

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF MEDICAID AND MEDICAL ASSISTANCE
Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)

FINAL

ORDER

Long-Term Care Facilities - Eligibility Determinations and Post-Eligibility Treatment; Undue Hardships

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance initiated proceedings to amend the Delaware Social Services Manual (DSSM) by adding a provision regarding long-term care eligibility, specifically, *to modify language regarding undue hardship provisions to align with current federal regulations and DMMA policy*. The Department's proceedings to amend its regulations were initiated pursuant to 29 **Del.C.** §10114 and its authority as prescribed by 31 **Del.C.** §512.

The Department published its notice of proposed regulation changes pursuant to 29 **Del.C.** §10115 in the June 2016 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by July 1, 2016 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSAL:

The purpose of this notice is to advise the public that Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) is proposing to amend the Delaware Social Services Manual (DSSM) by modifying provisions regarding long-term care eligibility, specifically, *to modify language regarding undue hardship provisions to align with current federal regulations and DMMA policy*.

Statutory Authority

- §1902(17)(c) of the Social Securities Act, *Reasonable evaluation of income and resources*
- §1912(a)(1)(A) of the Social Security Act, *Assignment of rights of payments*
- §1917 of the Social Security Act, *Liens, Adjustments and Recoveries, and Transfers of Assets*
- §1924(a)(3)(b) of the Social Security Act, *Methodology and standards for determining and evaluating income and resources for institutionalized spouses*
- §1924(c)(3)(c) of the Social Security Act, *Assignment of support rights*
- 42 CFR 435.602(c), *Financial responsibility of relatives and other individuals*

Background

Section 1902(a)(18) of the Act states that a state plan for medical insurance must comply with the provisions of §1917 of the Act with respect to liens, adjustments, and recoveries of medical assistance correctly paid, transfers of assets, and treatment of certain trusts.

The Delaware Department of Health and Social Services (DHSS), in order to comply with Section 1917 of the Social Security Act as amended by the Omnibus Budget Reconciliation Act of 1993 (OBRA '93), has established policies and procedures for treating the transfer of assets and trusts in eligibility determinations and post-eligibility treatment with regard to long-term care (LTC) facilities. Section 1917 provides provisions for the treatment of an individual's assets, including applicable trusts, when calculating resources for eligibility purposes.

Sections 1917(b)(3)(A), 1917(c)(2)(D), and 1917(d)(5) of the Act, allow for a state agency to establish procedures under which the agency waives requirements of Section 1907 of the Act in determining eligibility with regard to assets and trusts of an individual if such requirements would create an undue hardship on the individual as determined on the basis of criteria established by the Secretary.

Furthermore, §1924(c)(3) of the Social Security Act, Assignment of support rights, states that an institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where-

- (A) The institutionalized spouse has assigned to the State any rights to support from the community spouse;
- (B) The institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment but the State has the right to bring a support proceeding against a community spouse without such assignment; or
- (C) The State determines that denial of eligibility would work an undue hardship.

Summary of Proposal

Purpose

To modify language in the Delaware Social Services Manual (DSSM) regarding eligibility determinations and post-eligibility treatment for long-term care (LTC) Medicaid applicants or Medicaid recipients residing in LTC facilities. This regulation modifies language regarding undue hardship provisions to align with current federal regulations and DMMA policy emphasizing personal choice and placement in the most integrated settings.

Summary of Proposed Changes

If implemented as proposed, plan amendment will accomplish the following, effective August 11, 2016:

Align undue hardship provisions, 20350.11 and 20400.12.1, of the DSSM with current federal regulations and DMMA policy emphasizing personal choice and placement in the most integrated settings.

Public Notice

In accordance with the *federal* public notice requirements established at Section 1902(a)(13)(A) of the Social Security Act and 42 CFR 447.205 and the *state* public notice requirements of Title 29, Chapter 101 of the Delaware Code, Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) gives public notice and provides an open comment period for thirty (30) days to allow all stakeholders an opportunity to provide input on the modification of the undue hardship provisions. Comments were to be received by 4:30 p.m. on July 1, 2016.

Provider Manuals Update

Applicable Delaware Medical Assistance Program (DMAP) Provider Policy Specific Manuals will be updated. Manual updates, revised pages or additions to the provider manual are issued, as required, for new policy, policy clarification, and/or revisions to the DMAP program. Provider billing guidelines or instructions to incorporate any new requirement may also be issued. A newsletter system is utilized to distribute new or revised manual material and to provide any other pertinent information regarding manual updates. DMAP provider manuals and official notices are available on the DMAP website: <http://www.dmap.state.de.us/home/index.html>

Fiscal Impact

This regulation does not change the way in which the Division of Medicaid and Medical Assistance applies the undue hardship provisions, but rather modifies language to match current federal regulations and DMMA policy. Therefore, there is no fiscal impact projected.

Summary of Comments Received with Agency Response and Explanation of Changes

The Governor's Advisory Council for Exceptional Citizens (GACEC) and the State Council for Persons with Disabilities (SCPD) offered the following summarized observations:

This amendment to the DSSM regulations eliminates a provision that only allows a hardship exception to the transfer of asset and trust provisions for Medicaid long term care eligibility if there is no state facility that could take the applicant (DSSM 20350.11 and 20400.12.1). This is consistent with existing federal regulation, current DMMA practice, and Olmstead principles.

Council *endorses* the proposed regulation.

Agency Response: Thank you again for your review and feedback related to the proposed amendment to the Delaware Social Services Manual (DSSM) to modify language regarding undue hardship provisions. DMMA is pleased to provide the opportunity to receive public comments and greatly appreciates the thoughtful input given.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the June 2016 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Delaware Social Services Manual (DSSM) by modifying provisions regarding long-term care eligibility, specifically, *to modify language regarding undue hardship provisions to align with current federal regulations and DMMA policy*, is adopted and shall be final effective August 11, 2016.

Rita M. Landgraf, Secretary, DHSS
July 15, 2016

DMMA FINAL ORDER #16-018a REVISIONS:

20350.11 Undue Hardship

A transfer of assets is exempt from consideration if the penalty would cause undue hardship. Undue hardship exists when application of the transfer of assets provisions would deprive the individual of medical care such that his/her health or his/her life would be endangered. Undue hardship also exists when application of the transfer of assets provisions would deprive the individual of food, clothing, shelter or other necessities of life ~~and there is no State facility available to take care of this individual in the absence of Medicaid eligibility.~~

DMMA FINAL ORDER #16-018b

REVISIONS:

20400.12.1 Undue Hardship

Undue hardship exists when application of the trust provisions would deprive the individual of medical care such that his/her life would be endangered. Undue hardship also exists when application of the trust provisions would deprive the individual of food, clothing, shelter or other necessities of life ~~AND there are no State facilities available to take care of this individual in the absence of Medicaid eligibility.~~

20 DE Reg. 117 (08/01/16) (Final)