

*Erie County DSS
Fair Hearing Training - 2002
for
CASA, Medicaid and Food Stamp workers*

Training Objectives: The worker will understand the role and importance of the fair hearing process; will be able to carry out the worker's duties and obligations with respect to the fair hearing process; and is able to prepare and present case information at the Fair Hearing

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I. Due Process & Fairness

No person shall be ... deprived of life, liberty, or property, without due process of law.
U.S. Constitution, 5th Amendment.

[N]or shall any State deprive any person of life, liberty, or property, without due process of law.

U.S. Constitution, 14th Amendment.

The minimum process that is due an individual depends on the proposed governmental action, and its impact on the individual. For example, a criminal defendant facing a possible death penalty is due a lot of process. This does not eliminate mistakes. Bad or incomplete information and systemic inadequacies can result in innocent individuals being executed.

Under the Constitution, official government actions depriving an individual of life, liberty or property must meet minimum standards of fairness to the individual. First, we must determine whether an adverse decision will deprive a person of a protected property or liberty interest. Then we must determine the process that is due in that circumstance. This depends on:

- * the private interest affected by the action,
- * the risk of erroneous deprivation and the probable value of additional safeguards and
- * the Government's interest and the fiscal and administrative burdens of additional procedural requirements.

Goldberg v. Kelly, 397 U.S. 254 (1970) is a noted U.S. Supreme Court case. The case grew out of a denial of welfare benefits to some New York residents. The Court recognized that the benefits were "statutory entitlements," meaning that all applicants who met the eligibility criteria set by the legislature were entitled to receive the benefits. The welfare benefits were "property." Further, the benefits were designed to help those most in need. An improper termination would have very serious consequences for the recipient. New York had several due process elements in place - prior notice with reasons and the right to appeal. However, the State did not provide for an oral hearing with aid continuing until the hearing decision was issued. The court held that due process requires those additional protections to guard against an improper termination.

The required process is often some combination of the following procedural tools:

- * prior notice and hearing
- * trial-type hearing
- * right to counsel
- * an impartial decision maker
- * a decision with findings of fact and conclusions of law.

II. Federal Medicaid & Food Stamp Law

The Food Stamp Program was created by the U.S. Congress. The Congressional findings state:

It is declared to be the policy of Congress, in order to promote the general welfare, to safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households. Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of the Nation's agricultural abundance and will strengthen the Nation's agricultural economy, as well as result in more orderly marketing and distribution of foods. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation.

7 U.S.C. § 2011

Congress gave the United States Department of Agriculture (USDA) the authority and responsibility for operating the program. The USDA, using its delegated powers, developed regulations that detail the rules of the Food Stamp Program. These are published in the Code of Federal Regulations (CFR). The pertinent sections of the regulations are 7 CFR Parts 271 to 285.

Similarly, Congress created the Medicaid program to address a problem of access to medical care. 42 U.S.C. 1396 et seq. Congress chose a different administrative structure for Medicaid, as compared to Food Stamps. The Medicaid statute provides for a federal subsidy to States that choose to establish a Medicaid program. With that funding comes a detailed statutory list of mandatory and optional eligible individuals, services and procedures. However, each State assumes a substantial amount of responsibility for defining their own Medicaid program in their State Plan. In fact, every Medicaid program is different and the variations from State to State can be substantial.

The Medicaid statute delegates responsibility for federal program administration to the Department of Health and Human Services. HHS sub-delegates that authority to its agency, the Centers for Medicare and Medicaid Services (CMS). CMS until recently was called the Health Care Financing Administration (HCFA). Their regulations are found at 42 Code of Federal Regulations (CFR), Parts 430-456. Part 435 addresses Medicaid eligibility.

Each State must identify a single state agency responsible for administering the Medicaid program in that state. That agency is responsible for ensuring compliance with the federal mandates and the terms of the State Plan.

III. State Medicaid Law

The Food Stamp program operates under the Office of Temporary and Disability Assistance within the Department of Family Assistance. Social Services Law § 95. The Department is the United States Department of Agriculture's agent for administering the Federal food stamp program. Federal laws govern the rights, entitlements, duties and obligations of recipients.

The New York State Department of Health replaced the New York State Department of Social Services as the single State Agency responsible for supervising the Medicaid program effective October 1, 1996. This change did not change the rules or the personnel involved, except the Commissioner.

- A State Statute:
 - Fair Hearings - Social Services Law §22
 - Food Stamps: Social Services Law §95.
 - Medicaid: New York Social Services Law §363-369
- Especially
 - §366 - Eligibility generally
 - §366(2)(a) - Income and Resource Exemptions
 - §366(5)(c) - Transfers after October 1, 1989
 - §366-c - Institutionalized Spouse
 - §369(1) - MA Recovery and Lien Limitations
- B State Regulations: Title 18 of the New York State Official Compilation of Codes, Rules and Regulations (N.Y.C.R.R.)
 - Fair Hearing - 18 N.Y.C.R.R. Part 358
 - Food Stamp Eligibility - 18 N.Y.C.R.R. Part 387
 - Medicaid Eligibility - 18 N.Y.C.R.R. Part 360
- C Administrative Directives (ADM) - These transmittals from DOH to County Commissioners are interpretative policy statements, less formal, but more specific than, regulations. There is a process for developing an ADM, but it does not include public notice or comment.
- D General Information System (GIS) Messages - These are another step below the ADM in authority. GIS messages usually address very specific issues. They may serve as a preliminary notice to the local districts on policy or procedural changes that later will be developed into an ADM or an amendment to the regulations.

Local DSS Role - Social Services Law §20(3)(a) and 18 N.Y.C.R.R. § 300.6 prohibits local districts from applying locally developed Medicaid "rules, regulations or procedures" that have not been approved by the State Medicaid agency.

IV. Fair Hearings - 18 N.Y.C.R.R. Part 358

The regulations at 18 N.Y.C.R.R. Part 358 govern the fair hearing process for Medicaid and Food Stamps. They establish the rights and obligations of applicants, recipients, and social services agencies. These regulations expand upon the duties set out by federal law and State statute.

The regulations set forth the notice an A/R should receive if:

- * she/he has been accepted for or denied Medicaid or Food Stamps or,
- * there is to be a discontinuance, reduction, or suspension in their Medicaid or Food Stamps or,
- * there is an increase in their Medicaid or Food Stamps or,
- * there is to be a change in the calculation of such assistance or benefits or,
- * ECDSS concludes she/he has received an over-issuance of food stamp benefits.

the time periods within which to request a fair hearing and/or conference if her/his application for Medicaid or Food Stamps is not acted upon in a timely manner, or if a notice is received

- * what she/he is required to do to have a review of an action of ECDSS after she/he has received a notice, or if ECDSS has not acted in a timely manner including:
 - how to ask for a conference and fair hearing;
 - how to exercise the right to have Medicaid or Food Stamps continued until a hearing decision is issued (aid continuing);
 - how to request another hearing date if she/he is unable to attend the fair hearing on the day it is scheduled to be held;
 - how to get an interpreter if the A/R does not speak English or is deaf; and
 - who the A/R may bring to a conference, or fair hearing
- * what the A/R should do if ECDSS does not comply with the fair hearing decision.

For ECDSS workers, the regulations govern the following:

- * notices to be sent to applicants and recipients of covered programs or services;
- * agency conferences;
- * information and documents to be provided to A/Rs, or their representatives, who have requested a fair hearing;
- * the fair hearing process; and
- * compliance with fair hearing decisions.

A Fair Hearing Rights and Obligations of Applicants and Recipients

An A/R has the right to challenge certain determinations or actions of ECDSS or the failure to act with reasonable promptness or within the required time periods. 18 N.Y.C.R.R. §358-3.1 provides a long list of actions that give an A/R a right to a fair hearing including:

- (1) ECDSS denies the application or the A/R agrees in writing to withdraw an application but feels that she/he was given incorrect or incomplete information about eligibility.
- (2) ECDSS has failed to determine an A/R's eligibility with reasonable promptness or within the required time periods; issue or adjust food stamp benefits; or authorize medical care or services.
- (3) ECDSS discontinues, suspends or reduces Medicaid, food stamps or services, or increases Medicaid or food stamps.

Certain Food Stamp actions allow for limited appeals. For example, a food stamp reduction based on a U. S. Food and Nutrition Service order to reduce allotments gives the A/R the right to a fair hearing only if she/he believes that the benefit level was computed incorrectly under Federal rules, or that Federal rules were misapplied or misinterpreted.

- (4) a Medicaid authorization is restricted.
- (5) ECDSS denies a request for restoration of any food stamp benefits lost less than one year prior to the request for restoration; or the A/R does not agree with the amount of food stamp benefits restored or any other action taken by ECDSS to restore such benefits.
- (6) within a certification period, the amount of food stamp benefits is inadequate and the A/R requests a fair hearing within such certification period.
- (7) ECDSS determines there has been an over-issuance of food stamp benefits, (unless the amount of such claim has already been determined by an administrative disqualification hearing, a waiver for an administrative disqualification hearing, a court determination or a disqualification consent agreement.)
- (8) the A/R has reached a Medicaid utilization threshold and ECDSS denies the application for an exemption from or increase to such threshold.

An institutionalized spouse or a community spouse has the right to a fair hearing to challenge the amount of the community spouse monthly income allowance; and/or the amount of monthly income determined to be otherwise available to the community spouse; and/or the amount of resources attributed to the community spouse or to the institutionalized spouse; and/or the amount of the community spouse resource allowance. 42 U.S.C. §1396r-5(e).

B ECDSS Notice requirements.

ECDSS must review the intended action to determine whether the decision is correct based on the available evidence included in the A/R's case record. 18 N.Y.C.R.R. §358-4.1.

When ECDSS proposes to discontinue, suspend, reduce, or restrict Medicaid or Food Stamps it must give the A/R timely and adequate notice. 18 N.Y.C.R.R. §358-3.3.

ECDSS must give adequate notice when it accepts or denies an application for Medicaid or services or denies an application for an exemption from or an increase of a Medicaid utilization threshold (once the recipient reaches the utilization threshold)

Timely notice means a notice which is mailed at least 10 days before the date upon which the proposed action is to become effective. 18 N.Y.C.R.R. §358-2.23.

Adequate notice means a notice that sets forth all of the information listed in 18 N.Y.C.R.R. §358-2.2 including:

- (1) the action ECDSS proposes to take or is taking.
- (2) the effective date of the action (except a denial);
- (3) the specific reasons for the action (except an acceptance);
- (4) the specific laws and/or regulations upon which the action is based;
- (5) the A/R's right to request an agency conference and fair hearing, with the procedure for doing so, the right to aid continuing and the time limits for the request for a fair hearing;
- (9) the right of the A/R to review the A/R's case record and to obtain copies of documents which the agency will present into evidence at the hearing and other documents necessary for the A/R to prepare for the fair hearing at no cost.
- (10) the hearing rights to be represented or to represent oneself, the right to bring witnesses; to question witnesses at the hearing; the right to present written and oral evidence at the hearing;
- (12) the liability, if any, to repay continued or reinstated assistance and benefits, if the recipient loses the fair hearing;
- (13) the availability of community legal services to assist an A/R at the conference and fair hearing;

C Requests for a fair hearing and the Right to aid continuing - 18 N.Y.C.R.R. 358-3.5 and 358-3.6

A fair hearing may be requested in writing, by telephone, or in person.

A request for a fair hearing involving Medicaid must be made within 60 days after ECDSS's determination, action, or failure to act.

A request for a fair hearing involving food stamp benefits must be made within 90 days after ECDSS's determination, action or failure to act. Further, a fair hearing request to dispute the current level of food stamp benefits must be made during the food stamp certification period.

If the last day for requesting a fair hearing falls on a weekend or holiday, a hearing request postmarked or received by the department on the day after the weekend or holiday will be considered as timely received. The same rule applies for aid continuing purposes.

Aid continuing means the right to have Medicaid or Food Stamps, and services continued unchanged until the fair hearing decision is issued. The State DOH will determine whether the A/R is entitled to aid continuing and will advise ECDSS and the A/R of its decision.

Where ECDSS is required to give the Medicaid A/R timely notice, the A/R has the right to aid continuing if she/he requests a fair hearing before the effective date of a proposed action as contained in the notice of action. In the Medicaid Program, the A/R's right to aid continuing includes the right to have her/his spenddown liability (NAMI) continue unchanged.

Where ECDSS is required only to give the Medicaid A/R adequate notice (but not timely notice) the A/R is entitled to aid continuing only if she/he requests a fair hearing within 10 days of the mailing of the agency's notice of the action.

ECDSS must continue an A/R's food stamp benefits at the same level until the fair hearing decision is issued only where the proposed adverse action is to take place during the A/R's food stamp certification period and the request for a hearing is made prior to the effective date contained in a timely notice for the A/R's case closing or authorization reduction.

ECDSS must take immediate action to assure that the appellant's Medicaid or Food Stamps and services continue unchanged until the fair hearing decision is issued once notified of the DOH determination on aid continuing.

ECDSS may not require an attorney or an employee of an attorney to present written authorization to represent an A/R. Other individuals or organizations seeking to represent an A/R should provide ECDSS a written authorization to represent an A/R.

D Pre-hearing Obligations of ECDSS - 18 N.Y.C.R.R. §358-4.0 to 358-4.2

When requested, ECDSS must assist A/Rs in making a request for a fair hearing.

Upon request of the appellant, ECDSS must provide necessary transportation and transportation expenses to and from the fair hearing for the appellant and appellant's representatives and witnesses and payment for appellant's necessary child care costs and for any other necessary costs and expenditures related to the fair hearing.

Upon request, ECDSS must provide to the appellant and the appellant's authorized representative copies of the documents to be presented at the fair hearing or copies of any documents from appellant's case file which are identified and requested for purposes of hearing preparation. Such copies must be provided at a reasonable time before the hearing date. If the request for copies is made less than five business days before the hearing, ECDSS may provide the copies at the time of the hearing. ECDSS should mail the copies if the appellant or the appellant's authorized representative request that the documents be mailed and there is sufficient time for such documents to be received before the hearing. Requested copies must be provided without charge.

ECDSS must encourage the use of agency conferences to settle disputes and complaints concerning actions regarding an A/R's Medicaid or Food Stamps. This is intended to eliminate the need to hold fair hearings wherever the dispute can be resolved by scrutiny of documents and/or thorough investigation.

ECDSS must hold agency conferences if the appellant requests one a "reasonable time" before the date of the fair hearing. The A/R can request an agency conference though she/he has not requested a fair hearing. If the appellant is contesting a denial of expedited participation in the Food Stamp Program, the conference must be scheduled within two business days of the conference request, unless the appellant requests a later date.

ECDSS must bring the necessary information and documentation to any agency conference to explain the reason for the agency determination and to provide a meaningful opportunity to resolve the problem. An ECDSS representative must appear with the case record at the agency conference (except a telephone conference). The representative must have reviewed the case and must have the authority to decide speaking for ECDSS, including the authority to withdraw the intended action.

ECDSS must send copies of all correspondence relating to the conference and fair hearing to the authorized representative of the appellant.

No later than five calendar days before the hearing date, ECDSS may apply to the Office of Administrative Hearings to appear at a hearing on papers only.

E The ECDSS worker's responsibilities at the fair hearing - 18 N.Y.C.R.R. §358-4.2 & 358-4.3.

DOH should send a fair hearing notice to the appellant, appellant's authorized representative and to ECDSS at least 10 calendar days prior to the fair hearing date. The notice will list the date, time and place of the fair hearing. DOH will give priority to scheduling a fair hearing in certain circumstances. 18 N.Y.C.R.R. §358-3.2. Examples include situations where the hearing is being scheduled because the A/R has no food; or has an urgent need for medical care, services or supplies. In these cases, the fair hearing notice may be less than 10 days prior to the hearing date.

Upon request of either the appellant or ECDSS, the fair hearing may be rescheduled, upon a showing of good cause for requesting the delay. Requests to adjourn a fair hearing must be made following the instructions in the notice of fair hearing.

A fair hearing request can be withdrawn only by a written statement from the appellant or appellant's authorized representative stating that the request for a fair hearing is withdrawn; or the appellant or appellant's authorized representative has withdrawn the request on the record at the hearing. An oral statement by telephone or in person to an ECDSS employee that an appellant is withdrawing a request for a fair hearing is insufficient to withdraw a fair hearing request.

An ECDSS representative must appear at the hearing along with the case record and a written summary of the case. The ECDSS representative must provide complete copies of the agency's documentary evidence to the hearing officer and to the appellant or appellant's authorized representative, where such documents were not provided previously.

The ECDSS representative must have reviewed the case and be prepared to present evidence in support of the action, including:

- * the case number; the applicable category of Medicaid, food stamp benefits or services involved; the names, addresses, relationships and ages of persons affected;
- * the determination the hearing request was based on, with applicable notices;
- * a brief description of the facts, evidence and reasons supporting such determination, including identification of the specific provisions of law, department regulations and approved local policies which support the action;
- * any relevant budget prepared by ECDSS for the appellant's case;

The ECDSS representative must have the authority to make binding decisions at the hearing speaking for ECDSS, including the authority to withdraw the action or otherwise settle the case.

F The Fair Hearing & Decision - 18 N.Y.C.R.R. §358-5 & 358-6

In a fair hearing concerning the denial of or the adequacy of Medicaid or Food Stamps the appellant must establish that the agency's denial was not correct or that the appellant is eligible for a greater amount of assistance or benefits.

In fair hearings concerning the discontinuance, reduction or suspension of Medicaid or Food Stamps or services, ECDSS must establish that its actions were correct.

An impartial hearing officer employed by the department conducts the hearing. The officer:

- * makes an opening statement explaining the nature of the proceeding, the issues to be heard and the manner in which the fair hearing will be conducted.
- * regulates the conduct of the fair hearing, including administering the necessary oaths. Technical rules of evidence followed by a court of law are not applied. Irrelevant or unduly repetitious evidence and/or cross-examination may be excluded by the hearing officer.
- * elicits documents and testimony, including questioning the parties and witnesses. However, the hearing officer will not act as a party's representative. Where the hearing officer considers an independent medical assessment necessary, he may require that be made part of the record.
- * adjourns the fair hearing to another time on the hearing officer's own motion or on the request of either party when it would be prejudicial to the due process rights of the parties to go forward.
- * reviews and evaluates the evidence, rules on the admissibility of evidence, determines the credibility of witnesses, makes findings of fact relevant to the issues of the hearing.
- * prepares the fair hearing record including the recording of the fair hearing testimony, the hearing exhibits and a recommended decision to the commissioner.

The fair hearing decision issued by the commissioner must be based exclusively on the fair hearing record. The decision must set forth the fair hearing issues, the relevant facts, and the applicable law, regulations or approved policy upon which the decision is based. The decision must make findings of fact, determine the issues and state reasons for the determinations and when appropriate, direct specific action to be taken by ECDSS

For all decisions, except those involving food stamp issues only, definitive and final administrative action must be taken promptly, but more than 90 days from the fair hearing request. For all cases involving food stamp issues only the decision must be issued and the parties notified of the decision within 60 days of receipt of the request for the fair hearing.