

# Did You Know?

## Medicaid Notice Requirements

In an earlier posting, we talked about a Medicaid recipient's right to an administrative fair hearing. We noted that pursuant to the federal Medicaid Act, 42 USC 1396a(a)(3), states must provide "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."

This article will discuss a related topic: the context in which a state Medicaid agency is obligated to provide notices, and the required form and content of those notices. As held by the court in *Kapps v. Wing*, 404 F.3d 105, 124 (2d Cir. 2005), "in the absence of effective notice, the other due process rights afforded a benefits claimant - such as the right to a timely hearing - are rendered fundamentally hollow."

A Medicaid agency must issue a written notice whenever the agency takes any action affecting a recipient's claim for services. 42 CFR 431.206 (this would include a prior approval request for durable medical equipment). The notice must contain a statement of what action the state intends to take; the reasons for the intended action; the specific regulations that support, or the change in federal or state law that requires the action; and an explanation of the individual's right to request a hearing. 42 CFR 431.210.

Adequate notice is a fundamental component of due process. In *Mathews v. Eldridge*, 424 US 319, 348-349 (1976), the Supreme Court noted that "[t]he essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.'" (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 US 123, 171-172. (Frankfurter, J., concurring)). The court in *Kapps* noted that, "[i]n order to be constitutionally adequate, notice of benefits determinations must provide claimants with enough information to understand the reasons for the agency's action." (404 F.3d at 123) The agency must make the reasons for its decision plain so that "the opposing party can evaluate and challenge them." *Gaines v. Hadi*, Not Reported in F.Supp.2d, 2006 WL 6035742 at 12 (S.D.Fla. 2006). "Claimants cannot know whether a challenge to an agency's action is warranted, much less formulate an effective challenge, if they are not provided with sufficient information to understand the basis for the agency's action." *Kapps*, 404 F.3d at 124.

In *Ortiz v. Eichler*, 794 F.2d 889 (3d Cir. 1985), the District Court had directed the agency to issue notices that comply with the federal regulations and principals of due process. The order noted, "[a]t a minimum, these notices shall...3) provide a detailed individualized explanation of the reason(s) for the action being taken which includes, in terms comprehensible to the claimant, an explanation of why the action is being taken and, if the action is being taken because of the claimant's failure to perform an act required by a regulation, an explanation of what the claimant was required by the regulation to do and why his or her actions failed to meet this standard ...." 794 F.2d at 892 (quoting the District Court order). The Third Circuit approved this directive, holding that it tracked the notice requirements set forth in federal regulations.

State law and regulations may establish additional notice requirements. For example, in New York, notices must include the right to a fair hearing; the method of obtaining a fair hearing; the procedures to be followed throughout the fair hearing process; and any additional information which would clarify the fair hearing procedure and assist recipients in more adequate preparation for the hearing. NY Social Services Law 22(12). Courts interpreting that requirement have concluded that notices must advise the recipient of any time limits for requesting the hearing (60 days in New York). Failure to advise recipients that a fair hearing must be requested within 60 days results in an insufficient notice and an insufficient notice tolls the statute of limitations (i.e., the statute of limitations does not begin to run until an adequate notice is given). See *Zellweger v. New York State Department of Social Services*, 74 NY2d 404 (1989).

Similarly, New York regulations require the Medicaid agency to “issue a written determination approving, modifying or denying a [prior approval] request.” 18 NYCRR 513.7(a). A fair hearing decision held that the “agency’s practice of ‘voiding’ a prior approval request [related to durable medical equipment] contradicts the clear and unambiguous mandate of 18 NYCRR 513.7, that requires the Department of Health to issue a written determination...approving, modifying, or denying a prior approval request... The purpose of the notice requirement is to ensure the most basic precepts of administrative due process, which require that an Agency notify the applicant/recipient of its determination, explain the reasons for its determination, and advise the applicant/recipient of an opportunity to appeal that decision.” (*Matter of E.*, FH # 3275815L, at 4-5).

Advocates are encouraged to check their state laws and regulations and case law interpreting them for additional notice requirements. Please feel free to contact us for copies of any of the hearing decisions we have referenced or if you have any questions or comments. Also, if you won a hearing or court appeal/lawsuit regarding Medicaid notice requirements or any item of DME, please send us copies of the court decisions/documents or hearing decisions, so that we can share them with the AT network.

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