What Does Due Process Mean for State Notices on Receiving Public Benefits?

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Both the U.S. Food and Nutrition Service, which administers the Supplemental Nutrition Assistance Program (SNAP), and the Centers for Medicaid and Medicare Services, which administer Medicaid, recently issued guidance on state agencies' public-benefits notices informing individuals that their benefits have been denied, terminated, or reduced.[1] With state agencies reviewing their notices in light of the new guidance, this is an opportune time for legal advocates to look at their state's notices not only from a legal-compliance perspective but also to determine if those notices meet clients' fundamental needs—including clarity and comprehensibility—and to effect change through direct advocacy.

To be constitutionally adequate, benefit determination notices must give claimants enough information to understand the reasons for the agency's action.

These notices are central to a participant's ability to maintain critical benefits. To illustrate, consider Jane, who is a single mother of one child and who receives a notice from her state agency saying that her SNAP benefits will be terminated because her "gross income exceeds limit" and she is no longer eligible for SNAP. With little additional information about what income the agency counted to make this decision, Jane will have to call the agency and hope to get through to someone who can explain. Or she might have to file an appeal of the decision to learn more about the state's reasoning. Legal aid offices across the country have encountered countless Janes and have worked with, litigated against, and negotiated with their state human services agencies to improve public-benefits notices.

Here we

- discuss the history of public-benefits notices and their intersection with the Fourteenth Amendment to the U.S. Constitution;
- examine *Goldberg v. Kelly*, the seminal U.S. Supreme Court case that set out the due process rights for participants in and applicants to public-benefits programs;[2]
- explain the notice rules established by the three main public-benefits programs;
- outline lessons learned from New Mexico advocates working with their state agency on notices; and
- list key first steps for advocates who want to begin notice advocacy in their states.

Due Process in the Context of Public Benefits

To be constitutionally adequate, benefit determination notices must give claimants enough information to understand the reasons for the agency's action.[3] This requirement, like the right to a fair hearing, is

1 See Medicaid and CHIP Learning Collaboratives, Eligibility-Related Determination Notices State Toolkit: Tool #1: Statutory and Regulatory Review (Aug. 27, 2013); U.S. Department of Agriculture (USDA) Food and Nutrition Service, Best Practices in Developing Effective Supplemental Nutrition Assistance Program Client Notices (May 29, 2014); USDA Food and Nutrition Service, Guide to Improving Notices of Adverse Action (NOAAs) (Sept. 18, 2014). We use "public benefits" to include Medicaid, the Supplemental Nutrition Assistance Program (SNAP), and Temporary Assistance for Needy Families (TANF).

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

3 *Id.*

The absence of an effective notice undermines other due process rights, such as the right to a timely hearing, afforded a benefits claimant.

a basic element of procedural due process. Participants "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."[4] Thus the absence of an effective notice undermines other due process rights, such as the right to a timely hearing, afforded a benefits claimant.[5] To understand how to protect benefits-program participants in regard to notices, attorneys should start with the origins of the law around notices and due process.

The Fourteenth Amendment to the Constitution declares that no state shall "deprive any person of life, liberty, or property, without due process of law."[6] The due process determination consists of two steps. The first step is to determine if the person has a liberty or property interest protected by the due process clause. If the person has such an interest, then the second step is to determine whether state procedures protecting that interest are constitutionally adequate.[7]

In *Goldberg v. Kelly* the Supreme Court established that recipients and applicants for welfare benefits have a property interest in receiving benefits.[8] Individuals with a property interest have a right to procedures to claim their eligibility. That an individual may ultimately be found ineligible for a benefit does not negate the property interest protected by due process.[9]

The procedures used by state human services agencies when issuing public-benefits notices must meet the due process requirements of the Constitution. While no set procedures are required in each circumstance, *Goldberg v. Kelly* established, among other points, that participants in public-benefits programs are entitled to timely and adequate notice of agency action.

Goldberg v. Kelly

The Supreme Court determined that to satisfy constitutional due process requirements, an agency contemplating terminating or reducing public-assistance benefits must give the recipient timely and adequate notice detailing the reason and an effective opportunity to defend.[10] The rationale is that recipients of public-assistance benefits must be afforded a degree of protection from agency error and arbitrariness in the administration of those benefits.[11]

The fundamental requisite of due process of law is the opportunity to be heard.[12] In the public-benefits context, according to the Court, due process requires that a recipient have

> (1) timely and adequate notice detailing the reasons for a proposed termination of benefits;
>
> (2) an adequate hearing before termination of benefits;
>
> (3) the ability to appear personally and with counsel to present the recipient's own arguments and evidence orally to an impartial official;
>
> (4) an effective opportunity to present evidence and cross-examine witnesses; and
>
> (5) a decision based solely upon the evidence adduced at the hearing as well as a statement disclosing the reasons for the decision and the evidence upon which it was based.[13]

Beyond establishing that adequate notice must include detailed reasons for a proposed termination of benefits, *Goldberg* does not specify how much information the notice must give to satisfy due process.[14] This lack of specificity leaves an obvious challenge for both courts and state agencies in determining what level of detail is required. Courts across the country have made different determinations about this question.

Courts have held that the state cannot place the burden on the participant to find out all information needed to determine why a decision was made. The state agency must include that information in the notice: the agency must actively give "complete"

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

5 *Escalera v. New York City Housing Authority*, 425 F.2d 853, 862 (2d Cir. 1970).

6 U.S. Const. amend. XIV, § 1.

7 *Sealed v. Sealed*, 332 F.3d 51, 55 (2d Cir. 2003).

8 See *Kapps*, 404 F.3d at 113 ("While not all benefits programs create constitutional property interests, procedural due process protections ordinarily attach where state or federal law confers an entitlement to benefits."). Advocates seeking to establish a property interest in certain federally funded benefits, such as TANF, must look for rules under state or local ordinances under which the client can claim an entitlement protected from deprivation by the federal due process clause.

9 *Id*. at 115 (citing *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1103 n.7 (10th Cir. 2004) (en banc)).

10 *Goldberg*, 397 U.S. 254.

11 *Banks v. Trainor*, 525 F.2d 837, 842 (7th Cir. 1975).

12 *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

13 *Goldberg*, 397 U.S. 254.

14 *Id*. at 267–68.

notice and cannot "improperly place[] on the recipient the burden of acquiring notice[;] due process directs [the agency] to supply it."[15] Including this information is critical since people tend to believe that an action taken by a government agency in a benefit determination is correct. In addition, participants have limited direct contact with agencies and so may not be able to gather all of the necessary information to make an informed decision on their own. Unless participants are told why their benefits are being reduced or terminated, many mistakes "will stand uncorrected, and many [participants] will be unjustly deprived of the means to obtain the necessities of life."[16]

Individualized advance notice is *not* required for a mass change in a program resulting from congressional action.[17] The Supreme Court clarified the distinction between notices of a mass change and an adverse action notice for an individual when the Court held that the legislative history of the Food Stamp Act of 1977 did not suggest that Congress intended to eliminate the distinction between advance notice of an "adverse action" based on the facts of an individual case (which is required) and individual notice of a "mass change" in the law (which is not required).[18] This important distinction applies to all public-benefits programs. But while federal law does not require states to give advance notice of a mass change, giving participants advance notice of a mass change in benefits is still in the state's interest to reduce calls or visits with questions to agency offices.

To meet the requirements of *Goldberg v. Kelly*, the Fourteenth Amendment, and federal rules, public-benefits notices must be both adequate and timely.

While *Goldberg* and other cases have established that claimants must receive enough information to understand the basis for the agency's action in all instances, the specific type of notice required may depend on the circumstances of each case. In addition to understanding the constitutional framework, advocates must examine the federal and state regulations governing the administration of Medicaid, SNAP, and Temporary Assistance for Needy Families (TANF), which have a requirement, among others, that a notice state the reasons for the agency's intended action.

Elements of a Due Process–Compliant Notice

To meet the requirements of *Goldberg v. Kelly*, the Fourteenth Amendment, and federal rules, public-benefits notices must be both adequate and timely. An adequate notice is one that is available in the language spoken in the household and includes the following, in clear and understandable language:

(1) an explanation of the proposed action;

(2) the reason for the proposed action;

(3) the information used to make the decision;

(4) the household's right to request a fair hearing;

(5) the information about what a participant can do next, along with contact information;

(6) the availability of continued benefits until the hearing and the participant's liability for those benefits if the participant is not successful at the hearing; and

(7) the availability of free legal representation.[19]

The notice must give applicants and recipients enough information to understand the reasons for the agency's action.[20] The information should be more specific than just a citation to the policy manual. This information enables the applicant or recipient to make an informed decision on whether to proceed further.

To be timely and to give the participant enough time to respond, the state agency must mail the notice to the household at least 10 days before the action is to take place. This time frame is critical because, in some programs, current participants must appeal the decision within 10 days to continue to receive benefits. In addition, a core principle for due process is the opportunity to be heard; households that do not receive timely notice can miss that opportunity.

Adequate and informative notices are essential, especially given the decline in one-on-one contact between participants and agency workers. With increased use

15 *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)). See *Vargas v. Trainor*, 508 F.2d 485, 489 (7th Cir. 1974) (agency argued that notice sufficed because it invited recipient to seek additional information; court disagreed, stating that notice recipient "would be unable or disinclined, because of physical handicaps and, in the case of the aged, mental handicaps as well, to take the necessary affirmative action").

16 *Vargas*, 508 F.2d at 490.

17 See John Bouman & Lauren P. Schroeder, *"Transitional Due Process": Still a Viable Theory for Challenging the Implementation of Tightened Public Benefit Program Rules*, Clearinghouse Article (Nov. 2015).

18 *Atkins v. Parker*, 472 U.S. 115 (1985). See Requirements for Change Reporting Households, 7 C.F.R. § 273.12(e) (2016) (types of mass changes that require advance notice).

19 See Notice of Adverse Action, 7 C.F.R. § 273.13 (a)(2) (SNAP); Content of Notice, 42 C.F.R. § 431.210 (2016) (Medicaid); Notice of Agency's Decision Concerning Eligibility, 42 C.F.R. § 435.913 (Medicaid); Hearings, 45 C.F.R. § 205.10 (a)(4)(i) (2016) (TANF); *Goldberg*, 397 U.S. at 264–65.

20 *Goldberg*, 397 U.S. at 267–68.

of automation and call centers and the closing of local offices in many states, public benefit participants and applicants have much less opportunity for contact with a caseworker than they had in 1970 (when *Goldberg* was decided) or even as recently as the early 2000s.[21]

Medicaid, SNAP, and TANF have specific notice requirements in their statutes or federal regulations. Although the particulars may vary, each program requires that participants receive notice of agency actions.

Medicaid. In accordance with Medicaid regulations, the agency must send each applicant a written notice that contains

(A) A statement of what action the state ... intends to take;

(B) The reasons for the intended action;

(C) The specific regulations that support, or the change in Federal or State law that requires, the action;

(D) An explanation of—

(1) The individual's right to request an evidentiary hearing if one is available, or a State agency hearing; or

(2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted; and

(E) An explanation of the circumstances under which Medicaid is continued if a hearing is requested.[22]

The state or local agency must send the notice at least 10 days before the date of action.[23]

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SNAP. With similar requirements, SNAP regulations say that, prior to reducing or terminating a household's benefit, the state agency must give the household timely and adequate notice.[24] Notices are considered timely if they are mailed at least 10 days before the action becomes effective.[25] They are considered adequate if they explain, in easily understandable language,

(1) the proposed action;

(2) the reason for the proposed action;

(3) the household's right to request a fair hearing;

(4) the telephone number of the SNAP office;

(5) the name of the person to contact for additional information (if possible);

(6) the availability of continued benefits if the household requests a hearing;

(7) the liability of the household for any over-issuances received while awaiting a fair hearing, if the hearing official's decision is adverse to the household; and

(8) the availability of free legal representation.[26]

TANF. Having the same Medicaid and SNAP requirements, TANF regulations say that, in cases where the state agency intends to terminate, suspend, or reduce assistance, the agency must give timely and adequate notice.[27] "Timely" means that the notices are mailed at least 10 days before the action becomes effective.[28] "Adequate" means a written notice that explains

(1) the action the agency intends to take;

(2) the reasons for the intended action;

(3) the specific regulations supporting such action;

(4) an explanation of the individual's right to request a state agency hearing; and

(5) the circumstances under which assistance continues if a hearing is requested, along with the requirement that the individual must repay such assistance if the agency action is upheld.[29]

Public-benefits notices must also meet other standards, including plain-language and understandability requirements. Reviewing notices with both a legal and plain-language lens is critical, especially as we progress to a more technologically centered service-delivery system in which the way that clients receive notices is changing.

Lessons Learned: Rewriting Public-Benefits Notices in New Mexico

The New Mexico Human Services Department has been under a federal consent decree since 1988 to issue public-benefits notices that meet federal standards—in a case whose plaintiffs the New Mexico Cen-

21 See Gina Mannix et al., *How to Protect Clients Receiving Public Benefits When Modernized Systems Fail: Apply Traditional Due Process in New Contexts*, Clearinghouse Article (Jan. 2016).

22 42 C.F.R. §§ 431.210, 435.913.

23 Advance Notice, 42 C.F.R. § 431.211.

24 7 C.F.R. § 273.13(a).

25 *Id.* § 273.13(a)(1).

26 *Id.* § 273.13(a)(2).

27 In certain circumstances the local or state agency does not have to give standard timely and adequate notice (45 C.F.R. § 205.10(a)(4)(ii)–(iv)).

28 *Id.* § 205.10(a)(4)(i)(A).

29 *Id.* § 205.10(a)(4)(i)(B).

ter on Law and Poverty and its cocounsel represent.[30] The decree requires the state agency to give detailed and individualized information about case actions in language that is below a sixth-grade reading level.

Despite some improvements on notices over the years, the notices have fallen short of federal standards. After the state agency adopted a new eligibility and information technology (IT) system in October 2013, the notices became more of a concern because the new system led to a backlog of tens of thousands of benefit applications and renewals that were not processed within federal and state time frames. The computer system began automatically denying and closing backlogged cases and sending out notices that applicants "failed to comply with the application/recertification process" when, in reality, the state agency had failed to process the case. Meanwhile, New Mexico's case and procedural error rate, a measure used by the Food and Nutrition Service to assess the validity of negative actions on SNAP benefit cases, was the third highest in the country, largely due to inadequate notices.

The New Mexico Center on Law and Poverty filed a motion in March 2014 to enforce compliance with the notice provisions of the consent decree. The New Mexico Human Services Department entered a stipulated order with plaintiffs' counsel and agreed to rewrite all notices with plaintiffs' counsel. The New Mexico Center on Law and Poverty and the department have worked closely together since May 2014 to achieve that goal.

The first step was to set out a time frame for the large task of rewriting the hundreds of notices and standard form documents in use by the department, which had already established a work group to fix deficiencies related to the high SNAP error rate. The work group now includes state agency staff across the benefit programs, the New Mexico Center on Law and Poverty, and programmers working on the state's IT system. After eight months, the work group completed the first rewrite of the primary eligibility notice and all relevant denial and closure reasons. The work group is facing a changing time frame. The state agency initially projected one year to create and implement legally compliant notices. Instead the agency took a year to evaluate and redraft the notices, and now it anticipates another six months to program and implement the new notices.

Revisions of Notice Language and Layout. The work group looked at notices from other states, guidance from the Food and Nutrition Service, model Medicaid notices from the Centers for Medicare and Medicaid Services, and feedback from benefit participants to generate a layout for eligibility notices that gave the most important information up front and contained detailed information in simple, short text. If applicable, information related to specific programs was listed in separate sections of the notice. The master document for the notice of case action contained several variables or trigger conditions that would cause certain text to appear on the notice. For example, a trigger for reduction of benefits would populate language stating that benefits would decrease and explaining why.

This process took six months. The work group first drafted language for the various trigger conditions and static text and then began finalizing the layout, which led to further revisions.

Creating and agreeing on simplified language proved challenging. The work group adopted a few rules of thumb:

(1) Avoid the passive voice. For example, "Income has not been verified" became "You did not turn in proof of income."

(2) Avoid the word "eligible" or any variation of it. Using simpler words to explain why an applicant would or would not get benefits almost always made information easier to understand.

(3) Create simple headings as navigational aids, such as "Who will get SNAP" or "Who can't get SNAP and why." The work group designed simple tables to follow these headings and include the most critical information. Other information was presented in bullet form, with very short sentences.

(4) Avoid denial and closure reasons that include the word "or." Denial and closure reasons should never be "multiple choice." If a reason for a negative action involves the word "or," it should almost always be broken into two separate reasons that populate in the notice only when the relevant conditions exist. For example, we changed "You failed to turn in your interim report and proofs" to have one closure reason for failure to submit a SNAP interim report and an individualized reason stating what documentation, if any, a participant had failed to submit.

(5) Keep line lengths to 15 words or less for readability. White space in the notice makes the notice easier to read, and shorter sentences usually decrease the complexity of what is written.

Individualized Reasons for Benefit Denial and Case Closure. In addition to creating the notice, the work group reviewed and rewrote the 200 "reasons codes"—the codes used by caseworkers in preparing notices—for denying or terminating benefits across all benefit

30 Order Modifying Settlement Agreement, *Hatten-Gonzales v. Johnson*, Nos. Civ. 88-0385, 88-0786 (D.N.M. Aug. 27, 1988).

programs. By examining how and where those reasons would populate in the notice of case action, the work group eliminated unnecessary and confusing introductory language and clarified which denial reasons were behind the state agency action.

The work group added, as part of this process, more individualized and detailed denial and closure reasons. For example, in situations where the household did not verify eligibility factors, the new denial stated which eligibility factor it did not verify and replaced the general "failure to comply with the application/recertification process" with the more specific "you did not turn in your utility bill."

In reviewing the denial and closure reasons, the work group had to have computer programmers available to explain when the system was triggering and using each denial code to ensure that the negative action occurred for the proper reason and that the notice accurately and adequately explained the basis for the state's action. Significant programming was required to improve the accuracy of denial and closure reasons as stated on the notice.

SNAP Error Rates and Notice Design. In 2011 the Food and Nutrition Service adopted a new measure of incorrect negative actions in state SNAP programs.[31] Called the "case and procedural error rate," the measure assesses the clarity of denial and termination notices, the accuracy of the reason for denial and termination used in the notice, and the timeliness of the notice sent to the household.[32] The case and procedural error rate affirms the fundamental importance of adequate notice and gives states incentives to list

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detailed and accurate reasons for negative actions. Partly in response to the case and procedural error rate, New Mexico agreed to rewrite denial reasons that listed several possible bases for denial because those nonspecific reasons increased error rates.

That being said, the case and procedural error rate also creates incentives for a state to omit certain important information from notices to avoid errors. For example, the consent decree in the New Mexico case requires the state agency to include calculation tables in the notices of case action. The calculation tables are prone to state agency error and, if not done correctly, can increase the case and procedural error rate. However, the calculation tables also give participants important information about how the state is determining financial eligibility. Rather than simply remove the calculation tables as the state initially planned, the New Mexico Center on Law and Poverty encouraged the state to continue including them and is working with the state to create a simplified version that applicants and participants can understand.

Literacy Experts and Language Access. The notice provisions of the consent decree governing the New Mexico case require the state agency to have a literacy expert review all standard form documents to ensure that they are below a sixth-grade reading level. While the work group has been cognizant of reading level in proposing revised language in notices, literacy experts can verify that language will be comprehensible to as many people as possible.

New Mexico is required by court order to bear the cost of such an expert but was able to secure foundation funding for the literacy review. Similar resources are likely available in other states, as are experts from local universities or colleges. The experts working with the New Mexico agency will also handle translations and certify that the Spanish language notices meet literacy requirements. This is a vital improvement, as the state did not previously include Spanish language notices in literacy reviews.

Notices of Delay in Processing and Auto-Denial and Closure. Like many states, New Mexico uses an auto-denial and closure function to generate negative decisions automatically when a case has not been processed within federal and state time frames. However, federal law requires state agencies to evaluate SNAP applications that are not processed within 30 days before closing the case to determine whether the agency or the applicant is responsible for the delay. Federal law also requires the state to send a notice to SNAP participants when there is a delay in processing to explain the reason for the delay.[33] The same requirements are found in the recertification process.[34]

When New Mexico had a backlog in processing applications and participants began receiving notices of closure and denial for failure to comply with the application process, we saw that the state lacked the required notice of delay in processing. The court ordered the state to suspend automatic closure and denial.

31 Supplemental Nutrition Assistance Program: Quality Control Provisions of Title IV of Public Law 107-171, 75 Fed. Reg. 33422, 33426 (June 11, 2010).

32 See FY 2012 SNAP High Performance Bonuses (n.d.) (includes description of changes).

33 Office Operations and Application Processing, 7 C.F.R. § 273.2(h)(3)(i).

34 Recertification, 7 C.F.R. § 273.14(a) (treating applications for recertification as applications for assistance). See also *id.* § 273.14(e)(1).

The New Mexico Center on Law and Poverty and the state worked together to generate an interim delay notice that workers can use when they identify a delayed case. The New Mexico Center on Law and Poverty is also working with the state to prevent automatic closure and denial of cases where the state agency is responsible for a delay in processing; in such cases the state will trigger a delay notice, rather than incorrectly terminating or denying benefits. This change is particularly critical in preventing churning of participants from SNAP when recertification applications are not timely processed and ensuring that data on the timeliness of processing SNAP applications and recertification are accurate.[35]

Evaluating and Testing Notices. The New Mexico Center on Law and Poverty has encouraged the state to incorporate focus groups or testing into its notice development. The state has agreed to an evaluation of the notice after it has been in use for six months to find and fix any remaining problems.

Key First Steps for Advocacy on Public-Benefits Notices

Legal advocates considering work on public-benefits notices should first ask these questions:

(1) Have I looked at my state's notices, including adverse action and approval notices?

(2) Do I find them helpful? Do clients find them helpful?

(3) What is the most important information a notice should contain?

(4) What is the core point of a notice?

(5) What do I look for when I read and review notices for myself?

(6) Does the notice give the client or me enough information to challenge a negative decision?

Second, after reviewing the notices and asking these questions, determine if the state's notices need work. The Food and Nutrition Service issued robust guidance to states on adverse-action notices; that guidance included sample notices that states could use as they developed their own notices.[36] Advocates must look at this guidance as they think about and review their state's notices.

Third, after looking at the guidance and answering the questions above, schedule a meeting with the state agency to discuss your findings and learn what the state plans to do with notices. If the state has already begun a process to revise its notices, ask to be a part of the process and planning. As part of the group working to fix the notices, advocates can make sure that the participants' needs are not overlooked. For example, suggest focus groups to test the new notices. Reach out to advocates in other states to see what their state notices contain as good models for your state.

The issue of due process and notices is not going away for states. All parties will benefit if everyone is at the table when states discuss and revise their notices. Participants will have their needs met, and the state agency will not spend resources on a revision that does not meet the rules of the program and then have to revise the notices all over again. Attorneys should note that states are starting to move toward sending participants electronic notices, and all of the protections and requirements that apply to paper notices also apply to electronic notices.

The U.S. Supreme Court itself approved this summary of the importance of adequate notice:

> [T]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal.[37]

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35 "Churn" describes when eligible households temporarily lose eligibility for benefits, go without benefits for a short period, and then reapply to begin receiving assistance again.

36 See USDA Food and Nutrition Service, Guide to Improving Notices of Adverse Action (NOAAs), *supra* note 1.

37 *Goldberg*, 397 U.S. at 266.