

Legal Basics: Medicaid Appeals

Eric Carlson, Justice in Aging

Jennifer Goldberg, Justice in Aging

June 12, 2018

Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to NCLER@acl.hhs.gov.
- Written materials and a recording will be available at NCLER.acl.gov. See also the chat box for this web address.

About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

About Justice in Aging

Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we've focused our efforts primarily on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.

Key Lessons

1. Appeal rights are established by the Constitution and federal Medicaid law.
2. The State Medicaid agency must provide adequate notice of the right to appeal an adverse action.
3. The claimant can appeal the adverse action through an administrative hearing.
4. A state must honor rulings favorable to claimants, and further appeal is available when rulings are unfavorable.
5. Advocates should be aggressive in requesting and pursuing Medicaid fair hearings.

Right to Appeal: The Constitution and Federal Medicaid law

Constitutional Right to Appeal

- 5th and 14th Amendment
 - Federal and state governments cannot deprive a person of property without due process of law
- *Goldberg v. Kelly*
 - Monetary public benefits are property
 - Advance hearing is required before benefits can be reduced or terminated

Federal Medicaid Law Right to Appeal

- State Medicaid agency must provide a state fair hearing when Medicaid claim is denied or not acted upon with reasonable promptness
42 U.S.C. § 1396a(a)(3).
- Hearing system must be available to limited English proficient persons and persons with disabilities
 - 42 C.F.R. § § 431.205(e); 431.20
- States should promote appeal rights through wide distribution of rules and/or pamphlets.
CMS State Medicaid Manual § 2900.2.6(e).

Notice of Right to Appeal an Adverse Action

What Makes an Appealable Action?

- Appealable action includes: denials, terminations, reductions, and any action that limits coverage or increases a claimant's financial obligations.
- Hearing rights do not exist when:
 - An action results from a change in law that affects multiple claimants
 - Appeal must be a dispute of facts, not the result of a change in relevant law.

Medicaid Agency Must Give Notice

- Notice must:
 - Clearly describe the action to be taken
 - Reasons for that action
 - Supportive law
- Notice must inform claimant about fair hearing rights

Example 1

- Mrs. A, age 72, applies for Medicaid long-term care benefits. She receives a denial notice which says she did not submit sufficient bank records.
- The notice says that she must submit records from the past five years, and cites to the relevant state regulation.
- The notice also explains how she can request a fair hearing.

Notice and Fair Hearing Rights

- Notice must inform claimant about fair hearing rights, which include:
 - Right to request an expedited hearing if health is in jeopardy
 - How to request a fair hearing
 - Right to representation
 - Hearing time frames

Notice Deadlines

- At least 10 days before proposed action: Agency must provide notice
- Special circumstances for shorter notice periods:
 - Long-term care resident's physician prescribes a change in level of care
 - Claimant has been admitted to an institution
 - Claimant is ineligible for Medicaid
 - Other rare situations (see CMS State Medicaid Manual §§ 2901.1(B), 2901.2).

Timeline and Continued Benefits

- Medicaid must provide a “reasonable” time to request a hearing
 - Between 20-90 days
- If appeal made before effective date of action, benefits are continued until hearing decision is issued
 - Often called “aid paid pending”

Example 2

- Mr. B, age 84, has been receiving 30 hours per week of Medicaid personal care services for the past two years. He receives a notice saying that his personal care services will be reduced by ten hours per week.
- Mr. B files a request for a fair hearing within 10 days.
- He will receive “aid paid pending,” and continue to get 30 hours of Medicaid personal care services until the appeal is heard and a decision is made.

Filing a Hearing Request

- State must allow claimant to file a hearing request in person or in the mail.
- Some states allow hearing requests made through the internet, over the phone, or other electronic means.

Recouping Aid Paid Pending a Hearing

- *IF* Medicaid agency prevails in the hearing, agency may try to recover cost of services Medicaid paid for during the hearing period.
- These recovery requests are uncommon.
 - Medicaid recipients do not have financial resources to pay for this
- Medicaid agency can only try to recoup payment for services if they previously notified claimant of possibility of recovery.

Example 2 (again)

- Mr. B's notice told him that if he didn't succeed, the Medicaid agency could recoup the money paid for benefits he received pending the appeal.
- This made him nervous, but he decided to go ahead with the appeal anyway because he needed the full 30 hours of personal care.
- Mr. B's state does not generally recoup from Medicaid beneficiaries.

Legal Services and Fair Hearing Rights

- CMS advises Medicaid agencies that they “keep informed” about local legal services programs so the legal services programs can advise claimants about their availability

The Administrative Hearing

Claimant Rights Preparing for Hearing

- Claimant has a right to a hearing at a reasonable time, date and place.
- If needed, hearing can be conducted over the phone or in the claimant's home.
- Claimant has a right to examine the Medicaid case file and documents used by the Medicaid agency, prior to the hearing.

Claimant Rights During the Hearing

- Claimant has right to:
 - Present witnesses
 - Establish relevant facts
 - Present arguments without undue interference
 - Refute opposing testimony
- Hearing conducted by impartial person who was not involved in the initial determination

Claimant Rights During the Hearing (cont.)

- Medicaid agency must:
 - Provide a translator for the hearing, if necessary
 - Fund a medical assessment, if hearing officer believes additional medical assessment is necessary
 - Provide transportation for the claimant, their representative, and witnesses to and from the hearing (federal financial participation is available to pay for this)

Example 3

- Mrs. C receives a denial notice because she does not meet the medical eligibility criteria to receive nursing facility services.
- Mrs. C has limited English proficiency.
- Mrs. C's lawyer requests an interpreter when she requests the fair hearing.
- Mrs. C also has her doctor testify at the hearing.

Hearing Venue

- At the state's option, the administrative hearing may be set up as a local evidentiary hearing with a right of appeal to the Medicaid agency
- If the local hearing decision is adverse to the claimant:
 - Medicaid agency must notify claimant of right to appeal decision to Medicaid agency within 10 days after notice is received.
 - Then, claimant has right to de novo hearing with new evidence submission.

Hearing Decision

Hearing Decision

- Hearing officer's decision or recommendation must be based solely on evidence introduced in the hearing
- Hearing record includes only the transcript, documents filed in the proceeding, and hearing officer's recommendation or decision

Conclusive Decision

- On further appeals, the state’s “conclusive decision” is made by the hearing authority
- Hearing authority may be:
 - State agency’s highest officer
 - Panel of agency officials
 - Official appointed for that purpose
- Anyone involved in the lower level decision may not participate in decision

Decision Must Include:

- Evidentiary hearings must include:
 - A summary of the facts
 - Relevant regulations
- De novo hearing decision must include:
 - Reasons for the decision
 - Supporting evidence and regulation
- A notice informing the claimant of the right to further review

Hearing Decision Timeline

- Decision must be issued within 90 days of the hearing request
- A delay of up to 30 days may be allowed at the claimant's request, or if it requires medical evidenced that cannot be obtained within 90 days

Action Post-Hearing

- If decision is favorable to the claimant:
 - Medicaid agency must make fully-retroactive corrective payments
- If it is an adverse decision:
 - State has right to seek compensation for aid-paid-pending benefits (see slide 16)

Tips for Advocates Preparing for Hearings

1) Aggressively Pursue Fair Hearings

- Medicaid fair hearing process is invaluable for claimants.
- The fair hearing request itself can lead to positive outcomes:
 - Case may be resolved prior to a hearing by a state appeals worker.

2) Present a Clear Briefing

- Hearing officers are busy
- Help your client by presenting a clear briefing on relevant issues
 - Includes presenting the relevant law and responding facts

3) Review All of the State's Material

- Remember: state has obligation to provide access to Medicaid case file
- Review case file and all other documents used by Medicaid agency as soon as possible

4) Prepare Witnesses and Claimant

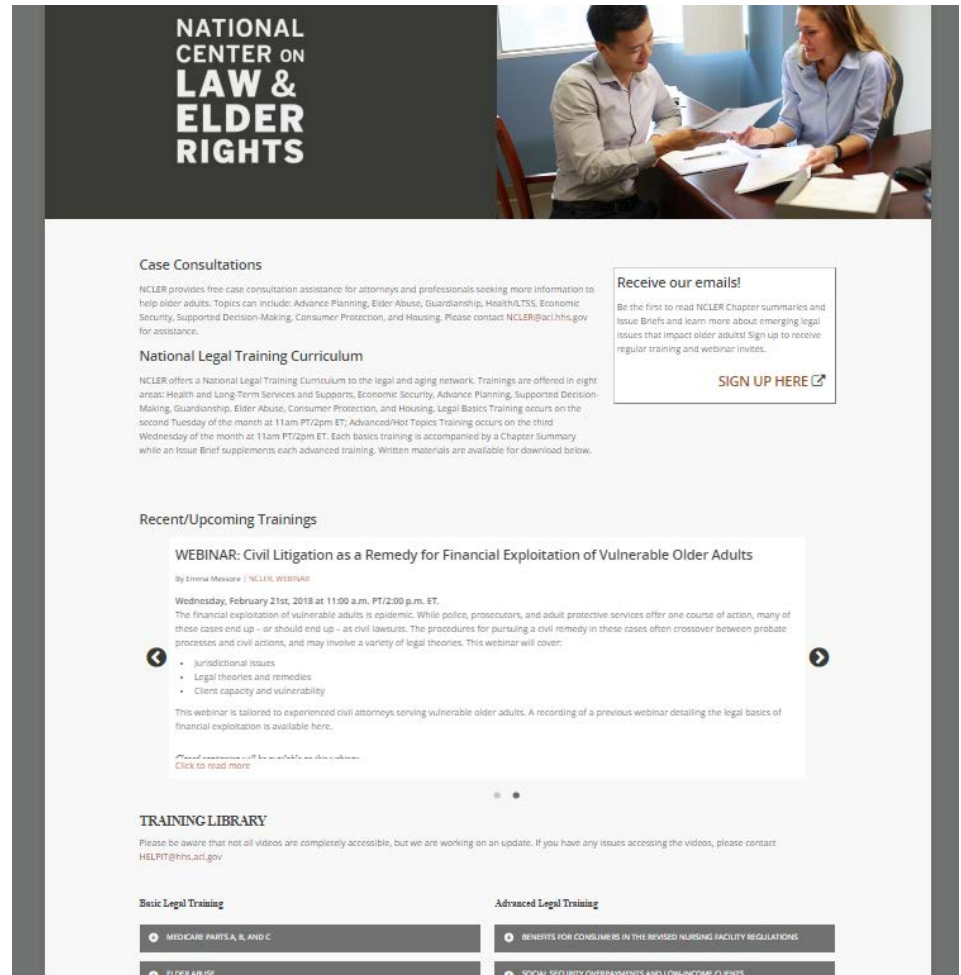
- Always prepare witnesses, especially the claimant
- Preparation provides witnesses a greater sense of confidence
- Focus on presenting the material in a useful way

Conclusion

- Medicaid appeals processes are vital to applicants, beneficiaries and their advocates.
- Medicaid programs make mistakes. The appeals process is the designated avenue for rectifying those mistakes.
- Federal regulations and policies provide important due processes protections.
- Always utilize appeals rights to help protect your client's Medicaid benefits.

Visit Our Website: [NCLER.acl.gov](https://www.ncler.acl.gov)

- Learn about upcoming NCLER trainings
- Access all materials from past trainings, including webinar recordings
- Sign up for our email list



NATIONAL CENTER ON LAW & ELDER RIGHTS

Case Consultations
NCLER provides free case consultation assistance for attorneys and professionals seeking more information to help older adults. Topics can include: Advance Planning, Elder Abuse, Guardianship, Health/MLTSS, Economic Security, Supported Decision-Making, Consumer Protection, and Housing. Please contact NCLER@acl.hhs.gov for assistance.

National Legal Training Curriculum
NCLER offers a National Legal Training Curriculum to the legal and aging network. Trainings are offered in eight areas: Health and Long-Term Services and Supports, Economic Security, Advance Planning, Supported Decision-Making, Guardianship, Elder Abuse, Consumer Protection, and Housing. Legal Basics Training occurs on the second Tuesday of the month at 11 am PT/2pm ET; Advanced/Hot Topics Training occurs on the third Wednesday of the month at 11am PT/2pm ET. Each basics training is accompanied by a Chapter Summary while an Issue Brief supplements each advanced training. Written materials are available for download below.

Recent/Upcoming Trainings

WEBINAR: Civil Litigation as a Remedy for Financial Exploitation of Vulnerable Older Adults
By [Krisna Messore](#) | [NCLER WEBINAR](#)
Wednesday, February 21st, 2018 at 11:00 a.m. PT/2:00 p.m. ET.
The financial exploitation of vulnerable adults is epidemic. While police, prosecutors, and adult protective services offer one course of action, many of these cases end up – or should end up – as civil lawsuits. The procedures for pursuing a civil remedy in these cases often crossover between probate processes and civil actions, and may involve a variety of legal theories. This webinar will cover:

- Jurisdictional issues
- Legal theories and remedies
- Client capacity and vulnerability

This webinar is tailored to experienced civil attorneys serving vulnerable older adults. A recording of a previous webinar detailing the legal basics of financial exploitation is available here.

[Click to read more](#)

TRAINING LIBRARY
Please be aware that not all videos are completely accessible, but we are working on an update. If you have any issues accessing the videos, please contact HELPT@hhs.acl.gov

Basic Legal Training

- MEDICARE PARTS A, B, AND C
- ELDER ABUSE

Advanced Legal Training

- BENEFITS FOR CONSUMERS IN THE REVISED NURSING FACILITY REGULATIONS
- SOCIAL SECURITY OVERPAYMENTS AND LOW-INCOME CLIENTS

Receive our emails!
Be the first to read NCLER Chapter summaries and Issue Briefs and learn more about emerging legal issues that impact older adults! Sign up to receive regular training and webinar invites.

[SIGN UP HERE](#)

Case Consultations

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.