

SENIOR BULLETIN: MEDICAID – INSTITUTIONAL/COPEs
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Asserting the rights of unrepresented applicants or recipients with impaired mental capacity

Short statement of the problem

An application for Medicaid is denied. Or, a decision is made by the Department of Social & Health Services to terminate ongoing Medicaid benefits. DSHS mails a notice to the affected applicant or recipient; but he or she has a mental capacity too impaired to understand the notice or to assert any appeal rights. And there is neither a guardian nor a person authorized by a power of attorney to act for the affected individual. A concerned neighbor brings the problem to the attention of a local Senior Information & Assistance office or another social service agency. What can be done?

Some general background

In general, when an application for medical assistance from the Department of Social & Health Services is denied, or when benefits are reduced or stopped, the affected individual has certain procedural rights – and the Department has corresponding procedural obligations. In particular, the individual has the right to notice of the Department's action and to an opportunity for a hearing to contest it – and the Department has the corresponding obligation to give such notice and opportunity for a hearing.¹

In most cases of DSHS application denial or benefit termination, the affected individuals have the mental capacity to understand the notice and to decide whether to request a hearing, or to seek assistance in reading the notice and in asserting appeal rights. Where affected individuals lack such mental capacity, special problems arise.

Some people with mental capacity so impaired that they cannot act for themselves have substitute decision makers with authority to act on their behalves. (The substitute decision makers may be guardians appointed by a court, or may be agents they have given powers of attorney to while they had sufficient mental capacity to give them.) In their cases, their substitute decision makers can assert their rights for them,

and the Department can usually satisfy its notice obligations by giving notice to the guardian or agent and allowing the guardian or agent to exercise or waive hearing rights.

Designating representatives

Some people with impaired mental capacity do not have substitute decision makers with authority to receive legal notices and exercise procedural rights on their behalves. Sometimes they will have family members or friends who can informally resolve their problems or who can initiate guardianship proceedings. But in some cases there is no such volunteer available to provide needed help. What happens in those cases?

It may be useful to approach this question from two directions: First, what does the Department do, and what should it do? Second, what can a friend, a family member, or a social worker or other advocate who becomes aware of the situation do?

The Department's practice

The Department has adopted policies for assisting applicants or recipients who “have a mental, neurological, physical or sensory impairment or other problems that prevent [them] from getting program benefits in the same way that an unimpaired person would get them.” WAC 388-472-0010 (“What are necessary supplemental accommodation [NSA] services?”) The assistance offered at present, however, generally assumes that the “client” can ultimately authorize or approve decisions – or that there is someone else able to do so.

The “NSA services” specifically identified in WAC 388-472-0010 do not include obtaining a determination of whether a client has the capacity to make independent decisions and, if not, obtaining appointment of a substitute decision maker. The regulation does not affirmatively prevent the Department from taking such steps, but as a practical matter, they are generally not considered.

In some cases, DSHS staff may see an individual whose application is denied or whose benefits are terminated as meeting the criteria for referral to its Adult Protective Services unit. APS has some resources available to pay for consultations “when the determination of capacity is necessary in developing an action plan to prevent future incidents of neglect (including self-neglect), abuse, abandonment, or

exploitation."² The Attorney General's office has allocated a very limited amount of staff time to initiate guardianship proceedings in certain cases referred by APS. There is no legal obstacle to the State's initiating a guardianship proceeding when an individual appears to lack the capacity to understand notice of a benefit denial or termination, or to exercise appeal rights; but, as a practical matter, representatives of the State have been hesitant about acknowledging public responsibility in this area and about allocating sufficient resources to discharge it.

Consequently, at present, there are cases in which an individual's DSHS file reflects, or DSHS staff is otherwise aware, that an individual lacks the mental capacity to understand a denial or termination notice, and in which a denial or termination notice is sent to him or her, with no effective accommodation for the incapacity. In some of these cases, presumably, some family member, friend, or social worker comes to the rescue; in others, presumably, the denial or termination simply takes place, and no meaningful opportunity for appeal is provided.

The Department's legal responsibility

The Department's obligation to provide effective notice and opportunity for hearing when denying or terminating assistance is not excused when an applicant or recipient is mentally incapacitated. The Department is responsible for accommodating the incapacity.

In other contexts, when a person entitled to notice from a state lacked the mental capacity to understand or respond to the notice, and when there was no other person with authority to act for that person, the United States Supreme Court has interpreted the Constitution to require that notice be given through a guardian. *If no proceeding has otherwise been initiated to determine whether a guardian is needed, and to appoint one if one is needed, the Department has no other apparent appropriate alternative than to initiate such a proceeding if it is to satisfy its notice obligations.*³

For eligibility disputes that reach the Office of Administrative Hearings, the problem of inadequate notice to incapacitated individuals may persist.⁴ The OAH has no rule or systematic procedure for addressing the problem. If the issue is noticed and an ALJ determines that inadequate notice has been given to the appellant, or that the appellant lacks the capacity to proceed with the hearing, the ALJ can hold the notice inadequate and decline to proceed until the Department takes the steps necessary to provide adequate notice. It may be that an ALJ could apply directly to the superior court for the appointment of a guardian

ad litem. An ALJ could certainly ask the Department to make such an application.⁵

How can a friend, family member, or social service provider help?

What a willing friend, family member or social service provider can do to help someone with impaired mental capacity who is facing a denial or termination of medical assistance will depend on the individual case. Sometimes by simply providing needed information to the Department an immediate problem may be resolved. Sometimes a volunteer (i.e., someone not legally obligated to take the action) may be willing to initiate the guardianship proceeding the State has failed to start.

A volunteer may call the problem to the attention of responsible staff at DSHS and urge that remedial measures be taken. It is appropriate to point out the Department's responsibility under WAC 388-472-0010 ("What are necessary supplemental accommodation services?") and related provisions, which require, among other things, development of an accommodation plan.

A volunteer may be able to make a hearing request for the incapacitated person. (WAC 388-02-0090 says: "Either you or your representative may request a hearing." In practice, DSHS may accept requests from *any* person for purposes of *initiating* a proceeding.) But once a hearing is scheduled, someone with authority to act for the affected individual should be identified by the tribunal (though this point may sometimes be overlooked in practice). As previously noted, the Office of Administrative Hearings does not have a procedure for appointing someone to act for an incapacitated person.

There may be additional legal remedies available in an individual case. To address the broader problem will ultimately require a public commitment, both in terms of policy and of resources.

Endnotes

¹ The right to a hearing is guaranteed by 42 U.S.C. § 1396a(a)(3) and 42 C.F.R. § 431.200 *et seq.*, as well as RCW 74.08.080. Procedures are established in WAC 388-08. Such cases as *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Cuddy v. Dept. of Public Assistance*, 74 Wn.2d 17, 19 (1968), discuss the constitutional background to these statutory and regulatory requirements.

² MB-AASA-HCS-97-56 (August 18, 1997).

³ "Notice to a person known to be incompetent who is without the protection of a guardian does not measure up to [the constitutional] requirement." *Covey v. Town of Somers*, 351 U.S. 141, 146, 100 L. Ed. 1021, 76 S. Ct. 724 (1956). In *Covey*, a deed based on a tax foreclosure sale was set aside on due process grounds, in spite of technical compliance with the notice requirements of a foreclosure statute, because the recipient of the notice was an incompetent person without a guardian. The Court specifically rejected the argument "that the Fourteenth Amendment does not require the State to take measures in giving notice to an incompetent beyond those deemed sufficient in the case of the ordinary taxpayer." *Ibid.* Cf. *Stieberger v. Apfel*, 134 F.3d 37 (2nd Cir. 1997)(as a matter of due process, an individual with a mental impairment that prevents understanding a Social Security Administration decision and the appeal process may be entitled to an extension of an appeal deadline); *Udd v. Massanari*, 245 F.3d 1096 (9th Cir. 2001)(as a matter of due process, an individual "who lacked the mental capacity . . . to understand the cessation of his disability benefits and to take the steps necessary to pursue an [SSA] appeal" may be entitled to a reopening of an adverse benefit decision and to retroactive benefits).

In addition to constitutional precedent read in conjunction with notice and hearing requirements specific to the Medicaid program, there are anti-discrimination statutes that should require accommodation by DSHS when providing notice to applicants or recipients with impaired mental capacity. Prominent among these statutes is the anti-discrimination section of the Americans with Disabilities Act, which says that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits or the services, programs, or activities of a public entity" 42 U.S.C. § 12132. A failure to address the need for a substitute decision maker may entail exclusion both from the hearing process and from the underlying benefits at issue.

⁴ The Americans with Disabilities Act applies to the Office Administrative Hearings, just as it applies to the Department of Social and Health Services. The cases of mentally incapacitated individuals facing denial or termination of benefits may be unlikely to reach the OAH, unless the individual is represented, but some do.

⁵ When a court is faced with an incompetent litigant, it has inherent authority to appoint a guardian ad litem. *Vo. v. Pham*, 81 Wash. App. 781, 784 (Div. I 1996). An administrative law judge may identify the same need for a guardian ad litem, but lacks the inherent authority to appoint one directly. Under WAC 388-02-0215(2)(p), which authorizes an ALJ to take "any other action necessary and authorized under these or other rules," an ALJ might have authority to apply directly to a court for appointment of a guardian ad litem pursuant to RCW 11.96A.160.