

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 - Post-Eligibility Treatment of Institutionalized Individuals Personal Needs Allowance

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend the Delaware Title XIX Medicaid State Plan and the Division of Social Services Manual (DSSM) regarding the Post-Eligibility Treatment of Institutionalized Individuals, specifically, *standards for payment of personal needs allowance for individuals in from long-term care facilities*. 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 April 2016 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by May 2, 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/Division of Medicaid and Medical Assistance is proposing to amend the Title XIX Medicaid State Plan and the Division of Social Services Manual (DSSM) regarding Post-Eligibility Treatment of Institutionalized Individuals, specifically; *standards for payment of personal needs allowance for individuals residing in long-term care facilities*.

Statutory Authority

- §1902(a)(50), (q) of the Social Security Act, *A State Plan for medical assistance must*
- §1924(d)(1) of the Social Security Act, *Allowances to be offset from income of institutionalized spouse*
- 42 CFR §435.725, *Post-eligibility treatment of income of institutionalized individuals in SSI States: Application of patient income to the cost of care*
- 42 CFR §435.733, *Post-eligibility treatment of income of institutionalized individuals in States using more restrictive requirements than SSI: Application of patient income to the cost of care*
- 42 CFR §435.832, *Post-eligibility treatment of income of institutionalized individuals: Application of patient income to the cost of care*

Background

Under §1902(a)(14)(l) of the Social Security Act medical assistance recipients that are institutionalized in long-term care facilities are required to apply their income toward the cost of institutional care. The individual must contribute income to pay for institutional services, deducting only certain allowable amounts, such as a personal needs allowance (PNA). A PNA is defined under Medicaid regulations in 42 CFR 435.725(c)(1) as follows:

(a) Required deductions. In reducing its payment to the institution, the agency must deduct the following amounts, in the following order, from the individual's total income, as determined under paragraph (e) of this section. Income that was disregarded in determining eligibility must be considered in this process.

(1) Personal needs allowance. A personal needs allowance that is reasonable in amount for clothing and other personal needs of the individual while in the institution. This protected personal needs allowance must be at least--

a. \$30 a month for an aged, blind, or disabled individual, including a child applying for Medicaid on the basis of blindness or disability;

b. \$60 a month for an institutionalized couple if both spouses are aged, blind, or disabled and their income is considered available to each other in determining eligibility; and

c. For other individuals, a reasonable amount set by the agency, based on a reasonable difference in their personal needs from those of the aged, blind, and disabled.

In reducing its payment to the institution, the agency must deduct a personal needs allowance. A personal needs allowance that is reasonable in amount for clothing and other personal needs of the individual while in the institution. This protected personal needs allowance must be at least \$30 a month for an aged, blind, or disabled individual; \$60 a month for an institutionalized couple if both spouses are aged, blind, or disabled and their income is considered available to each

other in determining eligibility; and for other individuals, a reasonable amount set by the agency, based on a reasonable difference in their personal needs from those of the aged, blind, and disabled.

Summary of Proposal

Rationale and Justifications

State Plan provisions require the Delaware Medical Assistance Program (DMAP) to provide a personal needs allowance (PNA) to Medicaid recipients residing in long-term care facilities. This PNA is intended to provide for clothing and other personal needs. The current PNA is \$44/month for individuals and \$88/month for couples and was set in 2002. DMMA recognizes that the cost-of-living has increased since 2002 and proposes to increase the PNA to offset some of the increased costs of personal needs for recipients.

Purpose

This amendment to the State Plan and DSSM adds a provision that allows DMAP to increase the personal needs allowance for individuals residing in long-term care facilities from \$44/month to \$50/month for individuals, and from \$88/month to \$100/month for couples.

Summary of Proposed Changes

Effective for services provided on and after July 1, 2016, Delaware Health and Social Services/Division of Medicaid and Medical Assistance (DMMA) proposes to amend Attachment 2.6-A, Page 4 and Page 4 Addendum of the Medicaid State Plan provisions to increase the Personal Needs Allowance for individuals residing in long-term care facilities from \$44/month to \$50/month for individuals, and from \$88/month to \$100/month for couples.

Also effective for services provided on and after July 1, 2016, DMMA proposes to make changes to policy sections 20620 Patient Pay Amount Deductions, 20620.1 Personal Needs, and 20995.1 Post-Eligibility Deductions, and applicable sub-sections of the Division of Social Services Manual (DSSM) to reflect the proposed changes to the State Plan.

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 agency's decision to increase the personal needs allowance for individuals institutionalized in long-term care facilities. Comments were to be received by 4:30 p.m. on Monday May 2, 2016.

CMS Review and Approval

The provisions of this draft state plan amendment (SPA) are subject to the Centers for Medicare and Medicaid Services (CMS) review and approval. The draft SPA page(s) may undergo further revisions before and after submittal to CMS based upon public comment and/or CMS feedback. The final version may be subject to significant change.

Provider Manual Update

Also, upon CMS approval, the 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.

Fiscal Impact

The following represents the potential increase in expenditures if the monthly Personal Needs Allowance for Medicaid recipients residing in long-term care facilities is increased from \$44 to \$50 for individuals and \$88 to \$100 for couples.

The following fiscal impact is projected:

	Federal Fiscal Year 2016 (1)	Federal Fiscal Year 2017
General (State) funds	\$ 15,125	\$ 60,500
Federal funds	\$ 18,360	\$ 71,596

(1) Represents July - September 2016 only

Summary of Comments Received with Agency Response

The Governor's Advisory Council for Exceptional Citizens (GACEC) and the State Council for Persons with Disabilities

(SCPD) offered the following observations and recommendations summarized below. The Division of Medicaid and Medical Assistance (DMMA) has considered each comment and responds as follows.

As background, under CMS regulations, Medicaid-funded individuals residing in long-term care facilities are generally required to contribute to costs of institutional services after deducting certain allowable amounts. At 894, quoting 42 CFR §435.725. One deduction is a "personal needs allowance (PNA)" which, for "aged, blind, or disabled" persons must be at least \$30/month for individuals and \$60/month for couples. The purpose of the PNA is to provide an "allowance that is reasonable in amount for clothing and other personal needs of the individual while in the institution".

The current PNA established by DMMA is \$44/month for individuals and \$88/month for couples. These amounts have not changed in 14 years, i.e., since 2002. The Division proposes to increase the PNA from \$44/month to \$50/month for individuals and from \$88/month to \$100/month for couples. The change would be effective July 1, 2016. The change is "subsidized" by federal funds. For example, in FFY17, the projected fiscal impact of the change is \$71,596 in federal funds and \$60,500 in State funds.

GACEC and SCPD have the following observations.

First, DMMA could consider a larger increase in the PNA. Consistent with the attachment, \$44 in 2002 equates to \$57.99 in 2016 based on inflation. Adopting a \$50 rate reflects an increase of less than half the inflation rate. Moreover, since the state infrequently changes the rate, adopting an overly restrained benchmark in 2016 which will remain in effect for many years will accentuate the disparity. DMMA could consider adopting a \$58 rate for individuals and a \$116 rate for couples which would fully account for the inflation rate. This would ostensibly raise the State fiscal impact from \$60,500 to \$141,167 while increasing the federal contribution from \$71,596 to \$167,057.

Agency Response: DMMA thanks the Council for its comment. However, no change was made as a result of this comment.

Second, on p. 896, DMMA may wish to consider substituting "ICF/IID" for ICF/MR. See CMS attachment, Title 29 Del.C. §608, and DMMA references to ICF/IID at 19 DE Reg. 888, 889 and 892.

Agency Response: DMMA agrees with the Council's recommendation. The reference has been changed from ICF/MR to ICF/IID.

Third, on p. 897, the following reference should be reconsidered in consultation with DDDS:

If the recipient regularly attends a rehab/educational program off the grounds of his ~~nursing~~ or her long-term care facility, including employment for the purpose of rehabilitation in a sheltered workshop ~~off the grounds of the facility~~, \$50.00 per month (rather than \$44) will be protected;...

The reference is somewhat archaic given Title 19 Del.C. §§740-747 (Employment First Act) and could be interpreted as excluding PNA eligibility to participants in supported employment as well as day habilitation programs. It may violate public policy to limit PNA to participants (including group home and foster home residents) in sheltered workshops to the exclusion of participants in supported employment.

Agency Response: DMMA thanks the Council for its comment. However, no change was made as a result of this comment.

Fourth, on p. 897, there are two references to an SGA limit of \$700. That was the SGA limit in 1999-2000. See attachment. There is also an incorrect reference to "Department of Social Services (DSS)" rather than Department of Health & Social Services and references to "DSS" that ostensibly should be "DMMA".

Agency Response: DMMA agrees with the Council's suggested revisions for this section of the eligibility policy. The following changes have been made and will be included in the final draft of this policy:

20620.1.3.2 If monthly earnings average more than the current SGA amount in a calendar year, this is considered SGA and the Division of Medicaid and Medical Assistance (DMMA) can allow a personal needs allowance of up to the AFC rate.

20620.1.3.3 If earnings average less than \$300 a month in a calendar year, this is not ordinarily considered SGA and DMMA can allow the \$50 personal needs allowance.

20620.1.3.4 If average earnings are between \$300 and the current SGA amount, DMMA must consider other factors to determine whether or not the work constitutes SGA. Other factors include considering if the work is comparable to persons without disabilities in the community performing similar jobs.

Fifth, on p. 897, the reference to "unimpaired people" should be reconsidered. See Title 29 Del.C. §608.

Agency Response: DMMA agrees with the Council's suggestion to reconsider this terminology. The following change has been made and to the regulation:

20620.1.3.4 If average earnings are between \$300 and the current SGA amount, DMMA must consider other factors to determine whether or not the work constitutes SGA. Other factors include considering if the work is comparable to persons without disabilities in the community performing similar jobs.

FINDINGS OF FACT:

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

THEREFORE, IT IS ORDERED, that the proposed regulation to amend Delaware Title XIX Medicaid State Plan and the Division of Social Services Manual (DSSM) regarding the Post-Eligibility Treatment of Institutionalized Individuals, specifically, *standards for payment of personal needs allowance for individuals in from long-term care facilities*, is adopted and shall be final effective June 11, 2016.

Rita M. Landgraf, Secretary, DHSS

**DMMA FINAL ORDER #16-013a
REVISIONS:**

ATTACHMENT 2.6-A
Page 4

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT
STATE: DELAWARE

ELIGIBILITY CONDITIONS AND REQUIREMENTS

42 CFR 435.725; 43 CFR 435.733; 42 CFR 435.832

B. Post-Eligibility Treatment of Institutionalized Individuals

The following amounts are deducted from the gross income when computing the application of an individual or couples income to the cost of institutionalized care:

- 1. Personal Needs Allowance.
 - a. Aged, blind, disabled -

Individuals	\$44	<u>\$50</u>
Couples	\$88	<u>\$100</u>

For the following individuals with greater need -

See Page 4 Addendum

- b. AFDC related -

Children	\$44	<u>\$50</u>
Adults	\$44	<u>\$50</u>

- c. Individuals under age 21 covered in this plan as specified in Item B.7. of ATTACHMENT 2.2-A Page 16.
\$44 \$50

**DMMA FINAL ORDER #16-013b
REVISIONS:**

ATTACHMENT 2.6-A
Page 4 Addendum

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT
STATE: DELAWARE

ELIGIBILITY CONDITIONS AND REQUIREMENTS

42 CFR 435.725; 43 CFR 435.733; 42 CFR 435.832

B.1.a. For the following individuals with a greater need
B. Post-Eligibility Treatment of Institutionalized Individuals (continued)

For the following individuals with a greater need (continued)

- d. \$50/month for NF and ICF/~~MR IID~~ residents engaging in frequent and regular rehabilitation out-of-facility activities.
- e. For nursing facility residents who are participating in gainful employment, the following amounts, not to exceed the adult foster care rate (SSI benefit amount + \$140), will be deducted from gross earned income:
 - i. Mandatory payroll deductions that are a condition of employment including, but not limited to:
 - * 1. Federal, State, and Local taxes
 - * 2. FICA
 - * 3. Union Dues
 - * 4. Insurance Premiums
 - * 5. Pension Contributions.
 - ii. Transportation costs as paid to and from employment.
 - iii. Clothing and personal needs allowance of \$75/month.

The maximum amount of income to be protected will not exceed the amount required to maintain an individual in adult foster/residential care. This amount is currently the SSI benefit plus \$140.

DMMA FINAL ORDER #16-013c

REVISION:

20620 Patient Pay Amount Deductions

42 CFR §435.725; 42 CFR §435.733; 42 CFR §435.832

The total income to be used in the post-eligibility process will include all amounts that meet the definition of income. This includes ~~both~~ income that is counted for eligibility, and as well as income that is excluded for eligibility.

~~Take the following deductions from the Medicaid recipients total gross income in the following order:~~

The following amounts are deducted from the gross income when computing the application of an individual or couples income to the cost of institutionalized care:

- ~~1. personal needs~~
- ~~2. expenses incurred for necessary medical care~~
- ~~3. community spouse income allowance or \$75 home maintenance disregard (if applicable)~~
- ~~4. family allowance (if applicable)~~

20620.1 Personal Needs Allowance;

20620.2 Necessary Medical Care Expenses;

20620.3 Community Spouse Income Allowance/Home Maintenance Disregard (if applicable); and

20620.4 Family Allowance (if applicable).

20620.1 Personal Needs Allowance

- a) 20620.1.1 ~~\$44.00~~ \$50.00 per month of available income is to be protected for the Medicaid recipients recipient's direct personal needs; or
- b) 20620.1.2 If the recipient regularly attends a rehab/educational program off the grounds of his ~~nursing~~ or her long-term care facility, including employment for the purpose of rehabilitation in a sheltered workshop ~~off the grounds of the facility~~, \$50.00 per month (~~rather than \$44~~) will be protected; or
- e) 20620.1.3 For ~~nursing~~ long-term care facility residents who are participating in substantial gainful activity (SGA) (20 CFR 416.971), the following amounts, not to exceed the Adult Foster Care rate will be deducted from gross earned income:

20620.1.3.1 Mandatory payroll deductions that are a condition of employment including, but not limited to:

- Federal, State and Local Taxes
- FICA
- Union Dues
- Insurance premiums
- Pension contributions
- Transportation costs as paid to & from work

- Clothing and personal needs allowance of \$75/month.

20620.1.3.2 If **[monthly]** earnings average more than **[\$700 a month the current SGA amount]** in a calendar year, this is considered SGA and DSS ~~[Department of Social Services (DSS)]~~ **[the Division of Medical Assistance (DMMA)]** can allow a personal needs allowance of up to the AFC rate.

20620.1.3.3 If earnings average less than \$300 a month in a calendar year, this is not ordinarily considered SGA and **[DSS DMMA]** can allow the \$44 ~~or~~ \$50 personal needs allowance.

20620.1.3.4 If average earnings are between \$300 and **[\$700 the current SGA amount]**, **[DSS DMMA]** must consider other factors to determine whether or not the work constitutes SGA. Other factors include considering if the work is comparable to **[unimpaired people persons without disabilities]** in the community performing similar jobs.

DMMA FINAL ORDER #16-013d

REVISION:

20995.1 Post - Eligibility Deductions

42 CFR §435.725; 42 CFR §435.733; 42 CFR §435.832

Post-eligibility determination is revised to allow the following deductions from the income of the institutional spouse. The deductions must be taken in the following order:

a. 20995.1.1 Personal Needs Allowance for the institutional spouse

The personal needs allowance amount is \$30 per month for SSI recipients, and \$44 ~~\$50~~ per month for all others. If the institutionalized spouse is employed, personal needs may range from \$50 up to the Adult Foster Care rate per month.

b. 20995.1.2 Community Spouse Income Allowance

~~The community spouse monthly income allowance is the amount of income necessary to bring the spouse's monthly otherwise available income up to:~~

~~the applicable percent of the FPL for two, plus
an additional amount for excess shelter~~

20995.1.2.1 ~~The community spouse monthly income allowance is the amount of income necessary to bring the spouse's monthly otherwise available income up to the applicable percent of the FPL for two, plus an additional amount for excess shelter.~~

20995.1.2.2 The total amount available to the community spouse may not exceed "Cap for Minimum Monthly Maintenance Standard. This standard usually changes each January based on the Consumer Price Index for Urban Consumers.

c. 20995.1.3 Family Allowance

d. 20995.1.4 Items for which protection of income has been approved by the ~~Long-Term~~ Long-Term Care Operation's Administrator and/or incurred medical expenses of the institutionalized spouse.

19 DE Reg. 1095 (06/01/16) (Final)