"Transitional Due Process"

Still a Viable Theory for Challenging the Implementation of Tightened Public Benefit Program Rules

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The Seventh Circuit decided *Youakim v. McDonald* in 1995 and set out rules for due process claims for welfare recipients when government agencies change program rules to reduce benefits or tighten eligibility.[1] The following year *Clearinghouse Review* published "Due Process for Welfare Recipients Subject to Changing Program Rules: An Illinois Case Study," which explained the Seventh Circuit's decision in *Youakim* and proposed strategies for developing successful due process claims for such cases based on *Youakim's* guidance.[2]

Since then, courts have examined additional situations in which program participants brought due process claims challenging their loss of benefits as a result of changing program rules. The courts have added context to the analysis, but the overall requirements for a successful "transitional due process" claim have remained the same.[3]

Here we review the recommendations from the 1996 article and analyze the status of these types of due process claims in light of court decisions since *Youakim*.

1 *Youakim v. McDonald*, 71 F.3d 1274, 1293 (7th Cir. 1995).

2 John Bouman, *Due Process for Welfare Recipients Subject to Changing Program Rules: An Illinois Case Study*, 30 Clearinghouse Review 1 (June 1996).

3 For our purposes here, these due process claims refer to the procedural rights of recipients under a public benefits program when that program makes the transition from existing eligibility and benefit rules to new rules that add eligibility requirements, eliminate coverage of certain populations, or decrease the package of assistance. We use the term "transitional due process" to characterize these types of claims.

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Youakim v. McDonald

Youakim v. McDonald involved a change in Illinois policy governing foster care benefits for children placed with relative foster parents.[4] Unlike nonrelative foster homes, relative caregivers did not have to be licensed to receive full foster care benefits on behalf of the child. So long as these relative homes passed a preliminary safety check, they were considered preapproved.[5] These preapproved homes were required to meet substantially the same standards of safety, health, and welfare as licensed homes but did not have to go through the official licensure process.[6] Although relative homes could become licensed, the Illinois Department of Children and Family Services and private child welfare agencies encouraged preapproved relative caregivers to skip the onerous licensing process; the relative caregivers would receive the same benefits regardless.[7]

The Illinois Department of Children and Family Services issued its Home of Relative Reform Plan (the Reform Plan) in 1995.[8] The Reform Plan stated that the department would not pay full foster care

4 *Youakim*, 71 F.3d at 1278.

5 *Id*. at 1279.

6 *Id*. at 1279–80.

7 *Id*. at 1280.

8 *Id*. at 1280–81.

benefits to any children living in unlicensed foster homes. The impact of the Reform Plan on children in relative foster care was significant and potentially devastating because a majority of these homes were not licensed. Based on the Reform Plan, children in preapproved homes would lose their foster care payments on July 1, 1995, whether or not their caregivers applied for licensure prior to that date. The benefits would be reinstated only after the home was able to obtain a license, and the affected child would not be entitled to recover the benefits lost in the interim.[9]

A class of foster children in relative foster homes challenged in federal court the procedures for implementing the benefits cutoffs.[10] The children argued that they had a property interest in continued receipt of foster care benefits and that requiring their foster homes to complete a licensure process that typically took nine months in just a few weeks (the time between passage of the new law and July 1 of that year) was unfair and violated the due process clause. While the Illinois Department of Children and Family Services argued that any property interest was extinguished as of the effective date of the Reform Plan, the Seventh Circuit disagreed. Due process, the court reasoned, requires that once a property interest has been created by a state, the interest can be extinguished only by constitutionally adequate procedures—the state cannot defend against a due process challenge by arguing that the plaintiff's property interest was rendered nonexistent by the state procedures being challenged.[11]

Since the plaintiffs were thus found to hold a protected property interest in continued receipt of their foster care benefits, the question then turned to the second part of a due process inquiry—what process is due before that interest can be extinguished?[12] The Illinois Department of Children and Family Services relied on the U.S. Supreme Court decision in *Atkins v. Parker* to argue that the legislative process in enacting the Reform Plan constituted sufficient process under the Fourteenth Amendment.[13] The *Atkins* Court held that the legislative process in amending the Food Stamp Act to change eligibility standards was sufficient process because the legislative initiative applied across the board and did not require the procedural fairness of individual eligibility determinations.[14] In *Youakim* the Seventh Circuit distinguished *Atkins* on the grounds that *Atkins* involved an across-the-board change in the method of computing income for purposes of program eligibility; under no set of facts could any recipient avoid the impact of the change.[15] Conversely, in requiring licensure to receive foster care benefits, the Reform Plan simply added another eligibility requirement that most unlicensed relative homes could meet if given a fair opportunity to do so. Unlike in *Atkins*, where no individual eligibility determination could prevent or alter the effect of the amendment to the Food Stamp Act, in *Youakim* an individual eligibility determination for the families would likely show that they could meet the licensure requirements of the Reform Plan.[16]

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Recommendations Post-*Youakim*

Following the Seventh Circuit's decision in *Youakim*, the 1996 *Clearinghouse Review* article summarized several lessons and takeaways regarding transitional due process cases.[17] Here we recount those lessons and takeaways.

First, advocates must carefully identify what the property interest at issue is and to whom it belongs. In *Youakim* the property interest at stake was the *children's* continued receipt of foster care benefits. The relative caregivers had an interest only in being qualified to receive those benefits on behalf of the child; due to the law change, they were required to have a license, and thus their status was as applicants for a license. Since applicants for licenses do not yet have a license, they have no argument to a right to "continued" treatment as a licensed home. Only *recipients* of the benefits—the children—had a legitimate expectation of continued benefits protected by the due process clause.

Second, in *Youakim* the state argued that the law eliminated the "relative foster care program" and brought all of foster care into the licensure system. That framework fueled the argument that nobody, including the children, had rights to "continued" benefits in a new program. They had only the rights of applicants—rights that do not include continued receipt of benefits while procedures are running their course. In such situations, advocates must determine whether the program with which they are dealing was really eliminated when deciding whether to bring a due process

9 *Id*. at 1281.

10 *Id*. at 1278.

11 *Id*. at 1289.

12 *Id*.

13 *Id*. *Atkins v. Parker* arose out of a congressional amendment to the Food Stamp Act; the amendment reduced the percentage of earned income that could be deducted in determining eligibility for program participation (*Atkins v. Parker*, 472 U.S. 115, 118 (1985)).

14 *Atkins*, 472 U.S. at 129.

15 *Youakim*, 71 F.3d at 1290.

16 *Id*.

17 See Bouman, *supra* note 2.

claim. If a program is entirely eliminated, a claim to continuing benefits is impossible. Advocates must look beyond the names of programs to determine what, if anything, remains for recipients after the program change. If nothing remains, the program is eliminated and proving continuing eligibility is impossible. Thus the due process claim will not succeed. But if, as a practical matter, the benefits or services are the same as before but with some changes, as in *Youakim*, then advocates have a strong argument that beneficiaries can claim the due process right to continued benefits.

Third, advocates should determine whether a meaningful number of recipients are likely to establish continuing eligibility if they are accorded fair process prior to termination. A due process claim is more likely to succeed if something is to be gained from the process other than buying time before an otherwise inevitable cutoff. In *Youakim* both the district court and the court of appeals found it important that most, if not all, children would be able, if given the chance, to establish eligibility for a license.

Fourth, *Youakim* firmly established that effective dates of program changes are not part of the substantive definition of the property right but instead are part of the procedures for implementing the change. Program changes cannot simply eliminate benefits with an unrealistically tight effective date. Advocates should look to effective dates when building their cases because if the effective date does not give adequate opportunity for program recipients to establish continuing eligibility, then a suit may be advisable.

Fifth, the distinction between benefits cuts and eligibility changes is not dispositive to the success of a due process claim. Benefits cuts, as in *Atkins*, do not necessarily mean individualized process cannot determine that the recipient would still receive the benefit just as individualized process might with eligibility requirement changes. The important question is whether recipients can make a showing to avoid a negative impact on their benefits if they are accorded a fair chance to do so.

Sixth, the defendants in *Youakim* cast the Reform Plan as a mandatory, across-the-board legislative change, and as such they argued that the legislative process gave all the process that was due. However, advocates must determine whether allowing recipients to come forward with proof of eligibility would allow them to continue receiving benefits. In the end, that determination is more important than whether or not the program change was mandatory, across-the-board, or legislative.

Seventh, advocates must remember that process is always due if a protectable property interest is at stake. In *Youakim* the Illinois Department of Children and Family Services relied on *Atkins* to argue that the legislative process undertaken to enact the Reform Plan was sufficient process. In fact, the sufficient process in *Atkins* offered more than did the process in *Youakim*. In *Atkins*, in addition to a generic notice of the program change, recipients who believed the new rule had been mistakenly applied (e.g., through a mathematical error) had the opportunity to file an appeal and freeze their current benefit level. In *Youakim* no such appeal process was available. Extending *Atkins* in such a circumstance would be aggressive but not frivolous. Advocates should be cautioned that courts might begin to interpret *Atkins* in a way that limits the process due for program changes.

The key takeaway for advocates from *Youakim* is to determine whether the fair opportunity for individualized determinations would make a difference for recipients facing program changes. If so, a due process claim might be brought.

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Twenty Years Later

The basic framework for analyzing due process claims in light of changing program rules has not changed since *Youakim* and the 1996 *Clearinghouse Review* article. However, courts have distinguished *Youakim's* applicability since 1996; those cases have yielded several continuing lessons for advocates bringing transitional due process challenges.

Define a Protectable Property Interest. Since *Youakim*, the Seventh Circuit has answered several times whether the benefit claimed is a protectable property interest. As was hypothesized after *Youakim*, advocates must be careful to identify the property interest at stake and to whom it belongs. Advocates should take care to ensure that two key attributes of the property interest are met. First, the plaintiff should be the beneficiary of the property interest. Second, the property interest should be in the benefit itself. Two cases highlight these attributes: *Dupuy v. Samuels* and *Shvartsman v. Apfel*.[18]

The 1996 *Clearinghouse Review* article noted the importance of the plaintiffs' characterizing the right to benefits as belonging to the foster children, not the relative foster parents.[19] The Seventh Circuit confirmed this analysis in *Dupuy v. Samuels*.[20] In *Dupuy* the plaintiffs alleged that the procedures used by the Illinois Department of Children and Family Services when foster parents were accused of (or, in the jargon of the field, "indicated for") child abuse and neglect violated the foster parents' due process rights. Specifically, when there was an indicated report, the department could deny licenses or stop the placement of children in the home, effectively ending the benefits received by the foster parents.[21]

When an individualized determination can establish continuing eligibility, individualized determination should be available.

The *Dupuy* plaintiffs unsuccessfully relied on *Youakim* to argue that the foster parents had a protectable property interest in the benefits received. However, the Seventh Circuit distinguished *Youakim* and noted that *Youakim* recognized a violation only of the *children's* due process rights.[22] The court reasoned that it had never held that foster parents had a property interest in foster care benefits paid to the children; therefore, no protectable property interest was at issue in the case.[23] Although the foster parents technically received the benefit, the true beneficiary was the child, and thus the child's property interest was at stake.[24]

Further, when bringing a due process claim, advocates should ensure that the property interest claimed is in the benefit itself and not in the means of accessing that benefit. In *Shvartzman v. Apfel* the Seventh Circuit held that food stamp recipients did not have a property interest in a recertification process allowing them to continue receiving food stamps, even though the recertification procedures were substantially more beneficial than procedures for new applicants.[25] Food stamp recipients must engage in a yearly recertification process to establish continuing eligibility for the program. A citizenship requirement was added to the eligibility criteria in 1996; the requirement mandated that all affected residents complete the recertification process by August 22, 1997, to demonstrate their citizenship. The plaintiffs were low-income permanent residents who applied for citizenship prior to August 22, 1997, but were still awaiting the results of their applications after that date.[26] They argued that they had a property right, not in the continuation of food stamp benefits, but in the recertification procedure itself.[27] As such, entirely cutting them from the Food Stamp Program after August 22, 1997, violated their due process rights.[28]

The Seventh Circuit disagreed.[29] The right to access adjudicatory procedures, the court emphasized, is not because there is a right to the procedures themselves, but because the adjudicatory procedures serve the litigants' true property interests, the underlying legal claims.[30] Further, the Seventh Circuit distinguished *Youakim* and recognized that, although the plaintiffs in both cases might be able to prove continuing eligibility given the opportunity for individualized deter-

18 *Dupuy v. Samuels*, 397 F.3d 493 (7th Cir. 2005); *Shvartsman v. Apfel*, 138 F.3d 1196 (7th Cir. 1998).

19 Bouman, supra note 2, at 6.

20 *Dupuy*, 397 F.3d at 515.

21 *Id*. at 513.

22 *Id*. at 515.

23 *Id*. While the Seventh Circuit did not delve into the importance of the distinction between who possessed the property interest, the Northern District of Illinois highlighted the reasoning behind the distinction in a 2003 order (*id*. at 500–502). Simply, foster care benefits are intended not to be income to the foster parent but to be a resource for foster parents to care for the foster child adequately (*id*. at 502). If the foster child is removed from the home due to an allegation of abuse or neglect, the child's foster parent is no longer in need of that resource (*id*.). The child would be placed with new foster parents, who would begin receiving benefits. In effect, the child never loses the benefit at all.

24 Had the court found a protectable property interest, the plaintiffs' claim might have succeeded. As highlighted above, in these due process cases, the essential question is whether individualized determination would have made a difference for recipients facing program changes. Heightened procedural protections might determine that the recipient did not abuse or neglect the foster child, thereby protecting the interest in payments.

25 *Shvartsman*, 138 F.3d at 1197–98.

26 *Id*. at 1197.

27 *Id*. The plaintiffs conceded that they did not have a property right directly in the continuous stream of benefits given the time-limited nature of the food stamps (*id*. at 1198).

28 *Id*.

29 *Id*. at 1200.

30 *Id*. at 1199.

If a claim can bring tangible gains because individualized determinations will allow a number of individuals to keep their benefits, advocates should strongly consider bringing a due process claim.

mination, the plaintiffs in *Youakim* had asserted an undisputed property interest in the continued foster care benefits. In *Shvartsman* the plaintiffs could not do so because the Food Stamp Program established time-limited and not ongoing periods of eligibility.[31] The plaintiffs were in the shoes of applicants, not recipients.

These cases further elucidate for advocates what it means to define a protectable property interest. First, as was clear after *Youakim* and is even clearer today, advocates must take care to bring cases with plaintiffs who are meant to be receiving and benefiting from the benefits. Second, advocates should avoid arguing that their clients have a protectable property interest in adjudicatory procedures designed to determine eligibility. The property interest is in the benefit itself, not in the process for keeping it.

The Level of Process Due. The key takeaway from *Youakim* regarding the process due when the plaintiff has established a property interest in continuing benefits is that when an individualized determination can establish continuing eligibility, individualized determination should be available. Several factors such as length of time allowed for any individualized determination and the number of recipients that would be harmed by such a determination can affect the success of a claim, but the key point is that at least some individualized determination should be required.[32]

The question of the efficacy of offering an individualized determination is the key distinction between *Atkins* and *Youakim*; it is not whether a change was legislatively mandated and across the board. This line was highlighted in 2009 by the Southern District of New York in *John E. Andrus Memorial Incorporated v. Daines*.[33] In *Andrus Memorial*, to better align bed supply with regional needs, the legislature tasked a commission with reviewing health care capacity in hospitals and nursing home facilities and recommending facilities to be closed or restructured.[34] As a result, the plaintiff hospital was downsized without receiving adequate notice or opportunity to be heard on the issue.[35] The defendant argued that, under *Atkins*, no individualized notice was required because the legislative enactment stated that all facilities in the state would be evaluated with an eye on restructuring.[36] The court did not find this argument persuasive and distinguished *Atkins* by finding that, while the statute does apply to all facilities, it mandates that the commission make individual, fact-specific determinations regarding those facilities.[37] The court then referenced *Youakim* to hold that when legislation calls for individualized determinations, particularized notice and procedure is required.[38]

While *Andrus Memorial* does not involve program changes that alter individuals' public benefits, it highlights the key takeaway from *Youakim*. Simply because a change is across the board and legislatively mandated does not mean that individual determinations will not affect the ultimate result. In *Andrus Memorial* a legislative mandate applied across the board, but hospital facilities might have been able to present evidence in an individualized proceeding that allowed them to avoid being downsized. If the impact of the change could be avoided by individual recipients through further action, then a due process claim might succeed.

What Can Be Expected Now?

Imagine a program offering a financial benefit to house individuals recently released from prison. The payment is made not to the individual himself but to the provider of the housing. Eligibility for the program is determined, among other factors, by the postincarceration income level of the recipient. The legislature enacts a program change to be effective six months from the date of enactment; the change will lower the maximum income level for eligibility. As a result, a number of housing providers will stop receiving a sizable portion of their payments under the program in six months if they continue to house the same individuals they are housing now. The state agency administering the program issues a generalized notice of the program change, and then it gives individual notice to the recipients; the individual notice includes mention of a right to appeal prior to the loss of benefits only if the recipients allege a mistake in applying the new law to them (such as a mathematical or factual error in calculating their income) but not if they only object to the new policy.

The first issue to address in determining whether to bring a due process claim is whether there is a protectable property interest at stake. As highlighted by

31 *Id.* at 1200.

32 See Bouman, *supra* note 2, at 7–8.

33 John E. Andrus Memorial Incorporated v. Daines, 600 F. Supp. 2d 563 (S.D.N.Y. 2009).

34 *Id.* at 566.

35 *Id.* at 567–69, 74.

36 *Id.* at 574.

37 *Id.* at 575–76.

38 *Id.* at 576.

Shvartsman and *Dupuy*, the property interest must be the benefit itself and be held by the recipient-beneficiary. In this case, if a claim is brought, the protectable property interest is the housed individual’s legitimate expectation of continued receipt of the housing benefit, not the provider’s expectation of continued payment. Once a protectable property interest is defined, the due process analysis moves to determining what process is due before that property interest can be extinguished. In that example, the mass notice accompanied by a right to contest factual errors would be adequate, consistent with *Atkins v. Parker*.

However, imagine that the program change is to add an eligibility requirement that the housed individual be engaged in at least 20 hours per week of defined work activities to be certified by the housing provider, and the effective date of the change is one month after enactment. The administering agency sends a generalized notice of the new requirement. On the effective date, the administering agency begins stopping payments to the housing provider based on the absence of work-activity certifications. Here the cases establish that the housing provider will have trouble establishing a protectable property interest, but the housed individuals do have a legitimate expectation of continued benefits and thus a protectable interest. The state agency might assert that the legislation ended the old program and started a new “housing and work” program, but the plaintiffs should have a good argument that in fact this is the same program but with a new aspect.

As to the process due, the plaintiffs would have a strong claim that the tight effective date did not allow adequate time for the housing provider to set up a certification system and for the housed individuals to seek and secure placements in jobs or approved work activities that could be certified to the housing provider. Much would depend upon the evidence in the case (e.g., how long it normally takes to do these tasks), but if the evidence supported this kind of showing, the plaintiffs would have a strong claim for an injunction requiring continued payments pending the establishment of the means to comply with the new requirement. Crucial to this outcome would be the ability to show that, with adequate time, most providers could establish a program and many, if not most, housed individuals could comply and remain eligible.

Since the Seventh Circuit decided *Youakim*, the analysis of due process claims to public benefits in the face of changing program rules has largely remained the same. However, courts have interpreted *Youakim* and given it more context. Advocates must be careful when deciding whether to bring a due process claim but should not be discouraged by recent decisions. If a claim can bring tangible gains because individualized determinations will allow a number of individuals to keep their benefits, advocates should strongly consider bringing a due process claim.

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