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Give Them a Reason They Can Understand: An Examination of Rhode Island's Medicaid Ineligibility Notices to the State's Most Vulnerable Populations

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Comments

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> Unless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose—and resembles more a scene from Kafka than a constitutional process. Without notice of the specific reasons for denial, a claimant is reduced to guessing what evidence can or should be submitted in response and driven to responding to every possible argument against denial at the risk of missing the critical one altogether.[1]

INTRODUCTION

Adequate notice is at the heart of due process.[2] It represents

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1. Gray Panthers v. Schweiker, 652 F.2d 146, 168–69 (D.C. Cir. 1980).

2. *Id.*; *see also* Perdue v. Gargano, 964 N.E. 2d 825, 835 (Ind. 2012) ("The touchstone of due process is protection of the individual against arbitrary action by government." (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)) (internal quotation marks omitted)).

fundamental "fairness in administrative process" and provides critical safeguards to protect individuals against arbitrary action by the government.[3] In the welfare context, though, "procedures often exist on paper . . . [and] are not pursued in practice."[4] Inadequate notice is particularly harmful to the elderly who, "as a group, are less able than the general populace to deal effectively with legal notices."[5] Without adequately detailed notice over why expected benefits are being denied, elderly Medicaid applicants unduly suffer fear, anxiety, and confusion. Moreover, elderly Medicaid applicants wrongfully denied Medicaid benefits suffer staggering financial hardship.[6] Individuals with progressively fatal diseases that require institutional long-term care such as Alzheimer's, Parkinson's, and Amyotrophic Lateral Sclerosis (ALS) rely on Medicaid to provide "essential, life-saving . . . care."[7] Currently, the average annual cost of long-term care in a Rhode Island nursing home exceeds $100,000.[8] The convergence of low-income and high-cost medical needs compounds the potential deprivation to elderly Medicaid applicants resulting from inadequate notice.[9] The necessity for adequate notice, however, is not limited exclusively to the elderly. Other vulnerable populations served by Medicaid, including low-income children, adults with disabilities, and children with special health care needs, are also at a distinct disadvantage in dealing with the government because of their age,

3. Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1253 (1965).

4. *Id.* at 1252.

5. *Gray Panthers*, 652 F.2d at 169.

6. *See* Genworth 2015 Cost of Care Survey Rhode Island State-SpecificData, https://www.genworth.com/dam/Americas/US/PDFs /Consumer/corporaten/cost-of-care /118928RI_040115_gnw.pdf. In 2015, the national median annual rate for long-term care in a nursing home was $80,300 for a semi-private room and $91,250 for a private room. In 2015, the Rhode Island median annual rate was $93,075 for a semi-private room and $103,113 for a private room.

7. *See* STATE OF R.I., INITIAL REPORT OF THE WORKING GROUP TO REINVENT MEDICAID: FINDINGS AND RECOMMENDATIONS FOR CONSIDERATION IN THE FISCAL YEAR 2016 BUDGET 4 (2015), http://www.eohhs.ri.gov/Portals/0/Uploads/Documents/ReinventMedicaid/Report_WorkingGrouptoReinventMedicaid.pdf.

8. *See* 41-040-002 R.I. CODE R. § 0384.20 ("Currently, the average monthly cost for private payment in a nursing facility is $9,113."); *see also supra* note 6.

9. *See Gray Panthers*, 652 F.2d at 166.

disability, and socioeconomic status.[10]

To investigate the adequacy of Rhode Island's Medicaid ineligibility notices, I submitted a Freedom of Information Act ("FOIA") request with the Rhode Island Department of Human Services ("DHS") for copies of the actual notices it sends to Medicaid applicants.[11] DHS's response to my request included samples of actual notice content and what it calls "tokens"—the template language used by DHS employees to draft notices.[12] The majority of the samples and tokens I reviewed revealed a recurring pattern of insufficient notices that fail to adequately notify Medicaid applicants of the reasons for their Medicaid ineligibility.

This Comment argues that particular categories of DHS's ineligibility notices violate constitutional requirements for due process. Part I provides a brief background of the Rhode Island Medicaid program including its structure, eligibility requirements, and application and notification procedures. Part II explains the federal and state constitutional requirements for due process, including what constitutes adequate notice and the test for determining the level of process due. Part III analyzes the legal insufficiency of Rhode Island's Medicaid ineligibility notices. By using notices from the FOIA sample, this Comment demonstrates how particular ineligibility notices violate the due process requirements. The actual content of the notice demonstrates the confusion applicants experience and the practical need for reform. Finally, Part IV provides brief closing remarks, including a call to action for DHS to fix its inadequate ineligibility notices for the benefit of both private and public interests. Rhode Island Medicaid applicants de-

10. *See* Ford v. Shalala, 87 F. Supp. 2d 163, 176–77 (E.D.N.Y. 1999) (noting that Supplemental Social Security Income (SSI) claimants' status as poor, aged, blind, and/or disabled puts them "in a profoundly inferior position in relationship to a government bureaucracy").

11. Information is on file with the *Roger Williams University Law Review*.

12. *Id.* DHS's legacy "InRhodes" computer system, which generates the agency's notices, does not have the capacity to store previously sent notices. As an alternative, DHS provided select content from actual notices and the "tokens" it uses to create its long-term care related notices. Tokens are templates that DHS merges with other data in its InRhodes system to produce its final notice. **The tokens do not constitute the entire notice.** *See also* Jennifer Bogdan, *Using Old Computer System to Cost R.I. Dept. of Human Services $4M*, PROVIDENCE J. (May 7, 2015, 12:01 AM), http://www.providencejournal.com/article/20150507/NEWS/150509474.

serve simplified, streamlined, and fair notice of their Medicaid ineligibility.

I. OVERVIEW OF RHODE ISLAND'S MEDICAID PROGRAM

Created in 1965, Medicaid is a joint federal-state spending program codified in Title XIX of the Social Security Act.[13] Medicaid is a means-tested program designed to provide health coverage to individuals with low-income and special health care needs.[14] Each state administers its own Medicaid program within certain parameters established by the federal government.[15] The states' administrative autonomy results in substantial variations in Medicaid eligibility policy from state to state.[16]

In Rhode Island, the Executive Office of Health and Human Services ("EOHHS") administers the Medicaid program, and the Rhode Island Department of Human Services ("DHS") determines Medicaid eligibility.[17] To qualify, applicants must satisfy citizenship, residency, and strict financial requirements.[18] Eligibility, however, is limited to individuals with specified characteristics. In Rhode Island, eligible coverage groups include low-income children, adults with disabilities, elders, and children with special health care needs.[19] Additionally, applicants are required to com-

13. Jon Donenberg, *Medicaid and Beneficiary Enforcement: Maintaining State Compliance with Federal Availability Requirements*, 117 YALE L. J. 1498, 1500 (2008); *see also* 42 U.S.C. § 1396 (2012); R.I. GEN. LAWS §§ 40-8-1–32 (Supp. 2015); R.I. GEN. LAWS § 42-7.2-2(a)(6) (Supp. 2015) ("[DHS shall] [a]dminister Rhode Island Medicaid in the capacity of the single state agency authorized under Title XIX of the U.S. Social Security [A]ct . . . and exercise such single state agency authority for such other federal and state programs as may be designated by the governor. Except as provided for herein, nothing in this chapter shall be construed as transferring to the secretary the powers, duties or functions conferred upon the departments by Rhode Island general laws for the management and operations of programs or services approved for federal financial participation under the authority of the Medicaid state agency.").

14. *See* R.I. GEN. LAWS § 40-8-3; *see also* 41-040-002 R.I. CODE R. § 0300.01(B) (LexisNexis 2014).

15. *See* 42 U.S.C. § 1396(a); R.I. GEN. LAWS § 42-7.2-2(a)(6).

16. *See* R.I. GEN. LAWS § 42-7.2-2(a)(6).

17. 41-040-002 R.I. CODE R. § 0300.01(C)(2).

18. R.I. GEN. LAWS §§ 40-8-1, 40-8-3; *see also* 41-040-002 R.I. CODE R. § 0300.01(B)(1).

19. R.I. GEN. LAWS § 40-8-3; *see also* 41-040-002 R.I. CODE R. § 0300.01(B)(1).

plete a burdensome and time-consuming application process.[20] DHS must provide each applicant with written notice of its eligibility determination.[21] If an applicant is ineligible, DHS must provide the "reasons for the action" and the "specific regulation supporting the action."[22] An applicant has thirty days to appeal DHS's ineligibility determination.[23]

As discussed in more depth in Part II, the legal requirements governing Medicaid ineligibility notices are apparent. As the FOIA request revealed, though, DHS's ineligibility notices do not always comply with these legal requirements.[24] DHS's failure, in some cases, to provide constitutionally adequate notice to Rhode Island Medicaid applicants is problematic because it markedly increases the risk that applicants who otherwise meet all of the other eligibility requirements will be erroneously denied benefits. Adequate notice protects Medicaid applicants—some of Rhode Island's most vulnerable residents—from mistakes and arbitrary agency action.

II. THE LEGAL REQUIREMENTS FOR RHODE ISLAND'S MEDICAID INELIGIBILITY NOTICES

The Fifth and Fourteenth Amendments to the United States Constitution require procedural due process.[25] Rhode Island has incorporated sufficiently similar due process requirements into its state constitution.[26] Generally, procedural due process requires the government to follow certain procedures before it may legally deny a person of life, liberty, or property.[27] The following Sections will explore the relevant judicial interpretations of procedural due

20. *See* R.I. GEN. LAWS § 40-8-6; *see also* R.I. DEP'T OF HUMAN SERVS., APPLICATION FOR ASSISTANCE (rev. Jan. 2016), http://www.dhs.ri.gov/ apply-now/DHS-2%20Application%20for%20Assistance%20Rev%2001-16.pdf.

21. 42 C.F.R. § 435.913 (2015); R.I. GEN. LAWS § 40-8-6.

22. 42 C.F.R. § 435.913; *see also* R.I. GEN. LAWS § 40-8-6 ("[N]otice to the applicant shall set forth therein the reason therefor").

23. *See* R.I. GEN. LAWS § 40-8-7.

24. *See infra* Part II.

25. U.S. CONST. amends. V, XIV.

26. *See* R.I. CONST. art. I, § 2, cl. 3. ("No person shall be deprived of life, liberty or property without due process of law . . . .").

27. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 569 (5th ed. 2015) ("Classic procedural due process issues concern what kind of notice and what form of hearing the government must provide when it takes a particular action.").

process as it pertains to adequate notice and the right to government benefits.

A. Goldberg v. Kelly: *Welfare Benefits Are Subject to Procedural Due Process Requirements*

Procedural due process applies in the context of government benefits because Medicaid applicants have a property interest in the legitimate expectation of receipt of benefits "rooted in state . . . [and] federal law."[28] Prior to 1970, though, procedural due process only applied when an interest was a right, not a privilege.[29] By the 1960s, legal scholars, particularly Yale Law Professor Charles Reich, increasingly criticized this traditional "rights-privilege" distinction.[30] Reich argued that government benefits such as welfare, education, and Social Security were a form of property rather than "charity" or "gratuity" and that the rights-privilege distinction was an anachronism.[31] In 1970, in the landmark case of *Goldberg v. Kelly*,[32] the United States Supreme Court discarded the traditional "rights-privilege distinction" and adopted Reich's so-called "new property" theory.[33] This ruling opened the door for the constitutional protections applicants and recipients of government benefits receive today.

In *Goldberg*, the Court held that welfare benefits were a "matter of statutory entitlement for persons qualified to receive

28. Ford v. Shalala, 87 F. Supp. 2d 163, 175 (E.D.N.Y. 1999); *see* 42 U.S.C. § 1396 (2012); R.I. GEN. LAWS § 40-8-7; *see also* Hamby v. Neel, 368 F.3d 549, 559 (6th Cir. 2004) (finding that plaintiffs had a property interest in Medicaid coverage "for which they hope[d] to qualify" because "Medicaid is a program established by Title XIX of the Social Security Act"); Perdue v. Gargano, 964 N.E. 2d 825, 832 (Ind. 2012) ("[E]ntitlement benefits are 'property' entitled to the full panoply of due process protections").

29. CHEMERINSKY, supra note 27, at 583.

30. *Id.*

31. *Id.*

32. 397 U.S. 254 (1970). The *Goldberg* case involved a class action appeal by New York City residents receiving welfare benefits under the joint federal and state program Aid to Families with Dependent Children. *Id.* at 255–56. The plaintiff class appealed New York state's termination of their welfare benefits without any hearing on the basis that such pre-hearing termination violated the Due Process Clause of the Fourteenth Amendment, and the Supreme Court agreed, establishing the modern view of property as an "entitlement." *Id.* at 260–61. *See also* CHEMERINSKY, *supra* note 27, at 583.

33. *Goldberg*, 397 U.S. at 261; *see also* CHEMERINSKY, *supra* note 27, at 583.

them" and that the "constitutional restraints" of due process must be extended to welfare recipients *prior to* the termination of benefits.[34] The Court refined the contours of its "new property" doctrine in *Board of Regents v. Roth*.[35] In *Roth*, the Court discussed two factors required to create a constitutionally protected property interest in a government benefit program:

> First, the benefit claimant must have a legitimate entitlement to the benefit rooted in state or federal law. In addition, the claimant must 'presently enjoy' that entitlement as opposed to expecting to receive it at some undefined time in the future.[36]

Since *Goldberg*, courts have found that entitlement applicants and recipients have legitimate property interests in government benefits, including, but not limited to, Social Security disability benefits,[37] food stamp benefits,[38] public housing assistance,[39] and Medicaid benefits.[40]

Establishing that procedural due process applies to Medicaid applicants, the next question is what constitutes adequate notice. The Supreme Court's standard for constitutionally adequate notice, set forth in *Mullane v. Central Hanover Trust Co.*, is that notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[41] *Goldberg* further clarified this standard for adequate notice requiring that notice "must be 'reasonably certain' to 'actually inform' the party, and in choosing the means, one must take account of the 'capacities and circumstances' of the parties to whom the notice is addressed."[42] Additionally, notice must be "timely" and "detail[] the

34. *Id.*
35. *See* 408 U.S. 564, 577–78 (1972).
36. Ford v. Shalala, 87 F. Supp. 2d 163, 175 (E.D.N.Y. 1999) (citing *Roth*, 408 U.S. at 577).
37. Mathews v. Eldridge, 424 U.S. 319, 332 (1976).
38. Atkins v. Parker, 472 U.S. 115, 128 (1985).
39. Nozzi v. Hous. Auth., 806 F.3d 1178, 1187 (9th Cir. 2015).
40. Hamby v. Neel, 368 F.3d 549, 556–57 (6th Cir. 2004).
41. *Id.* at 560 (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950)) (internal quotation marks omitted).
42. *Nozzi*, 806 F.3d at 1194 (citations omitted) (first quoting *Mullane*, 339 U.S. at 314; then quoting Goldberg v. Kelly, 397 U.S. 254, 268–69 (1970)).

[proposed] reasons for [the] termination."[43] "These constitutional mandates have been embodied in the federal and state regulations governing administration of the Medicaid program. . . ."[44] As such, the analysis for whether DHS's ineligibility notices violate statutory and regulatory requirements is substantially similar to the due process analysis.

B. Mathews v. Eldridge: *The Procedural Due Process Evaluative Rubric*

To determine "whether the administrative procedures provided . . . are constitutionally sufficient," courts routinely apply the balancing test the Supreme Court set forth in *Mathews v. Eldridge*:

> [T]he specific dictates of due process generally require[] consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[45]

Essentially, the *Mathews* test is a cost-benefit analysis of the pri-

43. *Goldberg*, 397 U.S. at 267–68.

44. Baker v. Alaska Dep't of Health & Soc. Servs., 191 P.3d 1005, 1009 (Alaska 2008). *See* 42 C.F.R. § 431.205(d) (2015) ("The hearing system must meet the due process standards set forth in [*Goldberg*] . . . ."); 42 C.F.R. § 435.913 (2015) ("The agency must send each applicant a written notice of the agency's decision on his application, and, if eligibility is denied, the reasons for the action, the specific regulation supporting the action, and an explanation of his right to request a hearing."). Rhode Island's statutory and regulatory framework governing Medicaid notices essentially mirrors federal law. *See* R.I. GEN. LAWS § 40-8-6 (2006) (requiring notice of ineligibility to applicants "set forth therein the reason therefor"); R.I. GEN. LAWS § 42-35-9(b)(4) (requiring notice in a contested case shall include "[a] short and plain statement of the matters inserted"); 41-040-002 R.I. CODE R. § 0300.02(D) (LexisNexis 2014) ("Written notice is provided to each applicant stating the Medicaid agency's eligibility decision, the basis for the decision, and an applicant's right to appeal and request a hearing.").

45. 424 U.S. 319, 335 (1976) (citing *Goldberg*, 397 U.S. at 263–71).

vate and governmental interests at stake.[46]

In *Mathews*, the Court ruled "that an evidentiary hearing [was] not required prior to the termination of [the plaintiff's Social Security] disability benefits" because the degree of potential deprivation to the plaintiff was limited.[47] Unlike the potential deprivation "of the very means by which to live" attributed to the plaintiff-welfare recipients in *Goldberg*, the *Mathews* Court noted eligibility for disability benefits was not contingent upon financial need.[48] Therefore, even if the plaintiff's benefits at issue in *Mathews* were terminated prior to a hearing, the plaintiff may have had access to other unaffected financial resources in order to sustain himself pending appeal.[49] The *Mathews* Court found that the additional administrative and fiscal burden to the Social Security Administration—providing a pretermination hearing—was not warranted, as the existing administrative procedures adequately safeguarded against any potential deprivation. *Mathews* provides a clear, flexible analytic framework for procedural due process analysis.

46. Stephanie E. Roark, *When the System Fails: What Notification System Does Due Process Require in the Context of State Aid to the Elderly?*, 12 ELDER L.J. 149, 162 (2004) ("The *Mathews* test is essentially a cost/benefit analysis: '[a]t some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased insurance that the action is just, may be outweighed by the cost.'" (alteration in the original) (quoting at *Mathews*, 424 U.S. at 348)).

47. 424 U.S. at 349.

48. *Matthews*, 424 U.S. at 340; *Goldberg*, 397 U.S. at 264. In his dissent, Justice Brennan noted that after the plaintiff's "disability benefits were terminated there was a foreclosure upon the [plaintiff's] home and the family's furniture was repossessed, forcing [the plaintiff], his wife, and their children to sleep in one bed." *Mathews*, 424 U.S. at 350 (Brennan, J., dissenting).

49. *See id.* at 342 (majority opinion) ("[T]he disabled worker's need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level"); *cf. Goldberg*, 397 U.S. at 264 ("[T]ermination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy." (emphasis omitted)).

C. Avanzo v. R.I Dep't of Human Services: *Rhode Island's Standard for Adequate Notice in the Government Benefit Context*

Rhode Island's requirements for adequate notice in the government benefits' context are set forth in *Avanzo v. R.I. Department of Human Services*.[50] In *Avanzo*, the Rhode Island Supreme Court considered DHS's use of preprinted standardized forms in order to notify a class of plaintiff-welfare recipients of the termination of their benefits.[51] The court held that DHS deprived the plaintiffs of due process of the law, because, *inter alia*, the preprinted standardized forms did not inform the plaintiffs of the individualized reasons for the termination of their benefits. [52]The court affirmed the following Superior Court conclusion that:

> [T]he termination notices [DHS] issued . . . are inadequate in failing to provide the class members with individualized reasons for the agency determination. The notices provided only broad, conclusory language, and fail to apprise the recipients of the specific grounds for the agency's determination. As a result[,] class members cannot determine in what respect their case was found wanting. Due process requires individualized notice, so that recipients can be apprised of the reasons their benefits are being denied or terminated.[53]

The court decided, "notices containing only general conclusory language without specific relevance to the recipients' individual cases [will] not suffice."[54] The meaningful opportunity to be heard, required by *Goldberg,* the court noted, would have required DHS to notify the plaintiffs of the new changes in standards for eligibility and provide an explanation of how the plaintiffs failed to meet these new standards.[55] Since 1993, DHS has maintained a consistent record of violating the legal requirements for notic-

50. 625 A.2d 208 (R.I. 1993).
51. *Id.* at 210.
52. *Id.*
53. *Id.* at 209–10 (internal quotation marks omitted).
54. *Id.* at 211 (citing Dilda v. Quern, 612 F.2d 1055 (7th Cir. 1980), *cert. denied*, 447 U.S. 935 (1980); Ortiz v. Eichler, 616 F. Supp. 1046 (D. Del. 1985), *aff'd*, 794 F.2d 889 (3d Cir. 1986)).
55. *Id.* at 210–11 (citing Goldberg v. Kelly, 397 U.S. 254, 269 (1970)).

es.[56] Examples of specific violations include notice that fails to give *any* reason for an adverse action and notice that does not cite any regulation in support of an adverse action.[57] There is no unanimity among Rhode Island courts as to what constitutes individualized notice.

In sum, adequate notice is "reasonably calculated" to "actually inform" a Medicaid applicant of the reasons for DHS's adverse determination of eligibility.[58] The notice must "detail[] the [proposed] reasons" for the adverse determination.[59] Furthermore, it must be *individualized*, meaning that the notice relates DHS's reasons for ineligibility to the specific facts of the applicant's particular case.[60]

III. THE LEGAL INSUFFICIENCY OF RHODE ISLAND'S PROBLEMATIC MEDICAID INELIGIBILITY NOTICES

Having explored the various judicial interpretations of notice requirements, this Part analyzes DHS's ineligibility notices by applying the *Mathews* framework to test the legal sufficiency of actual notice content sent to Rhode Island Medicaid applicants.[61] Specifically, it analyzes three broad categories of problematic notice: (1) notices that are conclusory; (2) notices with financial calculations but no itemizations; and (3) notices that are incompre-

56. *See* Dominguez v. R.I. Dep't of Human Servs., 2002 WL 475355, at *2 (R.I. Super. Ct. Mar. 25, 2002) ("This is not the first time a DHS Letter of Denial has been contested on due process grounds."); *see also* Borgueta v. R.I. Dep't of Human Servs., 2013 WL 1943163, at *9 (R.I. Super. Ct. May 2, 2013) ("DHS failed to cite any regulations supporting its reason for denying [applicant's] application in the second notice . . . ."); Armstrong v. R.I. Dep't of Human Servs., 1996 WL 936917, at *4 (R.I. Super. Ct. Apr. 10, 1996) ("Both the caselaw and statutory framework demonstrate that DHS's notice was in violation of such statutory provisions."); Flynn v. R.I. Dep't of Human Servs., 1995 WL 941389, at *7 (R.I. Super. Ct. Jan. 26, 1995) ("The Court has reviewed the record and agrees with this contention, but need not dwell on it as it has ruled that the notices were inadequate, thereby nullifying the subsequent proceedings.").

57. *See Borgueta*, 2013 WL 1943163, at *9; *Flynn*, 1995 WL 941389, at *7.

58. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 315, 318 (1950).

59. *See Goldberg*, 397 U.S. at 267–68.

60. *See Avanzo*, 625 A.2d at 210.

61. *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

hensible to the average Medicaid applicant.[62] These categories of deficiency are not mutually exclusive. Underlying all three categories is a lack of sufficient information, which prevents applicants from determining whether there is a meaningful basis to contest their Medicaid ineligibility. Applying *Mathews* in this context demonstrates the constitutional inadequacies of each category of notice; how each category of notice increases the risk of erroneous deprivation to Medicaid applicants; and the negligible burden on DHS to provide improved ineligibility notices.

A. *The Private Interest at Stake*

The private interest at stake involves the "degree of deprivation" to Rhode Island Medicaid applicants from DHS's inadequate notices.[63] Medicaid provides an essential "safety net" of vital medical care to Rhode Island's most vulnerable residents who, in addition to being poor, are aged, blind, or disabled.[64] Without Medicaid coverage, eligible applicants may be "condemned to suffer grievous loss . . . ."[65] As the Court noted in *Goldberg*:

> For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Thus the crucial factor . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits.[66]

Similar to the severe potential deprivation to welfare recipients described in *Goldberg*, there is a considerable degree of potential deprivation to otherwise eligible Medicaid applicants who are erroneously denied Medicaid benefits. Applicants with complex medical needs such as the elderly face substantial financial loss from an ineligibility determination—nursing home care in Rhode Island can exceed $100,000 annually. Moreover, an appli-

62. Please note this Comment stratified the sample notices into three broad categories of problematic notices for analytic purposes. None of the categories are mutually exclusive and, thus, may overlap.

63. Ford v. Shalala, 87 F. Supp. 2d 163, 176 (E.D.N.Y. 1999).

64. *Id.* at 167.

65. Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)) (internal quotation marks omitted).

66. *Id.* at 264 (footnote omitted) (citation omitted).

cant's fear and anxiety over how to obtain critical medical coverage can have a significant emotional impact on not just an applicant, but her entire family as well. Due to age, disability, and socioeconomic status, Medicaid applicants are already "in a profoundly inferior position in relationship to a government bureaucracy."[67] Therefore, the interest of Rhode Island Medicaid applicants is "substantial enough . . . to warrant" improved notice.[68]

B. *The Risk of Erroneous Deprivation*

Having established the requisite private interest, the analysis turns to the risk of erroneous deprivation to Rhode Island Medicaid applicants. The risk of erroneous deprivation involves an evaluation of the "fairness and reliability" of existing administrative procedures and the probable value of any additional procedural safeguards.[69] The administrative procedure at issue is the adequacy of DHS's ineligibility notices. Constitutionally adequate notice is "*reasonably calculated* to *actually inform*" applicants.[70] As the forthcoming FOIA examples will reveal, each category of problematic notice markedly increases the risk eligible Medicaid applicants will be erroneously denied benefits because the notices do not contain enough information for applicants to determine whether they have a meaningful basis to contest DHS's ineligibility determination. As such, this Section demonstrates the need for improved notices.

1. Conclusory Notices

Many of DHS's sample notices and tokens are inadequate because the notices do not *actually inform* applicants of the underlying reasons for DHS's ineligibility determination. Consider the following excerpt from an ineligibility notice sent to an actual Rhode Island Medicaid applicant:

> [You] are not eligible for RI Medical Assistance [because] you did not provide required proof of your situation. Spe-

67. Willis v. Lascaris, 499 F. Supp. 749, 756 (N.D.N.Y. 1980).
68. Gray Panthers v. Schweiker, 652 F.2d 146, 166 (D.C. Cir. 1980).
69. Mathews v. Eldridge, 424 U.S. 319, 343 (1976).
70. Nozzi v. Hous. Auth., 806 F.3d 1178, 1199 (9th Cir. 2015) (emphasis added); *see also* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

> cifically you did not provide: sufficient verification about a bank account (RI DHS Manual, Section 0300.25.20. [You did not provide] verification of income (RI DHS Manual, Section 0300.25.20). [You are ineligible] due to failure of verification.

This notice is conclusory because it lacks essential details; it does not specifically identify the subject or time period for which the information is requested nor does it explain what constitutes sufficient verification.

Notice must specifically identify the information requested. In *Henry v. Gross*, the Second Circuit held that a notice of termination to a welfare recipient was inadequate when it stated the defendant-city's reason for termination was "a bank account which contain[ed] in excess of $1,000."[71] The notice did not include the "name of the bank, the account number, or any information indicating whether the account [was] individually or jointly held . . . , [e]ven when the city actually possesse[d] the more specific information."[72] Because of the notice's lack of detail, the plaintiff was not able to determine what bank account disqualified her until her hearing.[73] The court found that for the notice to meet minimum constitutional standards of adequacy the defendant must add a statement advising recipients that "upon request, defendants will provide [the] . . . recipient the number of the bank account, the bank branch . . . , the account balance, and, if available, the full title of the account."[74]

In Rhode Island, compliance with *Goldberg* and *Avanzo* requires that DHS notify an ineligible applicant *how* she specifically failed to meet Medicaid eligibility standards. Broad-based conclusory statements such as "you are not eligible . . . [because] you did not provide required proof of your situation" or "verification about a bank account" lack sufficient detail to meet this standard. While the above sample provides "*some* information to [an applicant] . . . in brief and general terms . . . these are merely the 'ultimate reasons' for the denial [and] . . . fail to provide any explanation of *how*

71. 803 F.2d 757, 761 (2d Cir. 1986) (internal quotation marks omitted).
72. *Id.*
73. *Id.*
74. *Id.* at 765. The court also found that the defendant must add a statement explaining the implications of joint bank account ownership on eligibility for welfare. *Id.*

this 'ultimate reason' was reached."[75] Thus, the applicant cannot determine whether she has a meaningful basis to contest the decision.[76] "At a minimum, due process requires the agency to explain, in terms comprehensible to the [applicant], exactly what the agency proposes to do and why the agency is taking this action."[77] Detailed notice in adverse actions is a necessary protection against arbitrary agency decisions. Without sufficiently detailed notice, "only the aggressive receive their due process right to be advised of the reasons for the proposed action. The meek and submissive remain in the dark and suffer their benefits to be reduced or terminated without knowing why the Department is taking that action."[78]

Notice that does not "adequately inform" an applicant what the relevant eligibility standard is, and how she failed to meet it, puts an applicant at a "distinct disadvantage" at a hearing. In *Flynn v. R.I. Department of Human Services*, the court held that DHS's notice of termination to a welfare recipient was inadequate when it stated that she was no longer eligible for benefits because there was no evidence of her "total and permanent disability."[79] The court noted that this explanation was tautology—equivalent to "a declaration stating 'you are being denied benefits because you are ineligible to receive them.'"[80] Although the notice also contained a citation to a regulation and an invitation to request a copy of it from the DHS office, the court found that "mere citation

75. Perdue v. Gargano, 964 N.E.2d 825, 835 (Ind. 2012).

76. *See, e.g.*, Avanzo v. R.I. Dep't of Human Servs., 625 A.2d 208, 208 (R.I. 1993); *Perdue*, 964 N.E.2d at 832 (agreeing with plaintiff-welfare recipients that "due process requires 'notice specifying which *specific* document or documents [an applicant] is alleged to have failed to provide' so that individuals can make informed decisions about whether to appeal an adverse determination." (internal quotation marks omitted)).

77. *Perdue*, 964 N.E.2d at 836 (quoting Ortiz v. Eichler, 616 F. Supp. 1046, 1061–62 (D. Del. 1985), *aff'd*, 794 F.2d 889 (3d Cir. 1986) (internal quotation marks omitted)). In *Ortiz*, the court held that notice to public assistance applicants providing only "a one sentence explanation for the agency's action, such as 'children's wages exceed eligibility limit,' or 'you are over the gross income eligibility limit,' or 'you did not provide a protective payee as requested'" were constitutionally inadequate because the notices did not sufficiently explain the reasons underlying the agency's decision. *Ortiz*, 616 F. Supp. At 1061.

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

79. 1995 WL 941389, at *3 (R.I. Super. Ct. Jan. 26, 1995).

80. *Id.* at *8.

to the standards without any reference as to how the standards relate to an applicant's specific medical condition" does not advise an applicant of how she failed to meet eligibility requirements.[81] Further, the court determined that "due process require[d] that the entire Notice be contained within the document purporting to contain it without some additional and supplementary act required on the part of the recipient to locate the regulations and then apply them to her own case."[82]

Thus, it appears that *Flynn* established that, in addition to *Avanzo*'s individualized notice requirement, adequate notice must not shift the burden onto to applicants to decipher DHS's notices. Consider the following example of a conclusory notice, which requires the applicant to take supplemental action:

> [You] are not eligible for RI Medical Assistance [because you] are not "aged, or blind, or permanently disabled (RI DHS Manual, Sections 0306.05.05 (aged), 0306.05.10 (blind), 0306.05.15 (permanently disabled)).

This notice fails the *Avanzo* individualized notice requirement because it does not relate the eligibility standard to the applicant. Additionally, this notice is incomplete. In order to contest this decision, the applicant must contact DHS for the cited eligibility standards and the specific disqualifying factual information from the applicant's medical records. As the court in *Flynn* noted "mere citation" to a regulation is insufficient.[83] Furthermore, as illustrated in *Flynn*, notice is inadequate when it shifts the burden to the applicant to obtain more information.[84]

In sum, the lack of sufficient detail in DHS's conclusory notices render the notices facially inadequate. Statements such as you are ineligible "due to failure of verification" embody the broad-

81. *Id.* at *6.

82. *Id.*

83. *Id.* Other jurisdictions have also rejected the idea that otherwise inadequate notice can be remedied by having applicants/recipients proactively seek more information regarding the reasons for benefit terminations or ineligibility. *See, e.g.*, Kapps v. Wing, 404 F.3d 105, 126 (2d Cir. 2005); *Vargas*, 508 F.2d at 489; Ortiz v. Eichler, 616 F. Supp. 1046, 1062 (D. Del. 1985); Schroeder v. Hegstrom, 590 F. Supp, 121, 128 (D. Or. 1984).

84. *Flynn*, 1995 WL 941389, at *6; *see also* Baker v. Alaska Dep't of Health & Soc. Servs., 191 P.3d 1005, 1010 (Alaska 2008).

based conclusory statements specifically prohibited in *Avanzo*.[85] Imagine the difficulty aged, blind, and disabled applicants encounter upon receiving such a notice. DHS's conclusory notices only lead to more questions. Thus, Rhode Island Medicaid applicants are unable to adequately prepare for a hearing to contest DHS's ineligibility determination, and the risk of erroneous deprivation of benefits increases.

2. Notices with Financial Calculations but No Itemizations

Another consideration in analyzing the risk of erroneous deprivation is the factual and mathematical accuracy of DHS's ineligibility notices. Accuracy is of particular importance in notices containing financial calculations. Although notices are computer-generated, DHS employees are still required to input applicants' personal and financial information. Human errors, such as transposing the numbers of an applicant's bank account balance or monthly income figures, can make an otherwise eligible applicant ineligible. Consider the following calculation notice sent to a Rhode Island Medicaid applicant:

> The following individual(s) is(are) not eligible for the Medicare Premium Payment Program (QMB, SLMB, QI-1):
>
> [Redacted] income of $[redacted] exceeds the qualified standard of $[redacted] as of June 05, 2015 (RI DHS Manual, Section 0372.05).

The applicant, in this case, cannot test the notice's factual or mathematical accuracy. This notice does not provide any itemization of the figures DHS used to calculate the applicant's income. Further, this notice does not explain DHS's formula or any of the "underlying facts upon which the calculations were based."[86] The applicant may disagree with the income figure; however, without an itemized breakdown of the figures and underlying facts used in the calculation, the applicant cannot determine if DHS made a mistake. Moreover, this notice contains undefined technical terminology, such as "QMB," "SLMB," and "QI-1." Without further explanation, as discussed in subsection three, these terms make

85. Avanzo v. R.I. Dep't of Human Servs., 625 A.2d 208, 211 (R.I. 1993).
86. Ford v. Shalala, 87 F. Supp. 2d 163, 178 (E.D.N.Y. 1999).

the notice very difficult to understand, and, in order to test its accuracy, an applicant must have a complete understanding of the notice and any calculations contained within it.

Neither Rhode Island nor the First Circuit or Federal District Court for the District of Rhode Island has specifically ruled on the legal requirements for notices involving financial calculations without sufficient itemization. Other circuits and districts, though, have addressed the deficiencies of these notices. In a string of cases, decided shortly after *Goldberg*, the Seventh Circuit held that due process required notices must contain sufficient detail for an applicant or recipient to determine the factual and mathematical accuracy of the government agency's determination.[87] In *Vargas v. Trainor*, the Seventh Circuit acknowledged:

> [T]here is a human tendency, even among those who are more experienced and knowledgeable in the ways of bureaucracies than the aged, blind, and disabled persons before us in this case, to assume that an action taken by a government agency in a pecuniary transaction is correct. Unless the welfare recipients are told why their benefits are being reduced or terminated, many of the mistakes that will inevitably be made will stand uncorrected, and many recipients will be unjustly deprived of the means to obtain the necessities of life.[88]

The Seventh Circuit recognized that due process may require notices involving financial calculations to include "a breakdown of income and deductions."[89]

The United States District Court for the Eastern District of New York adopted the Seventh Circuit's approach in *Ford v. Shalala*.[90] In *Ford*, where the adequacy of the Social Security Administration's notices to recipients [of disability benefits] was at issue, the court found that:

> When the calculations are critical to the determination of eligibility or benefit amount, written notice must explain

87. Dilda v. Quern, 612 F.2d 1055, 1057 (7th Cir. 1980); Banks v. Trainor, 525 F.2d 837, 842 (7th Cir. 1975); Vargas v. Trainor, 508 F.2d 485, 490 (7th Cir. 1974).

88. 508 F.2d at 490.

89. *See Dilda*, 612 F.2d at 1057; *Banks*, 525 F.2d at 842.

90. 87 F. Supp. 2d at 178.

> the formula by which the benefit amount was calculated, identify the underlying facts upon which the calculations were based, and include a breakdown of the sums attributable to each factor in the equation.[91]

The inability of applicants to test the factual and mathematical accuracy of notices significantly increases the risk of erroneous deprivation. Because Medicaid is a means-tested program, "calculations are critical to [DHS's] determination of eligibility."[92] Without sufficient explanation of DHS's formula or detailed information about the itemizations and underlying facts, some applicants may never recognize factual or mathematical errors that were critical in DHS's decision to deny their eligibility for Medicaid.

Summarily, such DHS notices—with financial calculations but no itemizations—are constitutionally inadequate because the notices lack sufficient detail to protect against mistakes and arbitrary agency action. As the court in *Vargas* noted, there is a tendency to assume actions by a government agency are correct without further investigation.[93] Detailed itemizations provide a necessary safeguard for elderly or disabled applicants who because of their capacities and circumstances may not question DHS's decision.[94] Furthermore, Medicaid eligibility depends on whether an applicant's income and resources meet strict requirements.[95] Without sufficient explanation or itemization of all the figures used in DHS's calculations, seemingly insignificant errors can leave an applicant ineligible. Therefore, in the absence of sufficient detail in these notices to test the factual and mathematical accuracy of DHS's calculations, the risk of erroneous deprivation of benefits increases.

3. Incomprehensible Notices

The last category of problematic notice encompasses a broad spectrum of DHS's Medicaid ineligibility notices. At the farthest extreme of the incomprehensibility spectrum, incomprehensible

91. *Id.* (citations omitted).
92. *Id.*
93. *See* Vargas v. Trainor, 508 F.2d 485, 490 (7th Cir. 1974).
94. *See id.*
95. *See Ford*, 87 F. Supp. 2d at 186.

notice is best described as notice that is "so cryptic, and the information it contains so unhelpful, that it is virtually impossible effectively to gather documentary evidence" to contest DHS's adverse determination.[96] On the more moderate end of the incomprehensibility spectrum is notice that is difficult for the average Rhode Island Medicaid applicant to understand.

The most readily apparent example of incomprehensibility in the FOIA sample were notices that did not provide any definitions for or explanations of technical language. Terms like "MA household," "flexible test of income," and "income disregard" appear throughout these notices without any further elucidation. Technical language such as "flexible test of income" presupposes a level of legal sophistication and familiarity with a complex government program that most individuals do not possess. An additional example of defective notice in this category would include notices with spelling and grammar errors that change the meaning of the notice.

Clarity is an essential component of notices that are "reasonably calculated" to "actually inform[]."[97] Furthermore, effective notices are "concise," "well-organized," and tailored to recipients' reading skill levels and familiarity with the subject matter of the notice.[98] Recently, the Ninth Circuit in *Nozzi v. Housing Authority of the City of Los Angeles* held that notice advising section 8 housing beneficiaries of a reduction in their rent subsidies was constitutionally inadequate on its face because it did not "reasonably inform its intended recipients of the [subsidy reductions], the meaning of those changes, or, most important, their effect upon the recipient."[99] The Ninth Circuit found that the language of the notice, which "essentially mirrored the language" of the regulation, was "*incomprehensible* to anyone without a relatively sophisticated understanding of the . . . Program's payment calcula-

96. *See* Gray Panthers v. Schweiker, 652 F.2d 146, 156 (D.C. Cir. 1980).

97. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314–15 (1950).

98. *See* Ellen E. Hoffman, *Getting to "Plain Language"*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 47, 49 (2009); Cass Sunstein, Exec. Office of the President, Memorandum for the Heads of Executive Departments and Agencies: Final Guidance on Implementing the Plain Writing Act of 2010 (April 13, 2011), https://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-15.pdf.

99. 806 F.3d 1178, 1194 (9th Cir. 2015).

tions."[100] The notice "used the term 'payment standards' six times without ever defining or explaining the term's meaning."[101] The court noted that "[a] short and simple explanation . . . would have provided at least a small measure of clarity."[102] DHS's use of technical terminology in its ineligibility notices without a clear explanation of the language's meaning does not consider the "capacities and circumstances" of the average Medicaid applicant.[103] Thereby, decreasing the likelihood the ineligibility notice will *actually inform* an applicant of DHS's reasons for its ineligibility determination.

In sum, DHS's incomprehensible notices are constitutionally inadequate because the notices are not "*reasonably calculated*" to "*actually inform*" applicants of the reasons for their Medicaid ineligibility.[104] By not defining technical language, DHS has not individually "tailored" its notices to the "capacities and circumstances" of the average Rhode Island Medicaid applicant.[105] An applicant's understanding of DHS's notice directly correlates to her overall ability to meaningfully contest her Medicaid ineligibility. To appeal an adverse eligibility determination based on the size of an "MA household," an applicant must know the definition of an "MA household." As the court in *Nozzi* concluded, a "short and simple explanation" is all that is needed to provide a "small measure of clarity."[106] This category of problematic notice is broad, and the risk of erroneous deprivation to Medicaid applicants varies depending on which end of the incomprehensibility spectrum an ineligibility notice falls. Overall, though, if a notice is on the spectrum it increases the risk DHS will wrongly deny an otherwise eligible Medicaid applicant benefits.

C. *The Government's Interest*

The third *Mathews* inquiry centers on the administrative and fiscal burdens on DHS to provide improved notice.[107] Cost and

100. *Id.* (emphasis added).
101. *Id.*
102. *Id.*
103. *See* Goldberg v. Kelly, 397 U.S. 254, 268–69 (1970).
104. *See Nozzi*, 806 F.3d at 1194 (emphasis added).
105. *See Goldberg*, 397 U.S. at 268–69.
106. *Nozzi*, 806 F.3d at 1194.
107. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

scarce resources "place limits on the scope of due process notice relief."[108] The cost of some procedures cannot be justified. However, "[w]here the recipient has a 'brutal need' for the benefit at issue, as in the case of welfare recipients, courts have traditionally required that agencies go to greater lengths—incurring higher costs and accepting inconveniences—to reduce the risk of error."[109] Certainly, the private interest at stake—vital medical care to low-income children, elders, and the disabled—justifies any additional, negligible expenditures by DHS. It is difficult to conclude "that printing six paragraphs of information is any more burdensome than printing only four paragraphs of information."[110]

Accordingly, the three categories of DHS's deficient notice violate core principles of due process. While not all of DHS's ineligibility notices violate legal requirements, these notice examples demonstrate significant procedural deficiencies in DHS's eligibility determination process. In balancing the respective interests, the administrative and fiscal burdens to DHS are not outweighed by the substantial private interest and increased risk of erroneous deprivation to Rhode Island Medicaid applicants. Rather negligible improvements to DHS's notices would greatly diminish the risk that otherwise eligible Medicaid applicants are wrongly denied benefits. The public interest in conserving scarce administrative and fiscal resources does not override individuals' interest in essential, life-saving medical care. The *Mathews* test weighs in favor of improved notice.

CLOSING REMARKS

DHS's problematic ineligibility notices illustrate severe deficiencies in the agency's administrative procedures. Compliance with basic due process principles demands that DHS improve these deficient categories of ineligibility notices. Moreover, Rhode Island's children, elders, and disabled residents deserve fair and reliable administrative procedures, especially because of their rel-

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

109. Baker v. Alaska Dep't of Health & Soc. Servs., 191 P.3d 1005, 1010 (Alaska 2008) (footnote omitted) (quoting *Goldberg*, 397 U.S. at 261). *Goldberg* established that "governmental interests are not overriding in the welfare context." *Goldberg*, 397 U.S. at 266.

110. Henry v. Gross, 803 F.2d 757, 768 (2d Cir. 1986).

ative disadvantage to the government agency with whom they are dealing. As the court in *Gray Panthers* articulated:

> We do not believe it unwarranted to recognize that human nature frequently leads to careless and arbitrary action when the decisionmaker can retreat behind a screen of paper and anonymity. The principle that those who govern must be accountable to those whose lives they affect in forms not only our representative system of government, but on a broader scale, forms the very essence of what we expect from the Government it its dealing with us.[111]

The purpose of the Medicaid program is to provide services and supports to help Rhode Islanders live safe and healthy lives. Improved ineligibility notices ensure the integrity of this mission by reducing the risk eligible applicants will be wrongly denied the benefits to which they are legally entitled. A class action lawsuit may be necessary to implement the needed reforms. Whether DHS acts independently or its hand is forced by a lawsuit, these problematic notices must change. If not for the benefit of Medicaid applicants, then for the interest of conserving limited public resources. The additional burden to DHS to provide applicants with adequate notice would be negligible and may even save the agency money by avoiding the unnecessary expense of administrative fair hearings and lawsuits stemming from defective notice. DHS can and must fix this problem.

111. Gray Panthers v. Schweiker, 652 F.2d 146, 162 (D.C. Cir. 1980).