

by Claudia Schlosberg, NHeLP
February 10, 1997

Introduction

Recent changes in federal law, including the Personal Responsibility and Work Opportunities Reconciliation Act (PRWORA) and the Contract with America Advancement Act, have placed an estimated 1.6 million Medicaid beneficiaries at risk of losing their Medicaid benefits. As the states and federal government move to implement these laws, it is critically important that beneficiaries' due process rights are upheld. These rights, including the right to prompt ex parte redetermination of eligibility, pre-termination notice, a fair hearing and the right to receive benefits until a final administrative decision on eligibility has been made, have been well established in federal law for over a quarter of a century. Yet, evidence is mounting that states are ignoring these procedural safeguards and are moving quickly and illegally to terminate Medicaid coverage for tens of thousands of beneficiaries. This article details what federal law requires, what states are doing and suggests strategies to ensure that procedural due process rights are upheld.

Federal Requirements for Automatic, Ex Parte Redeterminations

Beneficiaries scheduled to lose SSI beginning on January 1, 1997 include approximately 785,000 elderly and disabled legal immigrants, 275,000 children and 200,000 adults whose disability was based on a finding of drug or alcohol addiction. In most states, the receipt of SSI automatically entitles the recipient to Medicaid. However, if SSI is lost, termination of Medicaid benefits is not automatic. Rather, upon notification that SSI cash assistance has been terminated, federal regulations require states to "promptly redetermine eligibility" 42 C.F.R. 435.916(1). This regulation has consistently been interpreted to require states to undertake an automatic, ex parte review of the beneficiary's eligibility for Medicaid. *Crippen v. Khader*, 741 F.2d 102 (6th Cir. 1984); *Massachusetts Ass'n of Older Americans v. Sharp*, 700 F.2d 749, 753 (1st Cir. 1983); *Stenson v Blum*, 476 F. Supp. 1331 (S.D.N.Y. 1979).

According to the Health Care Financing Administration, the redetermination process must involve examination of whether or not the individual would be eligible for Medicaid under any other available basis under the State's approved Medicaid plan. 62 Fed.Reg. 1683 (Preamble to Emergency Regulation, January 13, 1997). Thus, for example, if a child loses SSI because he or she is no longer considered disabled, the Medicaid agency must examine whether the child is eligible for Medicaid under AFDC eligibility standards, under poverty-level eligibility criteria or under any other "optional" category of coverage. Similarly, if a legal alien loses SSI and the state has opted to provide Medicaid coverage to qualified aliens, the Medicaid state agency

must examine whether the individual is "medically needy" or meets any other criteria for coverage under any available state option.

FFP and Aid Pending Redetermination

During the reconsideration process, the state must continue to provide Medicaid benefits to the individual recipient. 42 CFR 435.930(b); Crippen, *supra* at 107; Massachusetts Ass'n of Older Americans, *supra* at 753; Stenson, *supra* at 1339-41. The redeterminations also must be undertaken and completed promptly. Federal regulations at 42 C.F.R. 435.1003 provide that, with respect to individuals who had been eligible for SSI, federal financial participation (FFP) is available until the end of the month if the SSI termination notice is received from SSA by the 10th of the month; and until the end of the following month if the SSA notice is received after the 10th of the month. However, on January 13, 1997, HCFA issued an emergency rule authorizing the Secretary to waive the time limits for FFP when a change in Federal law affects the eligibility of substantial numbers of Medicaid recipients. 62 Fed. Reg. 1685 (January 13, 1997)(to be codified at 42 C.F.R. 435.1003).

The extension of FFP is intended to help states cope with the expected increased volume of redeterminations caused by the welfare law and the Contract with America. Although not specified in the emergency rule itself, the preamble language states that States may receive FFP for up to 120 days for each redetermination. 62 Fed. Reg. 1684. The preamble also indicates that the issue of whether states should routinely receive more than 120 days for completing redeterminations may be dealt with in a separate regulation at a future date. 62 Fed. Reg. 1684.

Notice and Aid Pending the Hearing

If the redetermination process results in a finding of ineligibility, then all established due process protections are triggered. Specifically, the state must provide recipients with timely and adequate notice of the proposed action. 42 CFR 435.919(a). To be timely, the notice must be sent, in most situations, at least 10 days before the date of action. 42 C.F.R. 431.211. To be adequate, the notice must comport with the requirements of 42 C.F.R. 431.210. Specifically, it must: (1) inform the beneficiary of what action the State intends to take; (2) the reasons for the intended action (3) the specific regulations that support, or the change in the Federal and State law that requires, the action; (4) an explanation of the recipients right to request an evidentiary hearing and (5) an explanation of the circumstances under which Medicaid is continued if a hearing is requested.

If the recipients requests a hearing before the date of action, then the agency must continue to provide benefits until a decision is rendered. 42 CFR 431.230. However, if the agency's action is sustained by the hearing decision, the agency may institute recovery procedures against the recipient to recoup the cost of any services furnished during this period. 42 C.F.R. Section 431.230(b).

Reinstatement of Services

Under certain circumstances, recipients may be able to get services reinstated, even if the recipient failed to request a hearing before the date of action. Specifically, 42 CFR 435. 231 provides that the agency may reinstate services if a recipient requests a hearing not more than 10 days after the date of action. The agency must reinstate services until a hearing decision, if action was taken without the required advance notice. 42 CFR 435. 231(d). Furthermore, if the recipient's whereabouts are unknown, as indicated by the return of unforwardable agency mail, any discontinued services must be reinstated if the recipient's whereabouts become known during the time he is eligible for services. 42 C.F.R. 431.231.

Additionally, if a beneficiary's physical or mental disability makes it difficult for him/her to understand the notice or respond to it in a timely fashion, Title II of the Americans with Disabilities Act, 42 U.S.C. sec. 12131 et seq and its regulation, 28 C.F.R. 35.130 (b)(7), may require a reasonable modification of the time or process for requesting a hearing

State Practices Violate the Law

Despite a clear mandate to undertake automatic ex parte redeterminations, states are ignoring the law. For example:

California, anticipating the January 1, 1997 termination of SSI benefits for recipients whose disability is based on a finding of drug or alcohol addiction, sent notices to recipients' representative payees stating that the recipient's Medicaid benefits would end on December 31, 1996. The notices were dated December 18, 1996, but in many cases, were not mailed until December 23, 1996, less than 10 days from the date of action. The notices, which also made no reference to appeal rights, invited recipients who still want medical coverage to reapply for benefits by completing a set of enclosed forms. Subsequently, California apparently learned that not everyone who was supposed to receive the notice got it on time, so they sent a second notice extending Medi-Cal benefits for one extra month. The second notice also reminded recipients that if they wanted their benefits to continue they must send in the forms that were included in the first mailing. Unlike the first notice, the second notice contained information on

how to request a hearing to appeal the termination of Medi-Cal benefits. California has now extended payment of Medi-Cal benefits through March 31, 1997, and under threat of litigation, is working to cure its notices and proceed with redeterminations.

In Florida, when the department is notified by the Social Security Administration that the SSI recipient's coverage is being terminated, the Medicaid agency notifies the recipient by mail of the agency's intent to terminate Medicaid eligibility. To initiate the redetermination process, the recipient must contact the agency within 20 days of receipt of the notice. If the recipient fails to respond within the prescribed period of time, the agency will take necessary steps to terminate Medicaid coverage.

In Illinois, recipients who qualified for SSI based on a drug or alcohol related disability received notices dated December 27, 1996 advising them that beginning February, 1997, their Medicaid coverage would end. In addition, the notice states: "If you think you are eligible under a different program, you must contact your local office and request a review for continued medical assistance." There are 26,000 individuals in Illinois who were eligible for SSI based on a drug or alcohol related disability. In Louisiana, recipients who have lost SSI are sent a notice with a form which must be completed and returned in person, along with documentation of proof of income, resources, expenses etc., within 15 days. If the form is not completed or if the recipient fails to contact the agency within the prescribed period of time, the state will take action to end Medicaid coverage. The notice is silent on appeal rights.

Wisconsin also requires recipients who have lost SSI to complete an application within a specified time frame to initiate the redetermination process. If the application is not submitted within the required timeframe, the recipient's Medicaid benefits will end because of the failure to provide information. Unlike, Louisiana, Wisconsin does inform the recipient of their right to appeal the cancellation of their benefits.

As these examples clearly document, instead of undertaking automatic, ex parte reviews of eligibility, states are placing the onus on beneficiaries to either initiate the redetermination process or actually reapply for benefits. Neither of these approaches meets the legal requirements established by regulations and case law. Additionally, states are ignoring long-established standards for providing adequate notice. The failure to provide adequate notice and to conduct redeterminations of eligibility will result in the inappropriate and illegal loss of Medicaid coverage for thousands.

What Should Advocates Do?

Requiring states to adhere to due process protections can help clients retain their benefits and forestall terminations. Here are some steps that advocates can take:

1. Find out what your state policy is on redeterminations and what your state is doing or planning to do for the beneficiaries affected by recent federal changes. If the policy violates federal law, you may be able to convince your state Medicaid agency to do it right. NHeLP can assist you with analysis, technical advice and strategy..
2. Assist clients, as appropriate, to exhaust their SSA appeal rights. For states which provide Medicaid to SSI recipients, states must continue to provide Medicaid during the SSI redetermination process and any timely appeal. As a general rule, the Medicaid state agency cannot move to terminate Medicaid benefits before SSA has taken action.
3. Assist clients, as appropriate to exhaust Medicaid due process protections. The first step is to seek a hearing and request aid pending. Even if more than 10 days have elapsed since notice was received, your clients may be entitled to have benefits reinstated.
4. Consider litigation. If your state is not complying with due process protections, the only way to prevent irreparable harm may be to bring suit against the state Medicaid agency. NHeLP may be able to assist you.