

Memorandum

To: CBMS Communications Integrated Projects Team (IPT)
From: Colorado Center on Law and Policy, Bethany Pray (303) 573-5669 x 310
Date: April 29, 2016
Re: Elements of Accessible, Comprehensive and Legally Sufficient Notices of Action

The Colorado Center on Law & Policy (CCLP) was asked to participate in a series of interviews to assess the legal sufficiency of current Notices of Action (NOAs) generated by CBMS for public benefit programs. CCLP consulted other legal advocacy organizations on the issues they see in working with clients of public benefit programs in preparation for the interview with JVA. To aid the efforts of the IPT in improving NOAs in Colorado, CCLP has drafted this memo summarizing the issues the legal advocacy community believes are essential to developing NOAs that are accessible, comprehensive and in compliance with federal legal standards for procedural due process.

Due Process Legal Standard for Public Benefit Notices

The vitality of our public benefit programs hinges on the state's ability to communicate important information to consumers clearly and comprehensively. Providing digestible and informative notices of action is a crucial component of effective administration of work support and health coverage programs. When NOAs are unclear, poorly formatted, and fail to inform the applicant of why an action is taken or what information was used to make that decision; it limits the ability of a recipient to contest errors in their eligibility and benefit determination and increases the likelihood of churn.

In Goldberg v. Kelly (1970), the U.S. Supreme Court interpreted the Fourteenth Amendment to require that benefit determination notices must give claimants sufficient information to understand the basis for the agency's action, in order for the notice to be constitutionally adequate.¹ This requirement is a cornerstone of maintaining procedural due process in benefit programs, since applicants "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."²

Moreover, federal courts have also held that state agencies may not place the burden on program participants to acquire all the information needed to understand why the decision was made. States must provide individuals "complete" notice about why benefits are being reduced or terminated in order that participants may make a fully informed decision about whether to

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

² Kapps v. Wing, 404 F.3d 105, 124 (2005).

challenge the state's proposed action.³ Simply citing a federal or state rule is insufficient. In Colorado, for example, Medical Assistance regulations require that NOAs contain both the specific regulations that require an action *and* "the reasons for the intended action."⁴ Similarly, regulations for Food Assistance notices must contain the reason for the determination, and verification request notices must "specify" the information requested.⁵ Recognizing that adequate notices are a basic element of procedural due process, federal courts have acknowledged that without sufficient notice, many errors "will stand uncorrected, and many [participants] will be unjustly deprived of the means to obtain the necessities of life."⁶

Consequently, as a matter of both legal compliance and best practice, NOAs must fully inform participants of the basis of an adverse decision in language that is accessible and comprehensive.

Accessibility

I. NOAs should organize information so that it is easy to understand:

For notices to be effective, they must be easy to read and understand. Accordingly, we suggest that the State of Colorado consider the following revisions:

- **Information should be conveyed in language that is at a 6th grade reading level or lower.**⁷ In a 2014 memorandum on best practices for NOAs, the USDA recommends using language at a 6th grade level or lower, in order for notices to be understandable to program participants.
- **Use simple headings to help participants navigate the notice.** Examples include "Who will get Medicaid" or "Who can't get Medicaid and why." These headings will facilitate better understanding of NOAs.
- **Reduce line lengths to 15 words or less and avoid conjunctions.** Using shorter sentences, as well as more white space in the notice, helps ensure better readability. Also, when giving reasons for an adverse decision, notices should be as precise as possible and should avoid using "or" to present multiple possible reasons for an adverse decision. For example, it is best to avoid sentences such as, "You did not qualify for benefits because you did not provide proof of expenses or proof of income."

³ 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)).

⁴ 10 CCR 2505-10 § 8.057.1

⁵ 10 CCR 2506-1 §§ 4.608.A., 4.604.1, 4.308.F

⁶ Vargas v. Trainor, 508 F.2d 485, 490 (7th Cir. 1974)

⁷ Available at: <http://www.fns.usda.gov/sites/default/files/SNAP%20%20Best%20Practices%20in%20Developing%20Effective%20SNAP%20Client%20Notices.pdf>

- **Information should be presented in a font that is easily readable.** According to the USDA “Guide to Improving Notices of Adverse Action”:
“It is best to use at least a 10-point type for the basic text and a larger font size for headings (usually at least 2 points larger than your text). Sans Serif fonts like Arial or Lucida Sans have an open look that is easier to read.” However, this “10-point” font size suggestion is merely a minimum benchmark, and to ensure readability, particularly for older beneficiaries, we recommend a larger font size, at least 12 point.
- **The most pertinent information should be bolded and presented at the beginning of the notice.** In Colorado, NOAs do not always clearly state the proposed action at the beginning of the notice. This problem is most evident on notices that contain information for several different programs. Emphasizing the proposed action, with larger font and higher prominence on the notice, will help ensure that more participants are aware of the pending changes in their status
- **Notices should not include previous (outdated) decisions nor should they include contradicting provisions.** NOAs should only contain information that is currently relevant and should not include outdated case information.
- **Citations to statutory regulations should be presented in a less prominent location on the notice.** Information that will initially be less helpful to the participant, such as citations to the “supporting rule,” do not reduce the need for information that is central to the recipient’s understanding, such as the plain language reason for the action. Although these regulatory citations are required in Colorado’s Medicaid program, they could displayed less prominently. Additionally, the inclusion of pages that are “intentionally left blank” also delays the presentation of more relevant information, and is confusing for beneficiaries.
- **Use of terms should be consistent within and between sections.** For example, Medicaid notices in Colorado currently contain two dates: an “application date” and “coverage start date.” A later page explains appeal rights, but uses the term “effective date.” Without further explanation, recipients would not be able to identify which date is the effective date.

II. NOAs should include a “Babel insert” to ensure the understanding of Limited English Proficient participants:

NOAs must be accessible to people with limited English proficiency (“LEP”). In order to ensure that limited English Proficient participants are able to understand the content of notices they receive, NOAs should include a standardized “Babel insert.” These inserts pose the following question in several different languages:

“If you need help understanding this document, please call 1-800-xxx-xxxx. We can provide an interpreter for free.”

Currently, the only NOAs in Colorado that include these inserts are those that originate from Connect for Health Colorado program (see **Appendix C, "CO Notice 10/27/2015," page 3**). These inserts should be included in NOAs for every program. This step would enable LEP participants to seek the help they might require in order to understand changes outlined in their notices. Including this insert would also ensure compliance with Title VI and the Affordable Care Act (ACA).⁸ A proposed rule on nondiscrimination in health programs under Section 1557 of the ACA would require taglines in the top 15 languages spoken by individuals with LEP nationally.⁹ By making plans to incorporate that language now, Colorado will be taking appropriate steps toward compliance.

Comprehensiveness

NOAs should include the specific rationale for the adverse decision, as well as the household and income information used as the basis for that decision.

I. NOAs should inform the participant of the specific reason for the adverse decision and to whom it applies:

Effective notices provide the participant with an individualized and specific basis for decisions involving their benefit determination and eligibility. When notices offer an explanation that is vague or generalized, the participant does not have enough information to know whether the determination is accurate. In order for an individual to confirm the accuracy of their benefit determination or to make an informed decision about whether to appeal, he or she must have specific information about the basis for denial, termination or reduction in benefits.

Examples of problematic language, and alternatives to that language, follow.

- a) In Appendix A, the box for "Medicaid + Additional Long-Term Care Services," the applicant was denied for the following reason:

"You did not give us everything needed to complete your application."

A more legally sound approach would be to provide the participant with the specific item(s) still needed to process the application. For example:

⁸ Title VI 42 U.S.C. § 2000d states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." This provision protects against discrimination based on language exclusion.

⁹ The federal Office of Civil Rights plans to provide a sample notice and translated taglines for use by covered entities. For more information on the proposed rule, see "Nondiscrimination in Health Programs and Activities Proposed Rule, Section 1557 of the Affordable Care Act." Available at: <http://www.hhs.gov/civil-rights/for-individuals/section-1557/nondiscrimination-health-programs-and-activities-proposed-rule/index.html>

"Your application was not processed because you did not give us proof of monthly utilities expenses."

Or see **Appendix D ("PA Notice, 8/31/2015")** for another example of a NOA that provides a more specific basis for a benefit determination:

"Your SNAP benefits are being stopped because you failed to submit a timely application for recertification, or you did not complete the recertification interview scheduled by the CAO."

(Although the rationale on this notice could be even more specific by eliminating one of the two alternatives, it is an improvement over the Colorado notice, insofar as it more precisely identifies the components missing from the application.)

- b)** In Appendix B, in the box for "Medicaid- No Premium required," the applicant was denied for the following reason:

"Your income is more than the limit for the program."

A better notice would include the specific amount that the participant exceeds the program's limit. In contrast, please refer to **Appendix E ("PA Notice, 4/22/2014")**, which reads:

"You do not qualify for SNAP because your countable resources are over the resource limit. The amount of your countable resources is \$3,405.00, which is over the limit of \$3,250.00."

II. NOAs should clearly present all of the relevant household information underlying the benefit calculation:

Notices are frequently mailed to program participants after there has been a reported change in household circumstances, resulting in a new benefit calculation or eligibility determination. Consequently, it is important that participants are given the underlying household information used in their benefit redetermination, so that they can verify the accuracy of this information and dispute any errors.

Specifically, when relevant, NOAs should inform participants:

- (1) Who is counted in the "household";
- (2) What is the recorded *income* of each household member; and
- (3) What are the recorded *expenses* of each household member.

This important information, which allows the participant to confirm the accuracy of their benefit determination, is already electronically stored, and thus, should be readily available for inclusion in NOAs.

For examples, please see some of the samples cited below: Note that Appendix A is a Medicaid notice and expenses are not necessary, just income.

- a) In **Appendix A (“CO Notice, 2/10/2016”)**, the Colorado notice does *not* include the recorded income or expenses for each household member.

A better alternative is **Appendix F (“WI Notice, 7/30/2012”)**, on page 4, there is a table that includes each individual in the household, their reported income, and their expenses (“Bills”).

- b) **Appendix E (“PA Notice, 4/22/2014”)**, which is intended to inform the participant that he or she is over the resource limit, includes a table with each household member and their reported assets. Note: this NOA does *not* include each household member’s income, as that information is irrelevant to the issue of whether they exceeded the resource limit.

By incorporating these revisions into Colorado’s Notice of Actions, the state will help to facilitate more effective communication with program participants. These improvements will allow participants to better understand their status and rectify any errors in their benefit calculations—thereby reducing churn and enabling savings to taxpayers and state agencies.