Exhibit A

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How to Make Fair Hearings More Fair

SHRIVER CENTER
Sargent Shriver National Center on Poverty Law

Making the Fair Hearing More FAIR

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Forty years ago *Goldberg v. Kelly* created a bulwark against arbitrary and capricious decision making—summarized by the innocuous phrase "aid paid pending"—for millions of people dependent on public assistance programs."[1] Behind these words lie three interrelated concepts: First, if an individual meets the eligibility requirements for public assistance, the individual is entitled to continue receiving benefits. Second, because these benefits can be the last defense against utter destitution, they can be taken away only if their owner is first afforded an opportunity to defend against their loss.[2] Third, there must be procedural safeguards to ensure fairness in the adjudication of the beneficiary's claim.

These safeguards are (1) timely and adequate notice detailing the reasons for the action; (2) the right to present evidence at an oral hearing and to cross-examine adverse witnesses; (3) the option of retaining an attorney; (4) the right to an impartial decision maker; (5) a decision which is based solely on the evidence presented at the hearing; and (6) a written explanation of the reasons for the decision.[3]

The parameters of these rights have been a battleground in the decades since, and the fight to ensure the integrity of the administrative hearing continues unabated, often raising the same issues in new guises. Here I review the elements of procedural due process in income-tested public benefits programs and aim to acquaint newer advocates with key court decisions which have continued relevance in ensuring *Goldberg*'s vitality.

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[1] *Goldberg v. Kelly*, 397 U.S. 254 (1970). As used here, "public assistance program" is any means-tested assistance—such as housing, utility, and welfare benefits—provided by government.

[2] Justice Brennan wrote: "Thus the crucial factor in this context—a factor not present in the case of ... virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits" (*id.* at 264).

[3] *Id.* at 267–71.

I. The Parameters of Procedural Due Process

The U.S. Supreme Court recently summarized the basic requirements of due process in the shadow of the global war on terrorism; the Court held that even "an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the [g]overnment's factual assertions before a neutral decision-maker."[4] These principles are founded on the Fifth and Fourteenth Amendments to the U.S. Constitution, forbidding the government from depriving one of "life, liberty, or property" without due process of law.[5]

In conferring benefits, government is not immune from the due process clause of the Fourteenth Amendment. In *Cleveland Board of Education v. Loudermill* the Supreme Court found violation when state workers were fired without a chance to defend themselves.[6] This principle applies to the federal government itself, whose Department of Housing and Urban Development tried to exempt itself from providing preeviction notice and hearing procedures to tenants before selling foreclosed properties.[7]

A. Finding a "Property" Right

Most procedural due process issues addressed by legal aid involve property interests such as continuously receiving public benefits. Such interests are "created and their dimensions are defined 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 such benefits."[8] But government action that has an impact on receiving benefits does not always trigger due process protection.

In *O'Bannon v. Town Court Nursing Center* Medicaid-funded nursing home residents faced transfers when the government sought to close their home because of code violations. Alluding to a "distinction between government action that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally ...," the Supreme Court denied a pretransfer hearing; the Court ruled that "while a patient has a right to continued benefits to pay for care in the qualified institution of his choice, he has no enforceable expectation of continued benefits to pay for care in an institution that has been determined to be unqualified."[9]

B. The Rights of Applicants

In alleging a deprivation of due process, close and careful attention must be paid to "the contours of the right conferred by the statutes and regulations" that can stem from several sources.[10] For example, the federal law creating the Low-Income Home Energy Assistance Program gives the state such wide discretion that the statute itself does not create property rights.[11] The state's implementation of the law can nonetheless create entitlements.[12] Hence, "to the extent

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[4]*Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (citing *Mullane v. Central Hanover Trust*, 339 U.S. 306, 313 (1950)).

[5]"The touchstone of due process is protection of the individual against arbitrary action of government" (*Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (citing *Dent v. West Virginia*, 129 U.S. 114, 123 (1889))). Procedural due process applies principally to adjudication. The general public has no due process right to notice of pending legislative action, or the right to a hearing before enactment (*Atkins v. Parker*, 472 U.S. 115, 130, n.33 (1985)).

[6]*Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 540–41 (1985).

[7]*Linares v. Jackson*, 531 F. Supp. 2d 460, 470 (E.D.N.Y. 2008).

[8]*Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

[9]*O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 786–87 (1979).

[10]*Id.* at 786. For a listing of the federal regulations incorporating the procedural protections announced in *Goldberg*, see the sidebar.

[11]42 U.S.C. § 8624 (2005).

[12]The implementing state regulation construed in *Kapps v. Wing*, 404 F.3d 105, 114 (2d Cir. 2005), for example, stated that "once determined eligible a household will receive a regular [energy assistance] benefit" (N.Y. COMP. CODES R. & REGS. tit 18, § 393.4(c) (2009)).

that state or federal law 'meaningfully channels' the discretion of state or local officials by mandating an award of [energy assistance] benefits to applicants who satisfy prescribed eligibility criteria, plaintiff-applicants possess a property interest...."[13]

This is true even where the program has only a limited amount of funding, unable to cover everyone who is potentially eligible. What is most important is the existence of rules governing individual eligibility for the distribution of what *is* available.[14] By contrast, applicants do not have due process rights when the agency has unfettered discretion to determine eligibility.[15]

C. Unfettered Discretion in the Operation of a Program

Programs which are governed by unwritten rules deny their recipients due process. In *Bush v. Gore* the Supreme Court famously threw out Florida's presidential election results because of the arbitrary method of determining the validity of a "chad."[16] Similarly the Court ruled in *Morton v. Ruiz* that "[n]o matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an *ad hoc* basis by the dispenser of [Bureau of Indian Affairs general assistance benefits]."[17] Eligibility decisions in government programs must be guided by articulated substantive standards.[18]

II. *Mathews v. Eldridge:* Judging the Adequacy of the Procedures

The existence of written guidelines prescribing eligibility is a major barrier to arbitrary action by an administrative agency. There must be adequate procedures to resolve disputes over the guidelines' application.

In *Mathews v. Eldridge* the Supreme Court devised a three-part balancing test which provides the prism for analyzing most procedural due process claims.[19] Three factors are weighed: "first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and third, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."[20]

Mathews held that an oral hearing need not occur prior to the termination of social security disability benefits. Weighing the private interest at stake, the Court judged the potential deprivation of needs-based public assistance benefits to be greater than the loss of social security since eligibility for the latter is not based on the recipient's income or resources.[21]

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[13] *Kapps*, 404 F.3d at 113–14.

[14] *Id.* at 117–18 (citing *Alexander v. Polk*, 750 F.2d 250, 260–61 (3d Cir. 1984)).

[15] *Ridgely v. Federal Emergency Management Agency*, 512 F.3d 727, 735–36 (5th Cir. 2008) (no right to hearing where Federal Emergency Management Agency had no substantive limits on its discretion to grant or deny rental assistance). See also *Washington Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 36 (D.C. Cir. 1997) (no right to hearing where no entitlement to shelter space) (citing *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (prison transfer discretionary, not mandatory); *Eidson v. Pierce*, 745 F.2d 453, 459-60 (7th Cir. 1984) (rejecting *Ressler v. Pierce*, 692 F.2d 1212, 1216 (9th Cir. 1982) (due process does not apply to applicants for federally subsidized housing rejected by private landlord; statute gave landlord, not government, discretion to accept or reject applicants)).

[16] *Bush v. Gore*, 531 U.S. 98, 105–6 (2000).

[17] *Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

[18] See, e.g., *Daniels v. Woodbury County, Iowa*, 742 F.2d 1128, 1135 (8th Cir. 1984) (General Assistance employability standards); *Franklin v. Shields*, 569 F.2d 784, 793 (4th Cir. 1977), cert. denied, 435 U.S. 1003 (1978) (parole criteria must be made available to inmates); *White v. Roughton*, 530 F.2d 750, 754 (7th Cir. 1976), (General Assistance eligibility standards); *Holmes v. New York City Housing Authority*, 398 F. 2d 262, 265 (1968) (public housing admission criteria).

[19] *Mathews v. Eldridge*, 424 U.S. 319 (1976).

[20] *Id.* at 335, 341, 343, 347.

[21] *Id.* at 340–41. One who lost disability benefits could always apply for welfare (*id.* at 342, n.27).

Next, scrutinizing the propriety of current or proposed procedural safeguards, the Court made several points. First, pretermination reconsideration procedures short of a hearing did exist, and additional safeguards would be considered only if the risk of erroneous deprivation absent the safeguard is widespread:[22] "[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions."[23]

Second, the case for a specific safeguard must be tied to the type of issues to be resolved. To gauge the need for a pretermination hearing, the *Mathews* court scrutinized the evidence required to prove disability: "[A] medical assessment of the [disabled] worker's physical or mental condition ... is a more sharply focused and easily documented decision than the typical determination of welfare entitlement[, where] a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process."[24] Hence "[t]he potential value of an evidentiary hearing ... is substantially less ... than in *Goldberg*."[25]

And, third, the Court analyzed the government's and society's administrative and fiscal interests, noting that "[a]t some point the benefit of an additional safeguard to the individual ... and to society ... may be outweighed by the cost." In the end, however, "[t]he ultimate balance involves a determination as to when ... judicial-type procedures must be imposed upon administrative action to assure fairness."[26] The interest in "assur[ing] fairness" is shared by all parties; good reason to ensure that adequate procedures are in place.

The creative application of the *Mathews* costs-benefits analysis to ensure a level playing field in administrative hearings cannot be underestimated. However, the *Mathews* analysis does not always apply.

A. Adequate Notice

Applying due process to a U.S. Department of Agriculture's adjudication of stockyard charges in the 1930s, the Supreme Court in *Morgan v. United States* underscored the role of detailed notice in ensuring the adequacy of the hearing. Before issuing a rate decision, "the [Department] formulated no issues and furnished appellants no statement or summary of its contentions and no proposed findings."[27] The government argued in defense that plaintiffs had nonetheless had a full hearing, evidenced by an 11,000-page record:

> But a "full hearing"—a fair and open hearing—requires more than that. The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise, the right may be but a barren one. Those who are brought into contest with the Government in a *quasi*-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes, and to be heard upon its proposals before it issues its final command."[28]

In *Mullane v. Central Hanover Trust*, addressing whether publication of notice

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[22] *Id.* at 339.

[23] *Id.* at 344.

[24] *Id.* at 343–44.

[25] *Id.* at 348.

[26] *Id.*

[27] *Morgan v. United States*, 304 U.S. 1, 16 (1938); see also *Willner v. Commission on Character and Fitness*, 373 U.S. 96 (1963) (denial of bar admission without notice of the reasons, or a hearing).

[28] *Morgan*, 304 U.S. at 18, 19.

passed muster when the affected party's mailing address is known, the Supreme Court required notice which is "reasonably calculated, under all the circumstances, to ... afford [parties] an opportunity to present their objections...." Moreover, "[t]he notice must be of such nature as reasonably to convey the required information ..., and it must afford a reasonable time for those interested to make their appearance."[29]

Goldberg's requirement of "timely and adequate notice detailing the reasons for a proposed termination" applied these considerations to public assistance.[30] The scope of "detailed notice" has been litigated for many years. A recent issue is the standard for determining the adequacy of a notice.

B. Weighing the Adequacy of the Notice

The Supreme Court has ruled that a notice's sufficiency is governed not by the *Mathews* balancing test but rather by the less rigorous standard set by *Mullane*.

In *City of West Covina v. Perkins* a lower court had required a police department's notice of a search warrant-related seizure of a third-party's personal property to describe the procedures for recovering the sequestered items. The Supreme Court relied on *Mullane* in reversing, holding that additional notice was not required since the applicable procedures were set forth in public statutes: "Once the property owner is informed that his property has been seized, he can turn to these public sources to learn about the remedial procedures available to him."[31]

Three years later, in *Dusenbery v. United States*, the Supreme Court upheld certified mail notice to a prisoner who never received it because the officer who signed for it never delivered it to the cell—an outcome seemingly at odds with *Mathews*'s analysis of the risks of an erroneous deprivation versus the probable value of additional safeguards. The Court refused to apply the *Mathews* factors.[32] Most recently in *Jones v. Flowers* the Court again relied on *Mullane*, though rejecting the adequacy of a mailed notice of a tax sale which had three times been returned as undeliverable; the Court held that additional efforts to notify the owner were required.[33]

City of West Covina to some degree weakens the case for more detail in the notice.[34] One appellate court, for example, has held that child support notices to custodial parents need not explain the amounts collected and disbursed.[35]

But a return to the skimpy notices of the bad old days is probably precluded. *City of West Covina*, *Dusenbery*, and *Jones* concerned the adequacy of a uniformly applicable notice procedure, and not the extent to which a notice must be tailored to individual circumstances to inform the recipient of the issues "meaningfully." For instance, in *Hamdi v. Rumsfeld* the court reiterated in passing that a no-

[29] *Mullane v. Central Hanover Trust*, 339 U.S. 306, 313 (1950).

[30] *Goldberg*, 397 U.S. at 267–68. As to the timing of the notice, the court was "not prepared to say that the seven-day notice currently provided ... is constitutionally insufficient per se" (*id.*).

[31] *City of West Covina v. Perkins*, 525 U.S. 234, 241 (1999). Of course, if the procedures are not spelled out in publicly available sources—as is often the case in local subsidized housing or county aid programs, notice of their availability must be given (see, e.g., *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 14–15 (1978) (right to contest utility bill); *Bliek v. Palmer*, 102 F.3d 1472, 1475–76 (8th Cir. 1997) (food stamp overpayment demand letter must tell recipients of department's authority to negotiate over amount due)). Moreover, even if the procedures are set forth in publicly available sources, the timing between the notice and the threatened government action may be so short as to require additional information (see, e.g., *Grayden v. Rhodes*, 345 F.3d 1225, 1242 (11th Cir. 2003) (thirty-six-hour notice to tenants to vacate their homes following condemnation proceedings, with no notice to tenants of their right to contest abatement)).

[32] *Dusenbery v. United States*, 534 U.S. 161, 170 (2002).

[33] *Jones v. Flowers*, 547 U.S. 220 (2006).

[34] Cases undermined include *Aacen v. San Juan County Sheriff's Department*, 944 F.2d 691, 697–98 (10th Cir. 1991) (garnishment notices must list possible exemptions), and *Finberg v. Sullivan*, 634 F.2d 50, 62 (3d Cir. 1980) (same, requiring listing of assets exempted from execution).

[35] *Arrington v. Helms*, 438 F.3d 1336, 1349–51, n.13 (11th Cir. 2006) (criticizing *Barnes v. Healy*, 980 F.2d 572, 578 (9th Cir. 1992), in light of *Dusenberry* and *City of West Covina*); see also *Grayden*, 345 F.3d at 1244.

tice must explain "the *factual* basis of his classification."[36] In public benefits cases, the need for detail flows from the nature of the disputed issues, "where recipients have challenged proposed terminations as resting on incorrect or misleading *factual premises* or on misapplication of rules or policies to the facts of *particular* cases."[37]

As the court held in the case involving New York state's implementation of the federal Low-Income Home Energy Assistance Program, "[c]laimants 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. [Citation omitted.] Thus, in the absence of effective notice, the other due process rights afforded a benefits claimant ... are rendered fundamentally hollow."[38] The requirement of detailed notice thus prevents agencies from "hiding the ball."[39]

C. Notices Required to Be Factually Specific and Have an Individualized Focus

For these reasons, courts have frowned on one-sentence or generic notices. For example, in *Escalera v. New York City Housing Authority*, the agency's allusion in one notice to the tenant's "record of antisocial activities and arrests," and in another notice to "illegal acts ... having an adverse effect on the project and its tenants," without more, was insufficient to evict.[40]

Because financial resources and assets available to a public assistance applicant factor into an eligibility determination, the disqualification of an applicant for financial reasons must result in a notice describing the alleged excess assets.[41] Similarly, where the recipient's income was at issue, the *Kapps* court required the notice to include budgetary information.[42]

A bad notice is not cured by giving the recipient or applicant an opportunity to talk to a public assistance eligibility worker:[43] "[I]t is common sense that a scheme which relies on beneficiaries to seek out basic information on why the agency took the action it did will result in 'only the aggressive receiv[ing] their due process right to be 'advised of the reasons for the proposed action.'"[44]

But the requirement of individualized notice does not apply when benefits are

[36] *Hamdi*, 542 U.S. at 533 (emphasis added).

[37] *Goldberg*, 397 U.S. at 268 (emphasis added).

[38] *Kapps*, 404 F.3d at 123–24.

[39] See, e.g., *Driver v. Housing Authority of Racine County*, 713 N.W.2d 670 (Wis. 2006): "[W]e can foresee housing authorities bending the rules and providing deficient written communications whenever they satisfy themselves that the section 8 recipient must 'already know' the basis for its termination decision. Such a self-serving conclusion, of course, improperly supposes that the tenant has committed some violation of which he or she must already be aware" (*id.* at 745).

[40] *Escalera v. New York City Housing Authority*, 425 F. 2d 853, 858 (2d Cir. 1970); see also *Caulder v. Durham Housing Authority*, 433 F.2d 998, 1000 (1970) (notice did not specify "the offences ... but asserted that [the tenant] had been previously informed of the causes").

[41] See, e.g., *Henry v. Gross*, 803 F.2d 757, 766–67 (2d Cir. 1989) (notice merely states that recipient "was in possession of assets which exceed the allowable amount"; court required notice to say asset was a bank account and list contact for further information); *Dilda v. Quern*, 612 F.2d 1055, 1057 (7th Cir. 1980) (disallowing notice stating that "[t]he Resource Consultant has re-budgeted your income and the appropriate change has been made"); *Vargas v. Trainor*, 508 F.2d 485, 487 (7th Cir. 1974) (reduction due to "'changes in your needs or living arrangements which occurred between January 1, 1974, and the current month, but which were not entered on your record so as to effect your check.' No other explanation or statement of reasons was given. ... [¶] The notice also stated that the reduction would not be made 'if you can show that it is wrong.'" More information was needed to avoid "the meek and submissive [from] remain[ing] in the dark" (*id.* at 490)).

[42] *Kapps*, 404 F.3d at 124–26.

[43] *Vargas*, 508 F.2d at 489–90 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1974); *Ortiz v. Eichler*, 616 F. Supp. 1046, 1062 (D. Del. 1985), aff'd, 794 F.2d 889 (3d Cir. 1986); *Buckhannon v. Percy*, 533 F. Supp. 822, 835 (W.D. Wis. 1982), aff'd in part, 708 F.2d 1209 (7th Cir. 1983); *Corella v. Chen*, 985 F. Supp. 1189, 1195 (D. Ariz. 1996).

[44] *Kapps*, 404 F.3d at 126 (quoting *Vargas*, 508 F.2d at 490).

affected by an across-the-board, legislatively mandated alteration of overall eligibility. In *Atkins v. Parker* the Supreme Court distinguished between "the procedural fairness of individual eligibility determinations" and a "legislatively mandated substantive change in the scope of the entire program." Tailored notices explaining the effect of the change on the particular recipient was not constitutionally required.[45]

D. Comprehension of the Notice

Meaningful notice must be understood by the intended recipient. In *David v. Heckler* the court invalidated Medicare notices written at overly high (twelfth-grade) level, castigating "bureaucratic gobbledegook, jargon, double talk, a form of officialese, federalese and insurancese, and doublespeak."[46] The notice should also avoid being overly complicated. One court permitted the unexplained use of the term "asset," holding that the welfare department "cannot be expected to inform recipients of complex changes in the law without using words understandable to an ordinary layman with a sixth grade education."[47] Notices have also been invalidated on due process grounds on a showing of "a particularized allegation of mental impairment of plausibly sufficient severity to impair comprehension."[48]

However, a number of cases hold that failure to give notice in the recipient's language does not violate due process.[49] In *Alexander v. Sandoval*, addressing the refusal of a driver's license bureau to give its written examination in Spanish, the Supreme Court ruled that the federal regulations barring policies having a disparate impact on language minorities are not enforceable in court by nongovernmental parties.[50] State law may provide avenues for addressing this issue.[51]

III. The Adequacy of the Hearing

Since *Goldberg*, oral hearings have been the main forum for adjudicating eligibility in means-tested programs. Who presides over the hearing, their conduct of the hearing, and the evidence allowed at the hearing often determine its fundamental fairness. Some of the issues are discussed below.

A. Termination Without a Hearing

Benefits can be terminated without a prior opportunity to be heard only in extraordinary circumstances. The agency must show that (1) the seizure is directly

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[45] *Atkins v. Parker*, 472 U.S. 115, 129 (1985). Decisions in "mass change" cases (see, e.g., *Vargas v. Trainor*, 508 F.2d 485 (7th Cir. 1974), and *Banks v. Trainor*, 525 F.2d 837, 842 (7th Cir. 1975), cert. denied, 424 U.S. 978 (1976)) can nonetheless be helpful in identifying the level of detail required of individual notices.

[46] *David v. Heckler*, 591 F. Supp. 1033, 1043 (E.D.N.Y. 1984); see also *Doston v. Duffy*, 732 F. Supp. 857, 872–73 (N.D. Ill. 1988) (invalidating welfare notices based on linguistics expert testimony regarding the confusing nature of the notices).

[47] *Buckhannon v. Percy*, 533 F. Supp. 822, 835 (W.D. Wis. 1982), aff'd in part, 708 F.2d 1209 (7th Cir. 1983).

[48] *Stieberger v. Apfel*, 134 F.3d 37, 40–41 (2d Cir. 1997); *Byam v. Barnhart*, 336 F.3d 172, 181–82 (2d Cir. 2003) (recipient must have capacity to act on, as well as understand, notice); *Evans v Chater*, 110 F.3d 1480, 1483 (9th Cir. 1997) (denying claim but acknowledging principle); *Young v. Bowen*, 858 F.2d 951, 955 (4th Cir. 1988); *Parker v. Califano*, 644 F.2d 1199, 1203 (6th Cir. 1981); *Elchediak v. Heckler*, 750 F.2d 892, 894 (11th Cir. 1985). In *Penner v. Schweiker*, 701 F.2d 256, 260–61 (3d Cir. 1983), the court found a colorable due process claim stated where the Social Security Administration sent a reconsideration denial notice to a mentally disabled claimant rather than to his attorney.

[49] *Maso v. New Mexico Taxation & Revenue Department*, 85 P.3d 276 (N.M. Ct. App. 2004) (driver's license), and *Vasequez v. Indiana*, 700 N.E.2d 1157 (Ind. Ct. App. 1998); *Alfonso v. Board of Review, Department of Labor and Industry*, 444 A.2d 1075 (N.J. 1982), cert. denied, 459 U.S. 806 (1982) (unemployment insurance); *Commonwealth v. Olivo*, 337 N.E.2d 904 (Mass. 1975) (nuisance abatement); *Dalomba v. Director, Division of Employment Security*, 337 N.E.2d 687 (Mass. 1975) (unemployment insurance); *Guerrero v. Carleson*, 512 P.2d 833 (Cal. 1973), cert. denied sub nom. *Guerrero v. Swoap*, 414 U.S. 1137 (1974) (public aid); *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983) (social security and Supplemental Security Insurance); *Vialez v. New York City Housing Authority*, 783 F. Supp. 109 (S.D.N.Y. 1991) (requiring translation would pose unjustified burden under *Mathews* test).

[50] *Alexander v Sandoval*, 532 U.S. 275, 289 (2001) (construing 42 U.S.C. § 2000d-1).

[51] See, e.g., *Siemion v. Department of Public Aid*, 522 N.E.2d 627 (Ill. App. Ct. 1988) (before denying benefits to limited-English-proficient person, state statute required worker to take other measures to communicate); Cal. Govt. Code § 11135 (2009) (barring discrimination by recipient of state funding because of, e.g., national origin or ethnic group identification); Cal. Code. Regs. tit. 22, § 98211(c) (failure to provide "alternative communication services" to limited-English-proficient individuals is discriminatory).

necessary to secure an important governmental or general public interest; (2) a special need exists for prompt action; and (3) the person initiating the seizure is a government official charged with determining, under a narrowly drawn statute, that the seizure is necessary and justified.[52] For example, in *Richmond Tenants Organization v. Kemp* the court held that alleged drug activity did not warrant ousting public housing tenants without notice and hearing since drug possession by itself is not an exigent circumstance, and an apartment is a fixed location, unlike an easily moveable car or yacht used for transporting drugs.[53] And in *Flatford v. City of Monroe* due process was violated when a tenant—evicted by the city in "extraordinary circumstances" because of the dangerous condition of the building—was not given a posteviction hearing.[54]

B. Delay of a Posttermination Hearing

Although the Supreme Court has said that an extended hearing delay following a termination can violate due process, the point at which that happens is elusive.[55] *FDIC v. Mallen* addressed a thirty-day postponement of a termination hearing beyond the statutorily required thirty-day deadline. Applying the *Mathews* balancing test, the Court found that, while the private interest possessed by the fired bank president in continued employment was great, the government's interest in preventing financial shenanigans, as well as both parties' interest in a thorough hearing, justified the delay.[56] Any incremental reputational damage would be slight, given the publicity surrounding the initial suspension.

By contrast, in *Barry v. Barchi*, involving a trainer whose state license was suspended for allegedly drugging a horse, the Court ruled that the absence of any timeline for holding the postsuspension hearing violated due process. There the private interest was paramount since,

> insofar as the statutory requirements are concerned, it is as likely as not that Barchi and others subject to relatively brief suspensions would have no opportunity to put the State to its proof until they have suffered the full penalty imposed. Yet, it is possible that Barchi's horse may not have been drugged and Barchi may not have been at fault at all.... We also discern little or no state interest ... in an appreciable delay in going forward with a full hearing. On the contrary, it would seem as much in the State's interest as Barchi's to have an early and reliable determination with respect to the integrity of those participating in state-supervised horse racing.[57]

Delays in public assistance hearings are mitigated, at least for recipients who timely appeal, by receiving aid paid pending the hearing decision. But, for anyone else, the private interest is decisive, subject to the government's need for sufficient time to schedule a hearing. Since the agency should have developed its case before it decided to terminate or deny benefits, the government's interest in a delay is slight, requiring a reasonably prompt hearing.[58]

C. Whether an In-Person Hearing Must Be Held

Mathews recognized that a face-to-face hearing would be warranted where "a wide variety of information may be deemed relevant, and issues of witness credibil-

[52] *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972).

[53] *Richmond Tenants Organization v. Kemp*, 956 F.2d 1300, 1307–8 (4th Cir. 1992).

[54] *Flatford v. City of Monroe*, 17 F.3d 162, 168–69 (6th Cir. 1994) (balancing *Mathews* factors).

[55] *Loudermill*, 470 U.S. at 546.

[56] *Federal Deposit Insurance Corporation v. Mallen*, 486 U.S. 230, 243–44 (1988).

[57] *Barry v. Barchi*, 443 U.S. 55, 66 (1979).

[58] Outside the due process context and citing the agency's expertise, the U.S. Supreme Court has refused to force deadlines on the Social Security Administration's adjudication of disability claims (*Day v. Heckler*, 467 U.S. 104 (1984)).

ity and veracity often are critical to the decision-making process."[59] Courts have nevertheless held that telephone hearings do not offend due process. As one court stated in regard to unemployment benefits denial and termination hearings, "the [Unemployment Insurance Appeals] Board has devised a pragmatic solution, made possible by modern technology, which attempts to reconcile the problem of geographically separated adversaries with the core elements of a fair adversary hearing ...."[60]

Telephonic and other hearings not held in-person could raise due process issues in cases—overpayments, for example—where credibility is key. Applying the *Mathews* criteria to Medicare appeals, one court wrote:

> [F]or cases "where factual issues involving the credibility or veracity of the claimant are at stake," ... informal oral hearings ... may be required by due process. ... For other claims, however, where proper documentation has not been filed by the beneficiary, or where only arithmetic computations or similar disagreements are at issue, ... [a] toll-free telephone system combined with a full paper hearing would be sufficient. [However,] "[i]f the total number of those cases is quite small, ... the adoption of procedures allowing for informal oral hearings is not warranted."[61]

D. The Problem of Bias

Administrative hearings are often heard by employees of the very agency taking action. This, without more, does not amount to bias. In *Withrow v Larkin* a medical doctor's license termination proceeding followed an investigation by the revoking body. The Supreme Court wrote:

> The risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position.[62]

Successful bias challenges are usually based on the hearing officer's pecuniary interest in the subject of the hearing. This may involve a direct bias, as in *Tumey v. Ohio*, where the judge's pay depended on fines generated by his convictions.[63] The bias may also be indirect, as in *Ward v. Village of Monroeville*, where the local mayor was also the traffic magistrate, the fines going to the village treasury for which he was responsible.[64] Another example is *Gibson v. Berryhill*, where an optometry board made up of independent practitioners ruled on the revocation of licenses of competing salaried optometrists.[65]

May bias be imputed from the fact that the agency hired the independent hearing officer, who would then be predisposed in favor of the agency? *Schweiker*

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[59] *Mathews*, 424 U.S. at 344.

[60] *Slattery v. Unemployment Insurance Appeals Board*, 60 Cal. App. 3d 245, 250 (1976); see also *Casey v. O'Bannon*, 536 F. Supp. 350 (E.D. Pa. 1982) (public aid and food stamps).

[61] *Gray Panthers v. Schweicker*, 716 F.2d 23, 35–36 (D.C. Cir. 1983) (citing *Califano v. Yamasaki*, 442 U.S. 682, 696 (1979): "[W]e do not think that the rare instance in which a credibility dispute is relevant to a § 204(a) claim is sufficient to require the Secretary to sift through all requests for reconsideration and grant a hearing to the few that involve credibility.").

[62] *Withrow v. Larkin*, 421 U.S. 35, 57 (1975).

[63] *Tumey v. Ohio*, 273 U.S. 510 (1927).

[64] *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972).

[65] *Gibson v. Berryhill*, 411 U.S. 564, 578–79 (1973); see also *Caperton v. A.T. Massey Coal Company*, 129 S. Ct. 2252, 2263 (2009) ($3 million campaign contribution to a candidate for state supreme court judge had "significant and disproportionate influence" in putting judge in position to produce swing vote in reversing $50 million judgment against campaign contributor).

v. McClure involved hearing officers chosen by the insurance company to judge plaintiffs' Medicare claims. Since both the salaries and the cost of medical care were paid by the federal government, the Supreme Court wrote: "In the absence of financial interest on the part of the [insurance companies], there is no basis for assuming a derivative bias among their hearing officers."[66] By contrast, where the temporary hearing officer presiding over a massage parlor license revocation proceeding was paid by the agency for each individual hearing, the California Supreme Court found that "a direct, personal, and substantial pecuniary interest does indeed exist when income from judging depends upon the volume of cases an adjudicator hears and when frequent litigants are free to choose among adjudicators, preferring those who render favorable decisions."[67] Most recently, in *Caperton v A.T. Massey Coal Company* Justice Kennedy wrote: "Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own cause."[68]

Bias can also exist when the initial decision maker is also the hearing officer. "[P]rior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review."[69] But that the hearing officer also gathers the record supporting the agency's case does not necessarily violate due process. Addressing the many hats worn by social security administrative law judges, the Supreme Court stated baldly that the judge "does not act as counsel. He acts as an examiner charged with developing the facts."[70] An unreported district court case has found that actual prosecution of the case by the hearing officer is a different matter and does violate due process.[71]

A related problem is the competency of the hearing officer to adjudicate complex issues. Section 8 voucher and General Assistance hearing officers are often eligibility workers promoted from the ranks, with little or no legal training. Remarkably few cases address this issue. In an unreported decision denying a motion to dismiss, one judge wrote: "[I]f ... due process requires that the hearings include the presentation of all legal arguments relevant to the recipient's defense, then Plaintiff's argument that the agencies are required to provide officers capable of analyzing and ruling on those arguments may well prove capable of supporting [equitable] relief."[72]

IV. Receiving Evidence at the Hearing

Since due process requires prior notice of the issues to be heard, unrelated issues should not be entertained. By the same token, the claimant who requested the hearing must be permitted to present evidence on the ultimate issues even if the agency thinks the issues are narrower.

In *Bell v. Burson* the plaintiff's driver's license was suspended under an uninsured motorist statute which required bond to be posted after an accident to ensure that the driver could pay damages. The plaintiff sought a hearing to prove that he was not at fault and therefore should not be required to post bond. The agency refused to hear the evidence because it saw

[66] *Schweiker v. McClure*, 456 U.S. 188, 197 (1982).

[67] *Haas v. County of San Bernadino*, 27 Cal. 4th 1017, 1031–32 (2002).

[68] *Caperton*, 129 S. Ct. at 2264.

[69] *Goldberg*, 397 U.S. at 271; see also *Morrissey v. Brewer*, 408 U.S. 471, 485–86 (1972) (someone other than supervising parole officer should adjudicate whether parole should be revoked).

[70] *Richardson v. Perales*, 402 U.S. 389, 410 (1971).

[71] *Stevenson v. Willis*, No. 3:07CV3743, 2008 U.S. Dist. LEXIS 76213 (N.D. Ohio Sept. 18, 2008) (hearing officer acting as both judge and housing authority advocate).

[72] *Hendrix v. Seattle Housing Authority*, No. C07-657MJP, 2007 U.S. Dist. LEXIS 85516, at *18–*19 (W.D. Wash. Nov. 9, 2007).

the dispositive issue as whether plaintiff had insurance. The Supreme Court held:

> The hearing required by the Due Process Clause must be "meaningful" and "appropriate to the nature of the case." ... It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended does not meet this standard."[73]

A. The Burden of Producing Evidence

An agency revoking public assistance benefits has the initial burden of presenting evidence establishing its prima facie case. Since a recipient must have "an effective opportunity to *defend* ...," the agency must present evidence supporting its decision before the recipient need rebut.[74] Otherwise the recipient will be forced to speculate about what evidence should be offered to rebut a case which has yet to be presented.

In *Basco v. Machin*, reviewing a Section 8 voucher termination, the federal court of appeals held:

> [C]ontrary to Machin's declaration [in the governing policy] that the "burden of proof that the individual is a visitor rests on the family," ... the [public housing agency] has the burden of persuasion and must initially present sufficient evidence to establish a prima facie case that an unauthorized individual "has been in the unit more than 15 consecutive days without [public housing agency] approval, or a total of 30 days in a 12 month period" [(quoting the applicable public housing agency policy).] Thereafter, the Section 8 participant has the burden of production to show "that the individual is a visitor."[75]

B. Trustworthy Hearsay Evidence

This leads to the problem of competent evidence. Although the mantra is often raised that "the rules of evidence are relaxed in administrative hearings," that truism has its limits. The main function of the hearing, after all, is "truthfinding," and all parties have an interest in factual findings which are supported by competent evidence.[76]

For example, only trustworthy hearsay evidence should be allowed in administrative hearings. In *Richardson v. Perales* the Supreme Court allowed the use of medical records to prove disability:

> The matter comes down to the question of the procedure's integrity and fundamental fairness. We see nothing that works in derogation of that integrity and of that fairness in the admission of consultants' reports, subject as they are to being material and to the use of the subpoena and consequent cross-examination.[77]

The treatment of medical reports illustrates the "adequacy of the procedures"

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[73] *Bell v. Burson*, 402 U.S. 535, 541–42 (1971) (internal citations omitted).

[74] *Goldberg*, 397 U.S. at 267–68 (emphasis added).

[75] *Basco v. Machin*, 514 F.3d 1177, 1182 (11th Cir. 2008). See, e.g., *La Prade v. Department of Water and Power*, 162 P.2d 13, 15 (Cal. 1945) (where job termination requires showing of cause, employer has initial burden of proof; only when this is met does burden pass to employee); *Daniels v. Department of Motor Vehicles*, 658 P.2d 1313, 1315 (Cal. 1983) (driver's license suspension). Applicants generally have the initial burden of proving eligibility (see *Martin v. Alcoholic Beverage Control Appeals Board*, 341 P.2d 291, 295 (Cal. 1959) (liquor license); *Layton v. Merit System Committee*, 60 Cal. App. 3d 58, 64–65 (Cal. App. 1976) (employment termination).

[76] *Mathews*, 424 U.S. at 344.

[77] *Richardson*, 402 U.S. at 410 (1971); see also *Consolidated Edison Company v. National Labor Relations Board*, 305 U.S. 197, 230 (1938) ("But this assurance of a desireable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence.").

prong of the *Mathews* balancing test: "[W]hile there may be professional disagreement with the medical conclusions the specter of questionable credibility and veracity is not present."[78]

In objecting to hearsay, the informality of the proceedings is a red herring. The real issue is the reliability of the hearsay statement to prove the asserted fact. Hearsay which is under "the specter of questionable credibility and veracity" raises the risk of an erroneous deprivation.[79]

Hence *Basco* held that hearsay police reports could not satisfy the agency's burden of persuasion that the rules had been violated. Hearsay *could* support a finding

> as long as factors that assure the underlying reliability and probative value of the evidence are present.... The reliability and probative force of such evidence depend on whether (1) the out-of-court declarant was not biased and had no interest in the result of the case; (2) the opposing party could have obtained the information contained in the hearsay before the hearing and could have subpoenaed the declarant; (3) the information was not inconsistent on its face; and (4) the information has been recognized by courts as inherently reliable.[80]

C. The Right to Confront and Cross-Examine Witnesses

Overreliance on hearsay can impinge on a recipient's right to cross-examine the agency's witnesses:

> [W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, 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. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination.[81]

One federal court of appeals has glibly said that "[t]he principle that hearsay evidence is admissible in administrative proceedings would be vitiated if a party could object to its admission on the ground that he was denied his right to cross-examination."[82] But this ignores the problem of the reliability of that evidence. When an essential element of the agency's case rests on hearsay that—unlike utility or medical records—was not created in conditions which support its reliability, the right of confrontation should include the ability to cross-examine the absent declarant.

In *Escalera v. New York City Housing Authority*, the court held that "denying the tenant the opportunity to confront and cross-examine persons who supplied information in the tenant's folder upon which [the defendant's] action is grounded is improper."[83] In *Edgecomb v. Housing Authority of the Town of Vernon*, where a Section 8 voucher was terminated based on a police report and newspaper articles, the

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[78] *Mathews*, 424 U.S. at 344 (quoting *Richardson*, 402 U.S. at 407).

[79] *Id.*

[80] *Basco*, 514 F.3d at 1182; accord *Edgecomb v. Housing Authority of the Town of Vernon*, 824 F. Supp. 312 (D. Conn. 1993) (police report and newspaper articles).

[81] *Goldberg*, 390 U.S. at 270.

[82] *Beauchamp v. De Abadia*, 779 F.2d 773, 775–76 (1st Cir. 1985) (termination of medical license).

[83] *Escalera*, 425 F. 2d at 862.

court agreed, holding *Richardson v. Perales* inapposite since in that case claimants objecting to medical reports could subpoena and cross-examine the authors.[84] And in *Jennings v. Jones* a California court required a welfare department to produce at hearings a worker familiar with the case: "The appearance at the hearing of a file custodian does not, by itself, satisfy the requirement of confrontation nor provide for meaningful cross-examination. The recipient whose benefits are being terminated cannot cross-examine a file."[85]

The *Mathews* factors support these conclusions. Public assistance hearings involve eligibility issues where "a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process."[86] Given the recipient's interest in continued eligibility, at issue is the adequacy of relying on the untested assertions of absent witnesses with unknown motives, which cross-examination could probe. The burden on the government of producing a live witness in the "generality of cases" would in most cases be minimal.

V. The Hearing Decision

Nearly a century ago, the Supreme Court described the key attributes of administrative adjudication:

> [T]he statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless.... [I]t has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the "indisputable character of the evidence" ...; or, if the facts found do not, as a matter of law, support the order made.[87]

Goldberg stated: "[T]he decision-maker's conclusions as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing."[88] Hence the hearing officer cannot rely on *ex parte* communications outside the hearing.[89]

Goldberg admonishes that the hearing decision "should state the reasons for [the judge's] determination and indicate the evidence he relied on."[90] The decision "need not amount to a full opinion or even formal findings of fact and conclusions of law."[91] However, some states

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[84] *Edgecomb*, 824 F. Supp. at 316.

[85] *Jennings v. Jones*, 165 Cal. App. 3d 1083, 1090 (Cal. App. 1985); see also *Costa v. Fall River Housing Authority*, 881N.E.2d 800 (Mass. App. 2008).

[86] *Mathews*, 424 U.S. at 343–44.

[87] *Interstate Commerce Commission v. Louisville and Nashville Railroad Company*, 227 U.S. 88 (1915).

[88] *Goldberg*, 397 U.S. at 271 (citing *Ohio Bell Telephone v. Public Utilities Commission*, 301 U.S. 292, 300–301 (1937).

[89] See, e.g., *Camero v. United States*, 375 F.2d 777, 780–81 (Ct. Cl. 1967) (*ex parte* communications by hearing officer in employment termination case); *Ortiz v. Eichler*, 616 F. Supp. 1046 (D. Del. 1985) (public aid hearings); *Boreta v. Department of Alcoholic Beverage Control*, 2 Cal. 3d 85, 104 (1970) (citing *English v. City of Long Beach*, 35 Cal. 2d 155, 158 (1950)); *La Prade v. Department of Water and Power*, 27 Cal. 2d 47, 52 (1945).

[90] *Goldberg*, 397 U.S. at 271. See also 7 C.F.R. § 273.15(q) (2009); 24 C.F.R. § 982.555(e)(6) (2009); 42 C.F.R. § 431.244(d)–(e) (2009).

[91] *Goldberg*, 397 U.S. at 271.

require the decision to describe the nexus between the evidence, the factual findings, and the ultimate conclusions in order to facilitate judicial review.[92] The *Mathews* criteria could be used to support a requirement that a hearing decision be required to make explicit findings.

■ ■ ■

Forty years after *Goldberg v. Kelly*, the fair hearing continues to be a tool for checking arbitrary, capricious, or downright vindictive actions by agencies charged with providing a safety net for low-income people. The continued effectiveness of the procedure largely depends on the vigilance of beneficiaries and their advocates in asserting the full panoply of rights announced in *Goldberg* and challenging attempts at their erosion. Until the need for public assistance programs disappears, this fight to ensure the integrity of the fair hearing will continue.

[92]See, e.g., *Topanga Association v. County of Los Angeles*, 11 Cal. 3d 506, 515 (1974) (a reviewing court can find an abuse of discretion if tribunal did not proceed in manner required by law, its order is not supported by findings, or its findings are not supported by evidence; citing CAL. CIV. PROC. CODE § 1094.5 (2009)); *Carter v. Lynn Housing Authority*, 880 N.E.2d 778 (Mass. 2008) (failure of agency to make findings). A related issue is the availability of a transcript of the proceedings (see, e.g., *Buckhart v. San Francisco Residential Rent Stabilization and Arbitration Board*, 197 Cal. App. 3d 1032, 1035–36 (1988) (lack of hearing transcript should have precluded review of administrative hearing decision, warranting reversal of trial court's judgment)).

Goldberg in the Federal Regulations

The regulations governing the major needs-based federal benefits programs incorporate the procedural protections required by *Goldberg v. Kelly*:

- Detailed written notice of the proposed action: 7 C.F.R § 273.13(a)(2) (2009) (food stamps); 20 C.F.R. § 416.1404(a) (2009) (Supplemental Security Income); 24 C.F.R. § 982.555(c) (2009) (Section 8 Voucher Program); 42 C.F.R. § 431.210 (2009) (Medicaid).
- At least ten days prior to the action: 7 C.F.R § 273.13(a)(1); 42 C.F.R. § 431.211.
- Right to a Hearing to contest the proposed action: 7 C.F.R § 273.15(k); 20 C.F.R. § 416.1429; 24 C.F.R. § 982.555(a)(1); 42 C.F.R. 431.220(a).
- Presided over by a hearing officer who has no personal stake in the matter, did not make the initial decision to take action, or is the supervisor of that person: 7 C.F.R § 273.15(m); 20 C.F.R. § 416.1440; 24 C.F.R. § 982.555(e)(4).
- Right to aid paid pending the hearing decision: 7 C.F.R § 273.15(k) (food stamps); 20 C.F.R. § 416.1336(b) 24 C.F.R. § 982.555(a)(2)); 42 C.F.R. § 431.230.
- Right to review the agency's file before the hearing: 7 C.F.R § 273.15(p)(1); 24 C.F.R. § 982.555(e)(2) (Section 8 Voucher Program); 42 C.F.R. § 431.242(a).
- Right to present evidence and cross-examine witnesses: 7 C.F.R § 273.15(p)(2) – (5); 20 C.F.R. § 416.1450; 24 C.F.R. § 982.555(e)(5); 42 C.F.R. § 431.242.
- Right to choose a representative: 7 C.F.R § 273.15(p)(2); 20 C.F.R. § 416.1449; 24 C.F.R. § 982.555(e)(3); 42 C.F.R. §§ 431.222(d), .242.
- A written decision based only on the evidence presented at the hearing: 7 C.F.R § 273.15(q)(1); 20 C.F.R. § 416.1453(a); 24 C.F.R. § 982.555(e)(6); 42 C.F.R. § 431.244(a).
- Which explains the reasons for the decision: 7 C.F.R § 273.15(q)(2)–(5); 20 C.F.R. § 416.1453(a); 24 C.F.R. § 982.555(e)(6); 42 C.F.R. § 431.244(d).

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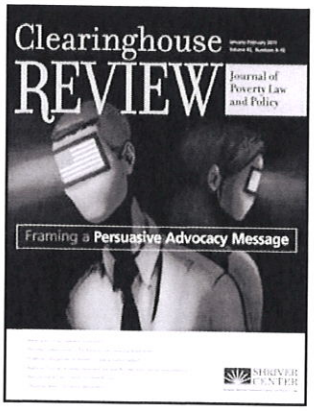

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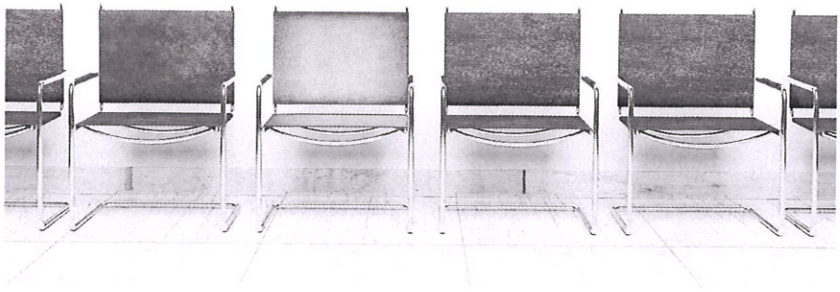
Exhibit B

How to Protect Clients Receiving Public Benefits When Modernized Systems Fail:

Apply Traditional Due Process in New Contexts

BY GINA MANNIX, MARC COHAN, AND GREG BASS

Fifty years ago *Goldberg v. Kelly* infused public benefits administration with due process principles of fundamental fairness by requiring agencies to give notice and the opportunity for a pretermination hearing to benefits recipients.[1] States today employ sophisticated technology to transform public benefits administration, but the result too often is chaos and arbitrary exclusions of eligible households when systems fail. These developments challenge advocates to revisit the meaning of due process and fundamental fairness and to consider how due process can shape their advocacy. Here we present a broad overview of the due process issues and highlight recent advocacy by Community Legal Services of Philadelphia.



States today employ sophisticated technology to transform public benefits administration, but the result too often is chaos and arbitrary exclusions of eligible households when systems fail.

When Public Benefits Modernization Fails

States have been "modernizing" administration of public benefit programs—including the Supplemental Nutrition Assistance Program (SNAP), Medicaid, and Temporary Assistance for Needy Families (TANF)—for over a decade. Modernization generally refers to a range of strategies such as automated eligibility determination and case management systems; Web-based systems for submitting applications, reporting changes, and finding case status and notices; call centers that may be used in the application process for reporting changes, giving case status information, and conducting eligibility interviews; digitized document imaging; and business process reengineering that revises case management workflow and typically moves away from a model in which a caseworker is assigned to a case toward a model in which workers perform designated functions.[2] The consequences have too often been

1 *Goldberg v. Kelly*, 397 U.S. 254 (1970).

2 The Patient Protection and Affordable Care Act has encouraged ambitious improvements by requiring states to streamline processing of applications for Medicaid and health coverage through the new health insurance marketplaces. Enhanced federal funding (i.e., 90 percent) is available for state Medicaid information technology (IT) upgrades to accomplish the streamlining and data sharing requirements. Federal waivers allow related state human services programs to benefit from the Medicaid IT upgrades and improve eligibility determination systems for these other programs (see, e.g., Terri Shaw et al., Center on Budget and Policy Priorities & Social Interest Solutions, State Innovations in Horizontal Integration: Leveraging Technology for Health and Human Services (March 24, 2015)). For a review of state online services, see Center on Budget and Policy Priorities, Online Services for Key Low-Income Benefit Programs (March 18, 2015).

disastrous for benefits applicants and recipients when system failures lead to rampant delays, denials, and terminations of otherwise eligible people.[3]

While developments spurred by the Patient Protection and Affordable Care Act have created huge opportunities for states to improve their human services eligibility systems and better serve low-income families, many states have struggled with modernization. Design and implementation failures, inadequate staffing, ineffective leadership, inability to oversee technology vendors, and reduced in-person service for vulnerable persons mean systemic failures that prevent eligible people from establishing and maintaining eligibility for desperately needed benefits. For example, computer systems may be programmed to close or terminate cases automatically if a worker has not entered an instruction to the contrary; workers' failure to act timely on applications and submitted documents means that cases are inappropriately and routinely closed without an individualized review.[4] Inadequate document imaging systems result in backlogs and large numbers of documents that are not matched to a case and are essentially lost, leading to benefit denials and delays.[5] Overloaded and inadequately staffed call centers—with lengthy waits and large numbers of abandoned or interrupted calls—prevent people from completing mandatory SNAP eligibility interviews or dealing with eligibility issues.[6] Inaccessible websites and call centers can present additional barriers to people with disabilities.[7] Families who experience procedural denials and terminations resulting from these and other systemic failures must reapply and suffer from the loss of benefits in the interim.

Litigation has been necessary to fix systemic delays in getting benefits to eligible households in states where modernization has fallen short.

This phenomenon, known as "churn," creates avoidable additional administrative tasks and costs for the agency, but state agencies have not adequately focused on understanding and avoiding churn.[8]

The U.S. Department of Agriculture's Food and Nutrition Service has developed extensive technical assistance materials on SNAP modernization design, challenges, and best practices; sought state improvements through its corrective action process; ramped up administrative enforcement of application processing requirements since late 2014; and supported outside technical assistance for some

3 For examples of disastrous rollouts of new computer systems, see Mary R. Mannix et al., *Public Benefits Privatization and Modernization: Recent Developments and Advocacy*, 42 Clearinghouse Review 4 (May–June 2008). See also Kim Lewis, National Health Law Program, Lessons from [California]: Halting the Medi-Cal Application Backlog in Court (Sept. 29, 2015) (IT problems with new eligibility and enrollment system).

4 The National Center for Law and Economic Justice and its partners achieved elimination of Medicaid autoclosure at renewal in *Davis v. Birch* (Amended Stipulation and Order of Settlement Concerning Department of Health Care Policy and Financing, *Davis v. Birch*, No. 04-CV-7059 (Colo. Dist. Ct. Feb. 25, 2011)). See Order Granting Motion to Enforce Compliance, *Hatten-Gonzales v. Squier*, No. 88-cv-0385 (D.N.M. May 20, 2014) (granting motion to enforce prior consent decree requiring timely Medicaid and Supplemental Nutrition Assistance Program (SNAP) application processing and requiring, inter alia, agency to stop automatic denials and terminations without individualized eligibility review); *Salazar v. District of Columbia*, 954 F. Supp. 278 (D.D.C. 1996).

5 See, e.g., Joel Ferber, *Bureaucracy Limits Access to Health Care for Missouri Children and Families*, Pedslines, Fall–Winter 2014, at 4.

6 See, e.g., State of Georgia, Division of Family and Children Services, SNAP Corrective Action Plan: 6 Month Update: 11/1/2014 (in our files).

7 See Stipulation and Order of Settlement, *Rafferty v. Doar*, No. 13-cv-1410 (S.D.N.Y. Oct. 23, 2015) (requiring Medicaid and SNAP agencies to issue notices and written material in alternative formats to those who are blind and visually impaired and including requirements for accessibility of website portal); Cary LaCheen, National Center for Law and Economic Justice, The Closed Digital Door: State Public Benefits Agencies' Failure to Make Websites Accessible to People with Disabilities and Usable for Everyone (June 22, 2010); National Center for Law and Economic Justice & Maximus, Modernizing Public Benefits Programs: What the Law Says State Agencies Must Do to Serve People with Disabilities (2010).

8 State data on the extent of churn is limited, but advocates are very familiar with their clients' experiences. For background, see Dottie Rosenbaum, Center on Budget and Policy Priorities, Lessons Churned: Measuring the Impact of Churn in Health and Human Services Programs on Participants and State and Local Agencies (March 20, 2015).

states.[9] Nonetheless, litigation has been necessary to fix systemic delays in getting benefits to eligible households in states where modernization has fallen short. In its litigation in various states and discussions with local advocates in other states, the National Center for Law and Economic Justice and its colleagues have seen the serious harms and deprivations that flawed modernization causes applicants and recipients.[10] Such systemic failures and the resulting exclusion of families from benefits challenge advocates to consider anew how fundamental due process principles apply in increasingly complicated, technology-driven eligibility systems and how they may shape advocacy strategies.[11]

Overview of Procedural Due Process

The "due process revolution of the 1970s" began with the U.S. Supreme Court's decision that afforded procedural due process rights guaranteed by the Fourteenth Amendment to welfare recipients prior to discontinuation of their benefits.[12] The landmark case of *Goldberg v. Kelly* remains the foundation for the acknowledgment that persons seeking to vindicate their entitlement to welfare assistance possess a property interest in those benefits; the property interest entitles them to due process protections of predeprivation notice and an opportunity for an evidentiary hearing.[13] In by-now familiar language, the Court elaborated upon the compelling need for pretermination due process protections:

> For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Thus the crucial factor in this context ... is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.[14]

Quoting the district court below, the *Goldberg* Court emphasized that "'[t]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great,'" to forgo adequate due process protections for these individuals.[15]

Addressing the contours of the pretermination hearing, the *Goldberg* Court emphasized that the procedures mandated by due process must be flexibly "adapted to the particular characteristics of welfare recipients, and to the limited nature of the controversies to be resolved."[16] This adaptability requires that the hearing "must be tailored to the capacities and circumstances of those who are to be heard."[17] The Court concluded that, in the welfare benefits context, due process requires a pretermination hearing consisting of the following minimum procedural safeguards: notice detailing the reasons for the proposed termination; the opportunity at the hearing to confront and cross-examine witnesses, to present oral arguments, and to be represented by counsel; and adjudication by an impartial decision maker who states reasons for the determination and indicates the evidence for it.[18]

The Court since *Goldberg* has continued to emphasize the flexibility and adaptability of due process and the corresponding need to adapt procedural protections to changing circumstances.

The Court since *Goldberg* has continued to emphasize the flexibility and adaptability of due process and the corresponding need to adapt procedural protections to changing circumstances.[19] This flexibility is in the "scope" of due process—"a recognition that not all situations calling for procedural safeguards call for the same kind of procedure."[20]

The Court described its approach to due process in *Wilkinson v. Austin*: "[W]e generally have declined to establish rigid rules

9 See, e.g., U.S. Department of Agriculture (USDA) Food and Nutrition Service, Call Center/Contact Center Support for States: A Framework and Reference Guide (Aug. 2011); Press Release, USDA Food and Nutrition Service, USDA Awards Grants to Improve SNAP Processing, Technology (Sept. 16, 2015); Memorandum from USDA Food and Nutrition Service to Regional Administrators (Oct. 1, 2014) ("State Guidance on Improving Low [SNAP] Application Processing Timeliness Rates"); Memorandum from USDA Food and Nutrition Service to Regional Directors (May 13, 2014) ("Supplemental Nutrition Assistance Program—Guidance for State Agencies on Novel Waivers"). For USDA Food and Nutrition Service materials on modernization, search fns.usda.gov for "SNAP modernization."

10 See, e.g., Stipulation and Order of Settlement, *Melanie K. v. Horton*, No. 1:14-CV-710 (N.D. Ga. Feb. 2, 2015) (approved Aug. 6, 2015); *Briggs v. Bremby*, No. 3:12-cv-324 (D. Conn. Dec. 4, 2012), aff'd, 792 F.3d 239 (2d Cir. 2015); *Leiting-Hall v. Phillips*, No. 4:14-CV-03155 (D. Neb.) (pending). See also Marc Cohan & Mary R. Mannix, *National Center for Law and Economic Justice's SNAP Application Delay Litigation Project*, 46 Clearinghouse Review 208 (Sept.–Oct. 2012).

11 As to the due process issues raised by increased automation, see Danielle Keats Citron, *Technological Due Process*, 85 Washington University Law Review 1249 (2008).

12 Jason Parkin, *Adaptable Due Process*, 160 University of Pennsylvania Law Review 1309, 1320 (2012).

13 *Goldberg*, 397 U.S. at 264–71.

14 *Id.* at 264 (citation and footnotes omitted).

15 *Id.* at 266 (citation omitted).

16 *Id.* at 267.

17 *Id.* at 268–69 (footnote omitted).

18 *Id.* at 268–71.

19 See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands."). See also *Connecticut v. Doehr*, 501 U.S. 1, 10 (1991) ("Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.") (internal quotation marks omitted).

20 *Morrissey*, 408 U.S. at 481.

and instead have embraced a framework to evaluate the sufficiency of particular procedures."[21] The Court established that framework six years after the *Goldberg* decision in *Mathews v. Eldridge*.[22] In rejecting the contention that the discontinuation of social security disability benefits without a pretermination hearing violates the due process clause, the Court adopted a new approach to determining what procedures are required by due process when the government seeks to deprive an individual of a constitutionally protected interest. The Court mandated consideration of three distinct factors as part of a fact-intensive balancing approach:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[23]

The Court continues to cite the *Goldberg* and *Mathews* holdings with approval in determining the extent of due process safeguards for persons possessing property interests in disputes involving other public benefits, such as food stamps.[24] Medicaid benefits constitute similarly protectable property interests that mandate due process safeguards.[25] While the Supreme Court has not yet ruled on the question, each circuit to examine the issue has held that applicants for benefits (as opposed to current recipients) may possess a property interest in receiving public welfare entitlements, sufficient to trigger due process safeguards.[26]

Courts have often declared that due process entails a foundation of fundamental fairness and rational decision making that serves as a buffer for recipients against arbitrary governmental action. In addressing the reduction of Medicaid home care services, the court in *Mayer v. Wing* held: "At a minimum, 'due process requires that government officials refrain from acting in an irrational, arbitrary, or capricious manner.'"[27] Due process further "demands that decisions regarding entitlements to government benefits be made according to 'ascertainable standards' that are applied in a rational and consistent manner."[28] In the public benefits context, "due process requires that welfare assistance be administered to ensure fairness and freedom from arbitrary decision-making as to eligibility."[29]

Due Process Considerations When Modernization Fails

Fundamental procedural due process protections are tools for advocates seeking to remedy many of the failures and disentitlements that can result from modernization. The array of advocacy strategies is far too extensive to be covered here, but we welcome direct conversation with advocates looking to combat disentitlement resulting from modernization or other reasons. However, several approaches merit brief discussion.

The advocate typically needs to show that there are systemic unlawful practices notwithstanding nominally adequate written policies and that such systemic failures cause widespread improper denials and terminations.

All too often in a modernized system, workers do not individually create the notices of denial or of adverse action that inform applicants or recipients of the reason(s) why an application has been denied or benefits are being terminated. Instead the workers may use an automated notice system that has generic drop-down screens or that lists multiple alternative reasons for the proposed adverse action. The use of such a system may violate due process requirements.

For example, in *Weston v. Cassata* the challenged notices were issued by the county using computer-generated text developed by the state agency.[30] In preparing individual sanction notices, county workers selected standard messages from

21 Wilkinson v. Austin, 545 U.S. 209, 224 (2005).

22 Mathews v. Eldridge, 424 U.S. 319 (1976).

23 *Id.* at 335.

24 See, e.g., Atkins v. Parker, 472 U.S. 115, 128 (1985) ("Food-stamp benefits, like the welfare benefits at issue in *Goldberg v. Kelly*, 'are a matter of statutory entitlement for persons qualified to receive them.' Such entitlements are appropriately treated as a form of 'property' protected by the Due Process Clause; accordingly, the procedures that are employed in determining whether an individual may continue to participate in the statutory program must comply with the commands of the Constitution" (quoting *Goldberg*, 397 U.S. at 262–63 (footnote omitted))).

25 See, e.g., NB v. District of Columbia, 794 F.3d 31, 42 (D.C. Cir. 2015) (due process attached to claims of entitlement to prescription drug coverage under Medicaid).

26 See Kapps v. Wing, 404 F.3d 105, 115–16 (2d Cir. 2005) (citing cases). In the application context, the process due "is notice of the reasons for the agency's preliminary determination, and an opportunity to be heard in response" (*Kapps*, 404 F.3d at 118 (citation omitted)).

27 Mayer v. Wing, 922 F. Supp. 902, 911 (S.D.N.Y. 1996) (quoting Pollnow v. Glennon, 757 F.2d 496, 501 (2d Cir. 1985)).

28 *Id.* (quoting Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968)).

29 White v. Roughton, 530 F.2d 750, 753 (7th Cir. 1976).

30 Weston v. Cassata, 37 P.3d 469 (Colo. Ct. App. 2001).

The Court since *Goldberg* has continued to emphasize the flexibility and adaptability of due process and the corresponding need to adapt procedural protections to changing circumstances.

the state's computer system but did not include case-specific information. One of the results was that the challenged notices did not specify the particular conduct that led to the sanction but instead simply listed multiple possible reasons. One set of notices generically said that the individual facing termination failed to cooperate with the "works requirement, child support requirement, or immunization requirement of the Colorado works program."[31] The *Weston* court found that the notices deprived recipients of due process, and that ruling was affirmed on appeal.[32] After the lower-court decision, the county reportedly paid over $500,000 to some 900 families who received welfare.[33] Many other courts have found notices to violate due process when they contained information too scant to enable the recipient to determine whether to request a hearing.[34]

But simply giving notice and opportunity for a hearing is not enough. More critical is that arbitrary government action may deprive applicants and recipients of their property without due process. Mounting a broad-based litigation due process challenge to widespread procedural denials and terminations of otherwise eligible households arising from the systemic failures of a modernized system is certainly novel and difficult. As to actions involving individual workers, state agencies are unlikely to acknowledge that "staff determine eligibility based upon their own unwritten personal standards."[35]

The advocate typically needs to show that there are systemic unlawful practices notwithstanding nominally adequate written policies and that such systemic failures cause widespread improper denials and terminations. Precedent does exist. In *Salazar v. District of Columbia* the court found that the defendant's persistent pattern of terminating eligible households based on incorrect information and a seriously flawed computer system was itself a due process violation.[36] The *Salazar* court focused not only on the massive number of incorrect determinations of ineligibility but also on the agency's long-standing knowledge of the problems and its persistent failure to take serious steps to remedy the violations.

Due process principles impose an obligation upon the state agency to ensure that the facts underlying the proposed adverse action are correct and that the person threatened with the adverse action correctly fits within the scope of persons intended to be affected. In *Mayer v. Wing* persistent reductions in home care hours for elderly and homebound Medicaid recipients violated due process principles despite their receiving timely and adequate notice because the reductions were determined to be "capricious" and not issued pursuant to ascertainable standards.[37] The *Mayer* court noted that the recipients won their fair hearings 92 percent of the time; however, the court concluded, the fair hearing system is a particularly poor remedy because many recipients do not request hearings and, when they do and subsequently prevail, the state resends a new notice of reduction predicated on the same facts that led to the issuance of the successfully challenged notice.[38]

The failure of an agency to consider adequately the information available to it in making individual eligibility determinations and to ensure that the information is correct may be arbitrary and capricious enough to give rise to a due process violation. In *Henry v. Gross* the trial court, which was affirmed on appeal, found that New York City's program of terminating cash assistance cases when computerized bank matches reveal that the household has assets in excess of $1,000 violated, inter alia, due process.[39] Among the city's failures was its not investigating whether the money in the bank account was actually available to the household.[40] The *Henry* court further observed that recipients were not given an adequate opportunity to show that even if the money was in the account, the money was not effectively available to the household.[41] In the context of a dysfunctional modernized system, fundamental fairness should arguably require that each person have a chance to establish eligibility and

31 *Weston v. Hammons*, No. 99-CV-412, at 10 (Colo. Dist. Ct. Nov. 5, 1999).

32 The court of appeals concluded after extensive analysis that the "record demonstrates that the notices contained the patent deficiencies noted by the trial court" (*Weston*, 37 P.3d at 478).

33 National Center for Law and Economic Justice, Colorado TANF Recipients Win Due Process Challenge to Sanction Notices (July 2001).

34 See, e.g., *Ellender v. Schweiker*, 575 F. Supp. 590 (S.D.N.Y. 1983) (notice of overpayment of federal benefits that listed only amount owed was found unconstitutional); *Willis v. Lascaris*, 499 F. Supp. 749, 755–58 (N.D.N.Y. 1980). See also *Corella v. Chen*, 985 F. Supp. 1189 (D. Ariz. 1996) (Medicaid termination notices unconstitutional where notices stated only that household was no longer eligible because of excess income); *Cherry v. Tompkins*, 1995 U.S. Dist. LEXIS 21990, at *51–52 (S.D. Ohio March 31, 1995) (Medicaid termination notices, which included only "generic reason" along with "legalistic citation," violated due process).

35 *White*, 530 F.2d at 754.

36 *Salazar*, 954 F. Supp. at 327–28.

37 *Mayer*, 922 F. Supp. at 910–11.

38 *Id.* at 911.

39 *Henry v. Gross*, 803 F.2d 757 (2d Cir. 1986).

40 *Id.* at 760.

41 *Id.*

receive an individualized determination of eligibility through a fairly operated system.

That individuals who are denied or terminated win their fair hearings while the agency obdurately refuses to correct the underlying action leading to the hearing requests may be sufficient to raise due process issues. In *Jones v. Califano* the Second Circuit concluded that the court had jurisdiction to hear a challenge to the refusal of the U.S. Department of Health, Education, and Welfare secretary to abandon an unlawful policy even though the policy was consistently reversed following administrative hearing; the court noted that the secretary's failure to follow the hearing results raised colorable due process and equal protection issues.[42] The *Jones* court observed that "the Secretary is forcing claimants to proceed by the tedious method of adjudicating their claims on an individual basis, even though eligibility is conceded."[43]

At the application stage as well as during renewal and other case actions, the worker in the modernized system may act arbitrarily. Due process protections may offer an opportunity for the advocate to attack systemic abuses. For example, in *Reynolds v. Giuliani* plaintiffs—New York City applicants for SNAP, Medicaid, and TANF—sought preliminary injunctive relief from city defendants' reengineering of traditional welfare centers into modernized job centers.[44] The plaintiffs alleged that New York City, through the conversion, erected hoops and hurdles that prevented otherwise eligible applicants from receiving assistance. They further claimed that the city gave applicants "false and misleading information in an effort to prune the welfare rolls."[45]

The *Reynolds* court granted preliminary injunctive relief. In addition to finding violations of federal statutes and implementing regulations, the court concluded that "plaintiffs' allegations concerning various practices..., such as providing false or misleading information to applicants about their eligibility [and] arbitrarily denying benefits to eligible individuals ..., state a viable due process claim under [42 U.S.C.] § 1983."[46]

Undergirding the change from welfare centers to job centers in *Reynolds* was New York City's decision to vest greater discretion in the granting of aid in workers whose primary responsibility was not to determine eligibility for assistance but to assist applicants in finding employment.[47] As a consequence, eligible applicants were frequently denied assistance through no fault of their own, largely through the worker's failure to follow well-established rules consistently.[48] Even though written, objective, and ascertainable standards are "an elementary and intrinsic part of due process," no well-developed case law explains how the requirement for objective standards applies in a context where such standards exist but rampant technology system failures (e.g., applicants cannot get through to call centers for mandatory eligibility interviews and are denied) mean that the standards are not actually fairly applied.[49]

Due process protections are critical to ensuring fundamental fairness in the operation of any bureaucracy. However, bringing effective challenges, particularly to unlawful patterns of conduct as opposed to illegal policies, can be very resource-intensive. The successful pattern-and-practice case often requires marshaling many examples of unlawful conduct, engaging in extensive discovery, making a strong factual showing through data, and engaging in a fact-finding hearing. Advocates will likely first want to rely upon statutes and implementing regulations for their litigation challenges, but due process claims can be a valuable strategic and tactical tool in a systemic lawsuit.[50]

The National Center for Law and Economic Justice is interested in hearing from advocates who are working on these issues. We would like to establish regular communication among such advocates. Please contact us.

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42 *Jones v. Califano*, 576 F.2d 12 (2d Cir. 1978).

43 *Id.* at 19.

44 *Reynolds v. Giuliani*, 35 F. Supp. 2d 331 (S.D.N.Y. 1999).

45 *Id.* at 336.

46 *Id.* at 341.

47 Committee on Social Welfare Law, *The Wages of Welfare Reform: A Report on New York City's Job Centers*, 54 Record of the Association of the Bar of the City of New York 472, 474–83 (1999).

48 *Reynolds*, 35 F. Supp. 2d at 347.

49 *Baker-Chaput v. Cammett*, 406 F. Supp. 1134, 1140 (D.N.H. 1976); cf. *Henry*, 803 F.2d 757.

50 See, e.g., Stipulation and Order of Settlement, *Rafferty*, No. 13-cv-1410.

Protecting Access to Benefits in Philadelphia's Modernized Benefits System

BY KRISTEN DAMA AND AMY HIRSCH

In response to repeated cuts in its operations budget and a prolonged hiring freeze, the Pennsylvania Department of Human Services (then called the Department of Public Welfare) attempted, beginning in 2005, to "do more with less" in running its assistance offices.[1] The department emphasized an online portal and call centers for customer service, while staff telephone numbers were no longer publicized and caseworkers lost access to voicemail.[2] Offices went "paperless," and all documentation had to be scanned and attached to clients' electronic case records before it could be acted upon.[3] Neighborhood offices were consolidated; in Philadelphia, mergers reduced offices from 18 to 11.

Meanwhile, demand for public benefits exploded due to the recession.[4] The intersection of "streamlined" operations and caseload increases was disastrous, and low-income Philadelphians were denied meaningful access to benefits. Most lacked Internet access to use the department's online portal, and hundreds of calls to call centers went unanswered each day.[5] Caseworkers discouraged clients from submitting documents by fax or mail because of processing delays. Frustrated clients flooded offices, only to be told to come back another day.

The intersection of "streamlined" operations and caseload increases was disastrous, and low-income Philadelphians were denied meaningful access to benefits.

Clients who did access offices faced severe delays in having their documents scanned and attached to their case files.[6] They then lost benefits erroneously, and this drove them back into offices to reapply or file appeals or both. Clients turned to social service agencies and legal aid offices, including Community Legal Services of Philadelphia, in record numbers.

After years of trying to resolve these problems administratively, Community Legal Services and pro bono cocounsel from Dechert LLP sent in July 2012 an "intent to sue" letter to Pennsylvania's legal counsel. We alleged that inaccessibility of Philadelphia's neighborhood offices and failure to process benefits applications properly violated constitutional requirements of due process and equal protection as well as federal statutory requirements.[7] We then launched prelitigation negotiations with the Department of Human Services. For nearly a year, negotiations were fruitless, and we prepared to file federal class action litigation. After a more responsive secretary of human services was appointed, the department agreed in May 2013 to negotiate significant changes in Philadelphia operations and thereby forestalled litigation.

While a new secretary contributed to meaningful negotiation and an eventual agreement, we used three strategies to achieve change:

1 Pennsylvania Department of Public Welfare, Modern Office Phase II Final Report and Assessment (Sept. 24, 2009) (in our files).

2 *Id.* at 11.

3 *Id.* at 16–18.

4 E.g., between 2008 and 2011, Pennsylvania's Supplemental Nutrition Assistance Program (SNAP) caseload increased by 46 percent, and the Medicaid caseload increased by 20 percent (Pennsylvania Department of Human Services, Medical Assistance, Food Stamps and Cash Assistance Statistics Reports (2015)).

5 Persistent complaints of unanswered telephones prompted the U.S. Department of Agriculture (USDA) to conduct a program access review of one Philadelphia office in 2011. The USDA reported that "[t]elephone operation procedures are not adequately serving households" (USDA, Program Access Review 1 (Sept. 1, 2011) (in our files)).

6 These problems with managing, filing, scanning, and tracking paperwork are documented in findings from an audit of a Philadelphia neighborhood office conducted by the Pennsylvania Department of Human Services' Office of Administration, Bureau of Financial Operations (Letter from Tina L. Long, Acting Director, Pennsylvania Department of Public Welfare, to Phillip Abromats, Acting Deputy Secretary, Office of Income Maintenance (Aug. 5, 2011) ("Finding No. 1—Case Record Filing is Disorganized and Backlogged.... There were 474 boxes of files and other documents observed sitting around the office waiting to be filed. Of the 21 case records requested for review, West District could only locate 11.... Finding No. 3—Documents Are Not Being Scanned Timely Or At All.")).

7 See, e.g., 7 U.S.C. § 2020(e)(2)(B)(iii), (3), (4), (9) (2014) (SNAP); 42 U.S.C. § 1396a(a)(8) (2012) (Medicaid).

1. Story Banking. Community Legal Services' model combines individual client representation with systemic advocacy. Our attorneys identified dozens of Philadelphia clients with particularly egregious experiences. Advocates worked with a team of law students to organize client stories to share with executive staff at the Department of Human Services (and potentially to use in eventual litigation).

2. Collecting and Analyzing Data. While the department's new secretary found individual client stories compelling, other department staff dismissed them as anecdotal. Community Legal Services built nine questions into its case management system, LegalServer, to capture operational problems during client intakes; such problems included long wait times in offices and poor telephonic access. Advocates used the data to generate reports that showed hundreds of affected cases, identified particularly troubled neighborhood offices, and demonstrated that operational problems were worsening over time.

3. Identifying Concrete Remedies. When the Department of Human Services' lawyers insisted that budgetary constraints precluded systems changes, Community Legal Services and Dechert asked to meet with high-level operations staff and, drawing from best practices in other states, presented a menu of concrete steps that the department could take to fix problems. Some of the menu items were new to the department, and its operations staff agreed that some were feasible. The department identified other steps that staff could take.

Advocates used the data to generate reports that showed hundreds of affected cases, identified particularly troubled neighborhood offices, and demonstrated that operational problems were worsening over time.

As a result, the Department of Human Services programmed its Philadelphia call center telephones so that overflow calls would "roll over" to less trafficked centers elsewhere in Pennsylvania. The department launched a pilot to allow Philadelphia's initial Supplemental Nutrition Assistance Program applicants to call a dedicated hotline for interviews during two-hour windows and agreed to explore a true "interview-on-demand" system. The department expanded reviews of terminations or denials for documentation, made review data available to Community Legal Services, and made other computer changes to safeguard against erroneous terminations due to documentation. The department publicized and retrained staff on a new policy: if cases had been closed recently, they could be reopened without applications having to be filed anew. And the department began collecting and sharing data on clients who "churned" on and off benefits rolls.

Community Legal Services continues to track operational problems at client intake. In 2013, of clients who had interactions with Philadelphia assistance offices, 86 percent encountered operational problems, and such clients had an average of 2.75 problems per case. So far in 2015, the number is down to 61 percent having operational problems at an average of 1.78 problems per case. Like assistance offices nationwide, Philadelphia's offices continue to operate far from perfectly. But advocacy has had a measurable impact, and Community Legal Services continues to work cooperatively with the Department of Human Services to find additional solutions.

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Exhibit C

What Does Due Process Mean for State Notices on Receiving Public Benefits?

BY SOVEREIGN HAGER AND TY JONES

Both the U.S. Food and Nutrition Service, which administers the Supplemental Nutrition Assistance Program (SNAP), and the Centers for Medicaid and Medicare Services, which administer Medicaid, recently issued guidance on state agencies' public-benefits notices informing individuals that their benefits have been denied, terminated, or reduced.[1] With state agencies reviewing their notices in light of the new guidance, this is an opportune time for legal advocates to look at their state's notices not only from a legal-compliance perspective but also to determine if those notices meet clients' fundamental needs—including clarity and comprehensibility—and to effect change through direct advocacy.

To be constitutionally adequate, benefit determination notices must give claimants enough information to understand the reasons for the agency's action.

These notices are central to a participant's ability to maintain critical benefits. To illustrate, consider Jane, who is a single mother of one child and who receives a notice from her state agency saying that her SNAP benefits will be terminated because her "gross income exceeds limit" and she is no longer eligible for SNAP. With little additional information about what income the agency counted to make this decision, Jane will have to call the agency and hope to get through to someone who can explain. Or she might have to file an appeal of the decision to learn more about the state's reasoning. Legal aid offices across the country have encountered countless Janes and have worked with, litigated against, and negotiated with their state human services agencies to improve public-benefits notices.

Here we

- discuss the history of public-benefits notices and their intersection with the Fourteenth Amendment to the U.S. Constitution;
- examine *Goldberg v. Kelly*, the seminal U.S. Supreme Court case that set out the due process rights for participants in and applicants to public-benefits programs;[2]
- explain the notice rules established by the three main public-benefits programs;
- outline lessons learned from New Mexico advocates working with their state agency on notices; and
- list key first steps for advocates who want to begin notice advocacy in their states.

Due Process in the Context of Public Benefits

To be constitutionally adequate, benefit determination notices must give claimants enough information to understand the reasons for the agency's action.[3] This requirement, like the right to a fair hearing, is

1 See Medicaid and CHIP Learning Collaboratives, Eligibility-Related Determination Notices State Toolkit: Tool #1: Statutory and Regulatory Review (Aug. 27, 2013); U.S. Department of Agriculture (USDA) Food and Nutrition Service, Best Practices in Developing Effective Supplemental Nutrition Assistance Program Client Notices (May 29, 2014); USDA Food and Nutrition Service, Guide to Improving Notices of Adverse Action (NOAAs) (Sept. 18, 2014). We use "public benefits" to include Medicaid, the Supplemental Nutrition Assistance Program (SNAP), and Temporary Assistance for Needy Families (TANF).

2 *Goldberg v. Kelly*, 397 U.S. 254 (1970).

3 *Id.*

The absence of an effective notice undermines other due process rights, such as the right to a timely hearing, afforded a benefits claimant.

a basic element of procedural due process. Participants "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."[4] Thus the absence of an effective notice undermines other due process rights, such as the right to a timely hearing, afforded a benefits claimant.[5] To understand how to protect benefits-program participants in regard to notices, attorneys should start with the origins of the law around notices and due process.

The Fourteenth Amendment to the Constitution declares that no state shall "deprive any person of life, liberty, or property, without due process of law."[6] The due process determination consists of two steps. The first step is to determine if the person has a liberty or property interest protected by the due process clause. If the person has such an interest, then the second step is to determine whether state procedures protecting that interest are constitutionally adequate.[7]

In *Goldberg v. Kelly* the Supreme Court established that recipients and applicants for welfare benefits have a property interest in receiving benefits.[8] Individuals with a property interest have a right to procedures to claim their eligibility. That an individual may ultimately be found ineligible for a benefit does not negate the property interest protected by due process.[9]

The procedures used by state human services agencies when issuing public-benefits notices must meet the due process requirements of the Constitution. While no set procedures are required in each circumstance, *Goldberg v. Kelly* established, among other points, that participants in public-benefits programs are entitled to timely and adequate notice of agency action.

Goldberg v. Kelly

The Supreme Court determined that to satisfy constitutional due process requirements, an agency contemplating terminating or reducing public-assistance benefits must give the recipient timely and adequate notice detailing the reason and an effective opportunity to defend.[10] The rationale is that recipients of public-assistance benefits must be afforded a degree of protection from agency error and arbitrariness in the administration of those benefits.[11]

The fundamental requisite of due process of law is the opportunity to be heard.[12] In the public-benefits context, according to the Court, due process requires that a recipient have

> (1) timely and adequate notice detailing the reasons for a proposed termination of benefits;
>
> (2) an adequate hearing before termination of benefits;
>
> (3) the ability to appear personally and with counsel to present the recipient's own arguments and evidence orally to an impartial official;
>
> (4) an effective opportunity to present evidence and cross-examine witnesses; and
>
> (5) a decision based solely upon the evidence adduced at the hearing as well as a statement disclosing the reasons for the decision and the evidence upon which it was based.[13]

Beyond establishing that adequate notice must include detailed reasons for a proposed termination of benefits, *Goldberg* does not specify how much information the notice must give to satisfy due process.[14] This lack of specificity leaves an obvious challenge for both courts and state agencies in determining what level of detail is required. Courts across the country have made different determinations about this question.

Courts have held that the state cannot place the burden on the participant to find out all information needed to determine why a decision was made. The state agency must include that information in the notice: the agency must actively give "complete"

4 *Kapps v. Wing*, 404 F.3d 105, 124 (2005).

5 *Escalera v. New York City Housing Authority*, 425 F.2d 853, 862 (2d Cir. 1970).

6 U.S. Const. amend. XIV, § 1.

7 *Sealed v. Sealed*, 332 F.3d 51, 55 (2d Cir. 2003).

8 See *Kapps*, 404 F.3d at 113 ("While not all benefits programs create constitutional property interests, procedural due process protections ordinarily attach where state or federal law confers an entitlement to benefits."). Advocates seeking to establish a property interest in certain federally funded benefits, such as TANF, must look for rules under state or local ordinances under which the client can claim an entitlement protected from deprivation by the federal due process clause.

9 *Id.* at 115 (citing *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1103 n.7 (10th Cir. 2004) (en banc)).

10 *Goldberg*, 397 U.S. 254.

11 *Banks v. Trainor*, 525 F.2d 837, 842 (7th Cir. 1975).

12 *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

13 *Goldberg*, 397 U.S. 254.

14 *Id.* at 267–68.

notice and cannot "improperly place[] on the recipient the burden of acquiring notice[;] due process directs [the agency] to supply it."[15] Including this information is critical since people tend to believe that an action taken by a government agency in a benefit determination is correct. In addition, participants have limited direct contact with agencies and so may not be able to gather all of the necessary information to make an informed decision on their own. Unless participants are told why their benefits are being reduced or terminated, many mistakes "will stand uncorrected, and many [participants] will be unjustly deprived of the means to obtain the necessities of life."[16]

Individualized advance notice is *not* required for a mass change in a program resulting from congressional action.[17] The Supreme Court clarified the distinction between notices of a mass change and an adverse action notice for an individual when the Court held that the legislative history of the Food Stamp Act of 1977 did not suggest that Congress intended to eliminate the distinction between advance notice of an "adverse action" based on the facts of an individual case (which is required) and individual notice of a "mass change" in the law (which is not required).[18] This important distinction applies to all public-benefits programs. But while federal law does not require states to give advance notice of a mass change, giving participants advance notice of a mass change in benefits is still in the state's interest to reduce calls or visits with questions to agency offices.

To meet the requirements of *Goldberg v. Kelly*, the Fourteenth Amendment, and federal rules, public-benefits notices must be both adequate and timely.

While *Goldberg* and other cases have established that claimants must receive enough information to understand the basis for the agency's action in all instances, the specific type of notice required may depend on the circumstances of each case. In addition to understanding the constitutional framework, advocates must examine the federal and state regulations governing the administration of Medicaid, SNAP, and Temporary Assistance for Needy Families (TANF), which have a requirement, among others, that a notice state the reasons for the agency's intended action.

Elements of a Due Process–Compliant Notice

To meet the requirements of *Goldberg v. Kelly*, the Fourteenth Amendment, and federal rules, public-benefits notices must be both adequate and timely. An adequate notice is one that is available in the language spoken in the household and includes the following, in clear and understandable language:

(1) an explanation of the proposed action;

(2) the reason for the proposed action;

(3) the information used to make the decision;

(4) the household's right to request a fair hearing;

(5) the information about what a participant can do next, along with contact information;

(6) the availability of continued benefits until the hearing and the participant's liability for those benefits if the participant is not successful at the hearing; and

(7) the availability of free legal representation.[19]

The notice must give applicants and recipients enough information to understand the reasons for the agency's action.[20] The information should be more specific than just a citation to the policy manual. This information enables the applicant or recipient to make an informed decision on whether to proceed further.

To be timely and to give the participant enough time to respond, the state agency must mail the notice to the household at least 10 days before the action is to take place. This time frame is critical because, in some programs, current participants must appeal the decision within 10 days to continue to receive benefits. In addition, a core principle for due process is the opportunity to be heard; households that do not receive timely notice can miss that opportunity.

Adequate and informative notices are essential, especially given the decline in one-on-one contact between participants and agency workers. With increased use

15 *Ortiz v. Eichler*, 616 F. Supp. 1046, 1062 (D. Del. 1985); *Schroeder v. Hegstrom*, 590 F. Supp. 121, 128 (D. Or. 1984) (quoting *Philadelphia Welfare Rights Organization v. O'Bannon*, 525 F. Supp. 1055, 1061 (E.D. Pa. 1981)). See *Vargas v. Trainor*, 508 F.2d 485, 489 (7th Cir. 1974) (agency argued that notice sufficed because it invited recipient to seek additional information; court disagreed, stating that notice recipient "would be unable or disinclined, because of physical handicaps and, in the case of the aged, mental handicaps as well, to take the necessary affirmative action").

16 *Vargas*, 508 F.2d at 490.

17 See John Bouman & Lauren P. Schroeder, *"Transitional Due Process": Still a Viable Theory for Challenging the Implementation of Tightened Public Benefit Program Rules*, Clearinghouse Article (Nov. 2015).

18 *Atkins v. Parker*, 472 U.S. 115 (1985). See Requirements for Change Reporting Households, 7 C.F.R. § 273.12(c) (2016) (types of mass changes that require advance notice).

19 See Notice of Adverse Action, 7 C.F.R. § 273.13 (a)(2) (SNAP); Content of Notice, 42 C.F.R. § 431.210 (2016) (Medicaid); Notice of Agency's Decision Concerning Eligibility, 42 C.F.R. § 435.913 (Medicaid); Hearings, 45 C.F.R. § 205.10 (a)(4)(i) (2016) (TANF); *Goldberg*, 397 U.S. at 264–65.

20 *Goldberg*, 397 U.S. at 267–68.

of automation and call centers and the closing of local offices in many states, public benefit participants and applicants have much less opportunity for contact with a caseworker than they had in 1970 (when *Goldberg* was decided) or even as recently as the early 2000s.[21]

Medicaid, SNAP, and TANF have specific notice requirements in their statutes or federal regulations. Although the particulars may vary, each program requires that participants receive notice of agency actions.

Medicaid. In accordance with Medicaid regulations, the agency must send each applicant a written notice that contains

(A) A statement of what action the state ... intends to take;

(B) The reasons for the intended action;

(C) The specific regulations that support, or the change in Federal or State law that requires, the action;

(D) An explanation of—

(1) The individual's right to request an evidentiary hearing if one is available, or a State agency hearing; or

(2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted; and

(E) An explanation of the circumstances under which Medicaid is continued if a hearing is requested.[22]

The state or local agency must send the notice at least 10 days before the date of action.[23]

Adequate and informative notices are essential, especially given the decline in one-on-one contact between participants and agency workers.

SNAP. With similar requirements, SNAP regulations say that, prior to reducing or terminating a household's benefit, the state agency must give the household timely and adequate notice.[24] Notices are considered timely if they are mailed at least 10 days before the action becomes effective.[25] They are considered adequate if they explain, in easily understandable language,

(1) the proposed action;

(2) the reason for the proposed action;

(3) the household's right to request a fair hearing;

(4) the telephone number of the SNAP office;

(5) the name of the person to contact for additional information (if possible);

(6) the availability of continued benefits if the household requests a hearing;

(7) the liability of the household for any over-issuances received while awaiting a fair hearing, if the hearing official's decision is adverse to the household; and

(8) the availability of free legal representation.[26]

TANF. Having the same Medicaid and SNAP requirements, TANF regulations say that, in cases where the state agency intends to terminate, suspend, or reduce assistance, the agency must give timely and adequate notice.[27] "Timely" means that the notices are mailed at least 10 days before the action becomes effective.[28] "Adequate" means a written notice that explains

(1) the action the agency intends to take;

(2) the reasons for the intended action;

(3) the specific regulations supporting such action;

(4) an explanation of the individual's right to request a state agency hearing; and

(5) the circumstances under which assistance continues if a hearing is requested, along with the requirement that the individual must repay such assistance if the agency action is upheld.[29]

Public-benefits notices must also meet other standards, including plain-language and understandability requirements. Reviewing notices with both a legal and plain-language lens is critical, especially as we progress to a more technologically centered service-delivery system in which the way that clients receive notices is changing.

Lessons Learned: Rewriting Public-Benefits Notices in New Mexico

The New Mexico Human Services Department has been under a federal consent decree since 1988 to issue public-benefits notices that meet federal standards—in a case whose plaintiffs the New Mexico Cen-

21 See Gina Mannix et al., *How to Protect Clients Receiving Public Benefits When Modernized Systems Fail: Apply Traditional Due Process in New Contexts*, Clearinghouse Article (Jan. 2016).

22 42 C.F.R. §§ 431.210, 435.913.

23 Advance Notice, 42 C.F.R. § 431.211.

24 7 C.F.R. § 273.13(a).

25 *Id.* § 273.13(a)(1).

26 *Id.* § 273.13(a)(2).

27 In certain circumstances the local or state agency does not have to give standard timely and adequate notice (45 C.F.R. § 205.10(a)(4)(ii)–(iv)).

28 *Id.* § 205.10(a)(4)(i)(A).

29 *Id.* § 205.10(a)(4)(i)(B).

ter on Law and Poverty and its cocounsel represent.[30] The decree requires the state agency to give detailed and individualized information about case actions in language that is below a sixth-grade reading level.

Despite some improvements on notices over the years, the notices have fallen short of federal standards. After the state agency adopted a new eligibility and information technology (IT) system in October 2013, the notices became more of a concern because the new system led to a backlog of tens of thousands of benefit applications and renewals that were not processed within federal and state time frames. The computer system began automatically denying and closing backlogged cases and sending out notices that applicants "failed to comply with the application/recertification process" when, in reality, the state agency had failed to process the case. Meanwhile, New Mexico's case and procedural error rate, a measure used by the Food and Nutrition Service to assess the validity of negative actions on SNAP benefit cases, was the third highest in the country, largely due to inadequate notices.

The New Mexico Center on Law and Poverty filed a motion in March 2014 to enforce compliance with the notice provisions of the consent decree. The New Mexico Human Services Department entered a stipulated order with plaintiffs' counsel and agreed to rewrite all notices with plaintiffs' counsel. The New Mexico Center on Law and Poverty and the department have worked closely together since May 2014 to achieve that goal.

The first step was to set out a time frame for the large task of rewriting the hundreds of notices and standard form documents in use by the department, which had already established a work group to fix deficiencies related to the high SNAP error rate. The work group now includes state agency staff across the benefit programs, the New Mexico Center on Law and Poverty, and programmers working on the state's IT system. After eight months, the work group completed the first rewrite of the primary eligibility notice and all relevant denial and closure reasons. The work group is facing a changing time frame. The state agency initially projected one year to create and implement legally compliant notices. Instead the agency took a year to evaluate and redraft the notices, and now it anticipates another six months to program and implement the new notices.

Revisions of Notice Language and Layout. The work group looked at notices from other states, guidance from the Food and Nutrition Service, model Medicaid notices from the Centers for Medicare and Medicaid Services, and feedback from benefit participants to generate a layout for eligibility notices that gave the most important information up front and contained detailed information in simple, short text. If applicable, information related to specific programs was listed in separate sections of the notice. The master document for the notice of case action contained several variables or trigger conditions that would cause certain text to appear on the notice. For example, a trigger for reduction of benefits would populate language stating that benefits would decrease and explaining why.

This process took six months. The work group first drafted language for the various trigger conditions and static text and then began finalizing the layout, which led to further revisions.

Creating and agreeing on simplified language proved challenging. The work group adopted a few rules of thumb:

(1) Avoid the passive voice. For example, "Income has not been verified" became "You did not turn in proof of income."

(2) Avoid the word "eligible" or any variation of it. Using simpler words to explain why an applicant would or would not get benefits almost always made information easier to understand.

(3) Create simple headings as navigational aids, such as "Who will get SNAP" or "Who can't get SNAP and why." The work group designed simple tables to follow these headings and include the most critical information. Other information was presented in bullet form, with very short sentences.

(4) Avoid denial and closure reasons that include the word "or." Denial and closure reasons should never be "multiple choice." If a reason for a negative action involves the word "or," it should almost always be broken into two separate reasons that populate in the notice only when the relevant conditions exist. For example, we changed "You failed to turn in your interim report and proofs" to have one closure reason for failure to submit a SNAP interim report and an individualized reason stating what documentation, if any, a participant had failed to submit.

(5) Keep line lengths to 15 words or less for readability. White space in the notice makes the notice easier to read, and shorter sentences usually decrease the complexity of what is written.

Individualized Reasons for Benefit Denial and Case Closure. In addition to creating the notice, the work group reviewed and rewrote the 200 "reasons codes"—the codes used by caseworkers in preparing notices—for denying or terminating benefits across all benefit

30 Order Modifying Settlement Agreement, *Hatten-Gonzales v. Johnson*, Nos. Civ. 88-0385, 88-0786 (D.N.M. Aug. 27, 1988).

programs. By examining how and where those reasons would populate in the notice of case action, the work group eliminated unnecessary and confusing introductory language and clarified which denial reasons were behind the state agency action.

The work group added, as part of this process, more individualized and detailed denial and closure reasons. For example, in situations where the household did not verify eligibility factors, the new denial stated which eligibility factor it did not verify and replaced the general "failure to comply with the application/recertification process" with the more specific "you did not turn in your utility bill."

In reviewing the denial and closure reasons, the work group had to have computer programmers available to explain when the system was triggering and using each denial code to ensure that the negative action occurred for the proper reason and that the notice accurately and adequately explained the basis for the state's action. Significant programming was required to improve the accuracy of denial and closure reasons as stated on the notice.

SNAP Error Rates and Notice Design. In 2011 the Food and Nutrition Service adopted a new measure of incorrect negative actions in state SNAP programs.[31] Called the "case and procedural error rate," the measure assesses the clarity of denial and termination notices, the accuracy of the reason for denial and termination used in the notice, and the timeliness of the notice sent to the household.[32] The case and procedural error rate affirms the fundamental importance of adequate notice and gives states incentives to list detailed and accurate reasons for negative actions. Partly in response to the case and procedural error rate, New Mexico agreed to rewrite denial reasons that listed several possible bases for denial because those nonspecific reasons increased error rates.

> All of the protections and requirements that apply to paper notices also apply to electronic notices.

That being said, the case and procedural error rate also creates incentives for a state to omit certain important information from notices to avoid errors. For example, the consent decree in the New Mexico case requires the state agency to include calculation tables in the notices of case action. The calculation tables are prone to state agency error and, if not done correctly, can increase the case and procedural error rate. However, the calculation tables also give participants important information about how the state is determining financial eligibility. Rather than simply remove the calculation tables as the state initially planned, the New Mexico Center on Law and Poverty encouraged the state to continue including them and is working with the state to create a simplified version that applicants and participants can understand.

Literacy Experts and Language Access. The notice provisions of the consent decree governing the New Mexico case require the state agency to have a literacy expert review all standard form documents to ensure that they are below a sixth-grade reading level. While the work group has been cognizant of reading level in proposing revised language in notices, literacy experts can verify that language will be comprehensible to as many people as possible.

New Mexico is required by court order to bear the cost of such an expert but was able to secure foundation funding for the literacy review. Similar resources are likely available in other states, as are experts from local universities or colleges. The experts working with the New Mexico agency will also handle translations and certify that the Spanish language notices meet literacy requirements. This is a vital improvement, as the state did not previously include Spanish language notices in literacy reviews.

Notices of Delay in Processing and Auto-Denial and Closure. Like many states, New Mexico uses an auto-denial and closure function to generate negative decisions automatically when a case has not been processed within federal and state time frames. However, federal law requires state agencies to evaluate SNAP applications that are not processed within 30 days before closing the case to determine whether the agency or the applicant is responsible for the delay. Federal law also requires the state to send a notice to SNAP participants when there is a delay in processing to explain the reason for the delay.[33] The same requirements are found in the recertification process.[34]

When New Mexico had a backlog in processing applications and participants began receiving notices of closure and denial for failure to comply with the application process, we saw that the state lacked the required notice of delay in processing. The court ordered the state to suspend automatic closure and denial.

31 Supplemental Nutrition Assistance Program: Quality Control Provisions of Title IV of Public Law 107-171, 75 Fed. Reg. 33422, 33426 (June 11, 2010).

32 See FY 2012 SNAP High Performance Bonuses (n.d.) (includes description of changes).

33 Office Operations and Application Processing, 7 C.F.R. § 273.2(h)(3)(i).

34 Recertification, 7 C.F.R. § 273.14(a) (treating applications for recertification as applications for assistance). See also *id.* § 273.14(e)(1).

The New Mexico Center on Law and Poverty and the state worked together to generate an interim delay notice that workers can use when they identify a delayed case. The New Mexico Center on Law and Poverty is also working with the state to prevent automatic closure and denial of cases where the state agency is responsible for a delay in processing; in such cases the state will trigger a delay notice, rather than incorrectly terminating or denying benefits. This change is particularly critical in preventing churning of participants from SNAP when recertification applications are not timely processed and ensuring that data on the timeliness of processing SNAP applications and recertification are accurate.[35]

Evaluating and Testing Notices. The New Mexico Center on Law and Poverty has encouraged the state to incorporate focus groups or testing into its notice development. The state has agreed to an evaluation of the notice after it has been in use for six months to find and fix any remaining problems.

Key First Steps for Advocacy on Public-Benefits Notices

Legal advocates considering work on public-benefits notices should first ask these questions:

(1) Have I looked at my state's notices, including adverse action and approval notices?

(2) Do I find them helpful? Do clients find them helpful?

(3) What is the most important information a notice should contain?

(4) What is the core point of a notice?

(5) What do I look for when I read and review notices for myself?

(6) Does the notice give the client or me enough information to challenge a negative decision?

Second, after reviewing the notices and asking these questions, determine if the state's notices need work. The Food and Nutrition Service issued robust guidance to states on adverse-action notices; that guidance included sample notices that states could use as they developed their own notices.[36] Advocates must look at this guidance as they think about and review their state's notices.

Third, after looking at the guidance and answering the questions above, schedule a meeting with the state agency to discuss your findings and learn what the state plans to do with notices. If the state has already begun a process to revise its notices, ask to be a part of the process and planning. As part of the group working to fix the notices, advocates can make sure that the participants' needs are not overlooked. For example, suggest focus groups to test the new notices. Reach out to advocates in other states to see what their state notices contain as good models for your state.

The issue of due process and notices is not going away for states. All parties will benefit if everyone is at the table when states discuss and revise their notices. Participants will have their needs met, and the state agency will not spend resources on a revision that does not meet the rules of the program and then have to revise the notices all over again. Attorneys should note that states are starting to move toward sending participants electronic notices, and all of the protections and requirements that apply to paper notices also apply to electronic notices.

The U.S. Supreme Court itself approved this summary of the importance of adequate notice:

> [T]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal.[37]

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35 "Churn" describes when eligible households temporarily lose eligibility for benefits, go without benefits for a short period, and then reapply to begin receiving assistance again.

36 See USDA Food and Nutrition Service, Guide to Improving Notices of Adverse Action (NOAAs), *supra* note 1.

37 *Goldberg*, 397 U.S. at 266.

Exhibit D

Marcum, Helene (EHS)

From: Schelong, Katy (EHS)
Sent: Thursday, May 28, 2009 7:19 AM
To: Marcum, Helene (EHS)
Subject: RE: Re[redacted] Harrington

Hi Helene,

Leaving you a voice mail to this effect as well:

1. I reissued the legal opinion today (Dated May 28, 2009) and exhibits and put 3 copies (one for you, one for the hearing officer and on for applicant) in the mail to you today so throw away the documents dated March 12, 2009.
[redacted]

2. Applicant's attorneys are not entitled to any legal opinion until the hearing date because up until then the agency has the option whether or not to introduce it into evidence.

3. Lisa Smith can come on in and look at the case file today or tomorrow but you should alert her that it does not contain a legal opinion.

4. If she wants to get her copy say an hour before the hearing on June 2nd I don't have a problem with that.

Katy

-----Original Message-----
From: Marcum, Helene (EHS)
Sent: Wednesday, May 27, 2009 3:09 PM
To: Schelong, Katy (EHS)
Subject: Re[redacted] Harrington

I've received a request from Lisa Smith the person handling this case to come into office either tomorrow or friday to look at this case. You sent me a decision dated 3-12-09 can I give her a copy of this before the Hearing 6-2-09 at 3pm. Thanks Helene Marcum

5/28/2009

Exhibit E

TRANSACTION REPORT

APR/10/2018/TUE 11:52 AM

FAX(TX)

#	DATE	START T.	RECEIVER	COM.TIME	PAGE	TYPE/NOTE	FILE
001	APR/10	11:44AM	16178471204	0:03:01	6	MEMORY OK G3	1381

256 Park Avenue, Suite 410
Worcester, Massachusetts 01609
508-755-6525
508-459-5060
www.edialaw.com
www.theseniorfocus.com

Elder & Disability Law Advocates

Fax

To:	Kim Larkin, Director Board of Hearings	**From:**	NG Kaltsas, Esq.
Fax:	617-847-1204	**Pages:**	6 pages including this cover sheet
Phone:		**Date:**	April 10, 2018
Re:	Subpoena Request	**cc:**	

☐ **Urgent** ☐ **For Review** ☐ **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

• **Comments:**

Enclosed please find a request that you issue the attached subpoenas.

Elder & Disability Law Advocates
Serving the needs of the elderly population and people with disabilities

Nicholas G. Kaltsas, Esq.*

*Member, National Academy of Elder Law Attorneys, Inc.

April 10, 2018

By Facsimile to: 617-847-1204
Kim Larkin, Director
Board of Hearings
Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
I 00 Hancock Street, 6th Floor
Quincy, Massachusetts 02171

Re: MassHealth ID: 100221965773
Notice No.: 58953196
Eva E. Hirvi v. Office of Medicaid

Medicaid Reference: 21502022647859
Notice No.: 58677152
Henry E. Hirvi V. Office of Medicaid

Dear Ms. Larkin:

As you know, I represent the Appellants in the above-referenced appeals. Earlier today, I forwarded two subpoenas I requested that you issue. Enclosed are two additional subpoenas that I think you will find more appropriate. Whether issued directly by a Notary Public of the Commonwealth of Massachusetts, or the Board of Hearings, this subpoena is valid pursuant to the authority granted to the Appellants under M.G.L. c. 30A, § 12(3).

G.L. Chapter 30A, Section 12(3), states in relevant part: "Any party to an adjudicatory proceeding **shall be entitled as of right to the issue of subpoenas** in the name of the agency conducting the proceeding. **The party may have such subpoenas issued by a notary public or justice of the peace, or he may make written application to the agency, which shall forthwith issue the subpoenas requested**. However issued, the subpoena shall show on its face the name and address of the party at whose request the subpoena was issued." [emphasis added]

Therefore, I have attached unsigned and undated subpoenas and request that you issue and serve them upon the Director, or Custodian of Records of the Medicaid Enrollment Center, Springfield. Please confirm your issuance and service of these subpoenas.

Sincerely,

Nicholas G. Kaltsas, Esq.

NGK/amk
Enclosures as stated

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
OFFICE OF MEDICAID
BOARD OF HEARINGS

Medicaid ID: 100221965773

Notice No.: 58953196

EVA E. HIRVI V. OFFICE OF MEDICAID

SUBPOENA DUCES TECUM

To: Director, or Custodian of Records
Medicaid Enrollment Center, Springfield

GREETINGS:

You (or designee) are hereby commanded, in the name of the Commonwealth of Massachusetts, and in accordance with Massachusetts General Laws, Chapter 30A, Section 12(3), Massachusetts General Laws Chapter 118E, §48, 130 Code of Massachusetts Regulation 610.052, and Massachusetts Rules of Civil Procedure 30(a) and 45, at the request of the Appellant, Eva E. Hirvi, to appear and to testify, in person, and not telephonically or electronically, at the Springfield MassHealth Enrollment Center, 333 Bridge Street, Springfield, Massachusetts 01103, on April 25, 2018, at 11:00 A.M., and from day to day thereafter until completed, regarding the facts upon which MassHealth bases its denial of eligibility in the present matter.

Further, you are required to bring with you those items described in Exhibit "A" attached hereto.

In lieu of appearing, the documentation, *with certification subscribed and sworn to under the penalties of perjury,* may be sent to the office of Attorney Nicholas G. Kaltsas, Elder & Disability Law Advocates, 255 Park Avenue, Suite 410, Worcester, Massachusetts 01609, no less than 10 days before said Fair Hearing.

It is not possible for the Appellant, based upon the Notice she received in the present matter, to determine the factual basis upon which the MassHealth agency relies in its determination of eligibility, or lack thereof, and its determination of the value of countable assets.

All questions and comments regarding this subpoena should be addressed to Appellant's legal counsel, Nicholas G. Kaltsas, Esq, 120 Park Avenue, Suite 410, Worcester, MA 01609, Tel.: 508-755-6525, Fax: 508-459-5060, Email: ngk@edlalaw.com.

Hereof fail not, as your failure to appear as required will subject you to such pains and penalties as the law provides.

Dated: _____ day of _____, 2018

_____
Notary Public
My Commission Expires:

EXHIBIT "A"

The witness is to furnish or make available for inspection the following documents:

1. Any and all documents, LOCATED in Eva Hirvi's case record, which describes the FACTS that support the agency's decision to deny the Appellant's application, per 42 CFR 435.914(a);

2. Any and all documents, NOT LOCATED in Eva Hirvi's case record, which describes the FACTS that support the agency's decision to deny the Appellant's application;

3. All documents which describe the FACTS upon which the denial of Eva Hirvi's application was based;

4. All documents, if any, contained in the applicant's case record, which state the FACTUAL basis upon which a determination of ineligibility was based by the agency, in denying Eva Hirvi's application;

5. All fair hearing decisions or court decisions which were considered as relevant to the Eva Hirvi application, including but not limited to any such decisions which reject or support the legal basis or theory upon which Eva Hirvi's application was denied.

6. All documents that identify the person who made the decision to deny the application.

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
OFFICE OF MEDICAID
BOARD OF HEARINGS

Medicaid Reference: 21502022647859

Notice No.: 58677152

HENRY E. HIRVI V. OFFICE OF MEDICAID

SUBPOENA DUCES TECUM

To: Director, or Custodian of Records
Medicaid Enrollment Center, Springfield

GREETINGS:

You (or designee) are hereby commanded, in the name of the Commonwealth of Massachusetts, and in accordance with Massachusetts General Laws, Chapter 30A, Section 12(3), Massachusetts General Laws Chapter 118E, §48, 130 Code of Massachusetts Regulation 610.052, and Massachusetts Rules of Civil Procedure 30(a) and 45, at the request of the Appellant, Henry E. Hirvi, to appear and to testify, in person, and not telephonically or electronically, at the Springfield MassHealth Enrollment Center, 333 Bridge Street, Springfield, Massachusetts 01103, on April 25, 2018, at 12:00 P.M., and from day to day thereafter until completed, regarding the facts upon which MassHealth bases its denial of eligibility in the present matter.

Further, you are required to bring with you those items described in Exhibit "A" attached hereto.

In lieu of appearing, the documentation, *with certification subscribed and sworn to under the penalties of perjury,* may be sent to the office of Attorney Nicholas G. Kaltsas, Elder & Disability Law Advocates, 255 Park Avenue, Suite 410, Worcester, Massachusetts 01609, no less than 10 days before said Fair Hearing.

It is not possible for the Appellant, based upon the Notice he received in the present matter, to determine the factual basis upon which the MassHealth agency relies in its determination of eligibility, or lack thereof, and its determination of the value of countable assets.

All questions and comments regarding this subpoena should be addressed to Appellant's legal counsel, Nicholas G. Kaltsas, Esq, 120 Park Avenue, Suite 410, Worcester, MA 01609, Tel.: 508-755-6525, Fax: 508-459-5060, Email: ngk@edlalaw.com.

Hereof fail not, as your failure to appear as required will subject you to such pains and penalties as the law provides.

Dated: _____ day of _____, 2018

_____
Notary Public
My Commission Expires:

EXHIBIT "A"

The witness is to furnish or make available for inspection the following documents:

1. Any and all documents, LOCATED in Henry Hirvi's case record, which describes the FACTS that support the agency's decision to deny the Appellant's application, per 42 CFR 435.914(a);

2. Any and all documents, NOT LOCATED in Henry Hirvi's case record, which describes the FACTS that support the agency's decision to deny the Appellant's application;

3. All documents which describe the FACTS upon which the denial of Henry Hirvi's application was based;

4. All documents, if any, contained in the applicant's case record, which state the FACTUAL basis upon which a determination of ineligibility was based by the agency, in denying Henry Hirvi's application;

5. All fair hearing decisions or court decisions which were considered as relevant to the Henry Hirvi application, including but not limited to any such decisions which reject or support the legal basis or theory upon which Eva Hirvi's application was denied.

6. All documents that identify the person who made the decision to deny the application.

Exhibit F

Part I ADMINISTRATION OF THE GOVERNMENT

Title III LAWS RELATING TO STATE OFFICERS

Chapter 30A STATE ADMINISTRATIVE PROCEDURE

Section 12 ADJUDICATORY PROCEEDINGS; SUBPOENAS

Section 12. In conducting adjudicatory proceedings, agencies shall issue, vacate, modify and enforce subpoenas in accordance with the following provisions:?

(1) Agencies shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence or documents, relating to any matter in question in the proceeding. Agencies may administer oaths and affirmations, examine witnesses, and receive evidence. The power to issue subpoenas may be exercised by any member of the agency or by any person or persons designated by the agency for such purpose.

(2) The agency may prescribe the form of subpoena, but it shall adhere, in so far as practicable, to the form used in civil cases before the courts. Witnesses shall be summoned in the same manner as witnesses in civil cases before the courts, unless another manner is provided by any law. Witnesses summoned shall be paid the same fees for attendance and travel as in civil cases before the courts, unless otherwise provided by any law.

(3) Any party to an adjudicatory proceeding shall be entitled as of right to the issue of subpoenas in the name of the agency conducting the proceeding. The party may have such subpoenas issued by a notary public or justice of the peace, or he may make written application to the agency, which shall forthwith issue the subpoenas requested. However issued, the subpoena shall show on its face the name and address of the party at whose request the subpoena was issued. Unless otherwise provided by any law, the agency need not pay fees for attendance and travel to witnesses summoned by a party.

(4) Any witness summoned may petition the agency to vacate or modify a subpoena issued in its name. The agency shall give prompt notice to the party, if any, who requested issuance of the subpoena. After such investigation as the agency considers appropriate it may grant

the petition in whole or part upon a finding that the testimony, or the evidence whose production is required, does not relate with reasonable directness to any matter in question, or that a subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive, or has not been issued a reasonable period in advance of the time when the evidence is requested.

(5) Upon the failure of any person to comply with a subpoena issued in the name of the agency and not revoked or modified by the agency as provided in this section, any justice of the superior court, upon application by the agency or by the party who requested that the subpoena be issued, may in his discretion issue an order requiring the attendance of such person before the agency and the giving of testimony or production of evidence. Any person failing to obey the court's order may be punished by the court for contempt.

610.052: Subpoenas

(A) A subpoena under this chapter is a document that commands a witness to appear at a given time to give testimony at an administrative proceeding. A subpoena can also require the witness to produce for the administrative proceeding any books, documents, papers, or records in his or her possession or control.

(B) Right to Subpoena. Any party to a hearing and BOH on its own have the right to request a subpoena requiring the attendance and testimony of witnesses and the production of any evidence including books, records, correspondence, or documents relating to any matter in question at the hearing. Any party may submit to BOH a written request for the issuance of such subpoena. If, in its discretion and in accordance with 130 CMR 610.065(B), BOH allows such request, a subpoena will be issued within three business days of receipt of such request.

(C) Petition to Vacate Subpoena. Any witness subpoenaed may petition BOH to vacate or modify a subpoena.

(1) BOH gives the party who requested the issuance of the subpoena notice of such petition orally or in writing. The notice contains or quotes the contents of the petition and indicates that the party may oppose the petition orally or, if time permits, in writing to BOH. If time does not permit a party to respond to the request to vacate, the hearing will be postponed long enough to permit the party to respond to the petition. This procedure is not be construed to require a hearing or adjudicatory proceeding.

(2) After such investigation as BOH considers appropriate, BOH may grant the petition in whole or in part upon a finding that:

(a) the testimony or the evidence whose production is required does not relate with reasonable directness to any matter in question;

(b) the subpoena is unreasonable or unduly burdensome; or

(c) the subpoena has not been issued a reasonable period in advance of the time when the evidence is requested.

(3) Unless BOH finds that at least one of the conditions in 130 CMR 610.052(C)(2)(a) through (c) exists, BOH will deny the petition.

(D) Failure to Comply with a Subpoena. If any person fails to comply with a properly issued subpoena, BOH (or the party who requested the subpoena) may petition the Superior Court for an order requiring compliance with the terms of the subpoena.

(130 CMR 610.053 through 610.060 Reserved)