficiaries in the face of the pandemic and beyond.

Extended Appeal Timelines

Early on during the public health crisis, DHCS extended appeal deadlines for Medi-Cal fee-for-service and managed care enrollees. These flexibilities were issued, in part, due to Governor Newsom's Executive Orders, which suspended certain requirements for administrative hearings, including required timeframes and in-person hearings.² By state and federal law,

¹ Sarah Somers, Nat'l Health L. Program, *Medicaid and Due Process During the COVID-19 Pandemic* (April 10, 2020), <https://healthlaw.org/resource/medicaid-and-due-process-during-the-covid-19-pandemic/>.

² Executive Dep't State of Cal., Executive Order N-55-20 (April 22, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/04/EO-N-55-20.pdf>; Executive Order N-63-20 (May 7, 2020),

Medi-Cal applicants and beneficiaries in fee-for-service Medi-Cal have 90 days to request a state fair hearing for negative actions to eligibility and enrollment as well as for service denials.³ Alternately, managed care plan enrollees have 120 days to request a state fair hearing after exhausting the plan's internal grievance/appeals process and also have six (6) months to request an independent medical review (IMR) complaint with the Department of Managed Health Care (DMHC) if the plan is licensed under the Knox-Keene Act.⁴

Through the COVID-related PHE Section 1135 waivers approved by the federal Medicaid agency, DHCS has temporarily provided an additional 120 days to request a state fair hearing during the PHE.⁵ Therefore, currently, Medi-Cal appeal timelines are extended to 210 days from the date of a negative action related to eligibility and, for fee-for-service enrollees, service denials.⁶ Managed care plan appeal timelines are extended to 240 days after exhausting the internal plan appeal process for service-related disputes.⁷ These extended timelines give beneficiaries additional room to timely exercise their due process rights if they wish to dispute a negative action. This can be particularly important for people who become ill and have extended hospitalizations, or those displaced from their housing by fires or other pandemic related economic impacts. For these reasons, state Medi-Cal agencies should implement these extended appeal timelines for beneficiaries permanently.

<https://www.gov.ca.gov/wp-content/uploads/2020/05/5.7.20-EO-N-63-20-text.pdf>. See also, Cal. Dep't of Health Care Servs., "Updated Audits and Data Submittal Timeframe Extensions and Administrative Hearings (Sept. 15, 2020), <https://www.dhcs.ca.gov/Documents/COVID-19/EO-Flexibilities-Audits-and-Admin-Hearings-Medi-Cal-Providers.pdf>.

³ 42 C.F.R. § 431.221(d); Welf. & Inst. Code § 10951(a)(1)

⁴ 42 C.F.R. § 438.408(f)(1) and (2); § 1374.30(k); see also Cal. Dep't of Health Care Servs., *Grievance and Appeal Requirements and Revised Notice Templates and "Your Rights" Attachments* (May 9, 2017),

<https://www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPLsandPolicyLetters/APL2017/APL17-006.pdf>. [hereinafter "APL 17-006"]; see also Abigail Coursolle, Nat'l Health L. Program, *Managed Care in California Series, Issue 4: Internal Grievances and External Review* (Aug. 8, 2017),

<https://healthlaw.org/resource/managed-care-in-ca-series-issue-1-network-adequacy-laws-revised-may-7-2018/>. [hereinafter "*Managed Care in California Series, Issue 4*"]

⁵ Cal. Dep't of Health Care Servs., *Medi-Cal Fee-For-Service (FFS) State Fair Hearings Section 1135 Waiver Flexibilities Relative to the 2019-Novel Coronavirus (COVID-19)* (Mar. 26, 2020),

<https://www.dhcs.ca.gov/Documents/COVID-19/State-Fair-Hearing-Timeframe-Changes-Fee-For-Service-1135.pdf>.

⁶ *Id.*

⁷ Cal. Dep't of Health Care Servs., *Emergency State Fair Hearing Timeframe Changes* (March 26, 2020), <https://www.dhcs.ca.gov/Documents/COVID-19/COVID-19-1135-State-Fair-Hearing-Guidance.pdf>.

Telephone and Video Hearing Access

Telehealth has been an instrumental tool to “bridge the digital gap” during the public health crisis.⁸ Beyond accessing services, similar electronic modalities have aided the continued functioning of Medi-Cal’s state fair hearings and appeal processes. On April 22, 2020, Governor Newsom suspended timeline requirements for DHCS, including for the issuance of hearing decisions under existing law.⁹ In addition, the Governor ordered county offices to remain closed during the PHE and temporarily suspended all statutes and regulations that permit in-person hearings.¹⁰ During the COVID crisis, DHCS is allowing claimants to postpone their state fair hearings if they are not prepared to proceed during the pandemic, while addressing technology barriers on a case-by-case basis. In addition, the Department of Social Services, State Hearings Division (DSS-SHD) represented that they will accommodate claimants individually to address digital barriers by arranging accommodations with claimants who do not have a private place to conduct their hearing or who do not have consistent access to a telephone by sending out loaner cellphones.¹¹

While DSS-SHD’s swift action to accommodate claimants in need and to avoid a backlog on the court calendars is important, claimants normally have the option of an in-person hearing or a hearing by telephone. In certain cases, particularly ones involving beneficiaries with complex health conditions, in-person hearings can be beneficial and preferable to telephone hearings. While video conferencing can be a helpful alternative to preserving a visual element of the hearing, overreliance on expensive technology is cost prohibitive for beneficiaries who rely on these public programs because they have low incomes. Digital tools can also be unreliable due to the inequities in access and unforeseeable technical malfunctions, such as internet outages or glitches. Therefore, removing in-person hearings can result in unnecessary delays where claimants are otherwise prepared for, and cannot afford to delay, their state fair hearings. For those reasons, the right to an in-person hearing should be restored as soon as possible, both now and after the PHE ends.

Parity of Rights and Appeal Timelines

As mentioned above, DHCS extended appeal deadlines for beneficiaries during the PHE. While this undoubtedly gives beneficiaries much more time to appeal negative actions to their

⁸ See Fabiola Carrión, Nat’l Health L. Program, *California Policy Needs During COVID: Telehealth* (Nov. 2, 2020), <https://healthlaw.org/resource/telehealth-in-medi-cal-lessons-learned-during-covid-that-should-continue/>.

⁹ Welf. & Inst. Code § 14171; Cal. Dep’t of Health Care Servs., *UPDATED Audits and Data Submittal Timeframe Extensions and Administrative Hearings* (Sept. 15, 2020), <https://www.dhcs.ca.gov/Documents/COVID-19/EO-Flexibilities-Audits-and-Admin-Hearings-Medi-Cal-Providers.pdf>.

¹⁰ *Id.*

¹¹ Cal. Dep’t of Social Servs., State Hearings Division quarterly meeting dated Oct. 30, 2020.

Medi-Cal benefits, there is still a need for policy changes during the pandemic and beyond. As described above, appeal timelines are different for Medi-Cal fee-for-service versus managed care, as well as for disputes to eligibility versus access to services. Another wrinkle that managed care enrollees must also consider is whether they have an additional right to obtain an IMR, since beneficiaries cannot obtain such a review if a Medi-Cal fair hearing has already taken place to prohibit conflicting decisions.¹² As such, certain managed care plan enrollees who can also request an IMR must carefully time their appeal and consider their options to preserve their right to both avenues for appeal. The varying appeal deadlines and rights are confusing and burdensome for Medi-Cal enrollees. Aligning the fee-for-service and managed care appeal timelines as well as the timelines to appeal negative actions to eligibility and negative actions to services, would simplify the process for beneficiaries and streamline resolution of denials or disputes. Finally, all managed care enrollees should have access to an IMR, not just those enrolled in Knox-Keene Act licensed plans.

Uniform Policies for Court Closures and Hearing Delays

While in-person state fair hearings have been suspended during the PHE, this should only be reserved for exceptional circumstances during a PHE or disaster. Under the Governor's Executive Order, court and county employees may be designated as "essential workers" during the public health crisis.¹³ State agencies should prepare best practices and uniform protocols so that every court system, including SHD, has a plan in the event of another disaster or emergency. And where, as now, a public health crisis goes on for an extended period, the right to an in-person hearing should be available for certain cases where necessary to preserve the claimant's rights to a full and fair hearing.

As explained above, SHD has provided individualized assistance in cases that are currently set for a state fair hearing. While the individualized help to beneficiaries is important, delays also unnecessarily clog the court calendars and deters efficient case handling for beneficiaries who need more immediate and timely resolution to secure essential Medi-Cal and other benefits. The process must remain accessible to *all* beneficiaries during a health crisis through uniform policies and protocols, to protect due process rights while mitigating potential risks to safety. As mentioned above, delaying hearings, even if non-urgent, and denying in-person hearings, should not continue after expiration of the PHE, and an exceptions process should be available even during the pandemic.

¹² Cal. Health & Safety Code § 1300.74.30(f)(3); *Managed Care in California Series, Issue 4, supra* note 3, at 6.

¹³ Executive Dep't State of Cal., Executive Order N-33-20, *Essential Workforce* (March 19, 2020), <https://files.covid19.ca.gov/pdf/EssentialCriticalInfrastructureWorkers.pdf>.
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Conclusion

As a result of the COVID pandemic and PHE, California has the opportunity to examine gaps within our current system and implement solutions to promote equal and equitable access to due process. While California has incrementally shifted towards more accessible channels for beneficiaries to exercise their appeal rights, the pandemic has highlighted where further improvements should be made during the PHE, and after it expires.

Complete List of Recommendations

- DHCS should extend appeal timelines and create parity between current deadlines.
- DHCS should invest in digital resources to promote access to telephonic or video hearings.
- DHCS should ensure that beneficiaries still have the right to an in-person hearing.
- DSS-SHD should develop and enforce uniform standards for in-person state fair hearings in the event of a disaster or public health crisis in order to preserve timely access to benefits and hearings.