

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

**PROPOSED**

**PUBLIC NOTICE**

**Long Term Care Medicaid**

**DSSM 20400.9.1.1 Treatment of Special Needs Trusts**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the **Delaware Code**) and under the authority of Title 31 of the **Delaware Code**, Chapter 5, Section 512, Delaware Health and Social Services (DHSS) / Division of Medicaid and Medical Assistance (DMMA) is proposing to amend a rule in the Division of Social Services Manual (DSSM) used to determine eligibility for medical assistance.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Sharon L. Summers, Policy and Program Development Unit, Division of Medicaid and Medical Assistance, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 or by fax to (302) 255-4425 (new fax number) by December 31, 2006.

The action concerning the determination of whether to adopt the proposed regulation will be based upon the results of Department and Division staff analysis and the consideration of the comments and written materials filed by other interested persons.

**SUMMARY OF PROPOSED CHANGE**

**Statutory Authority**

Section 1917(d)(4)(A) of the Social Security Act, *Liens, adjustments and recoveries; transfer of assets*

**Background**

In 1993, Congress created an exception under the amendments to the Omnibus Budget and Reconciliation Act (OBRA '93) which specifically authorized the use of Supplemental Needs Trusts for the benefit of individuals who are under the age of 65 years and disabled according to Social Security standards. The Social Security Operations Manual authorizes the use of Supplemental Needs Trusts to hold non-countable assets. A special needs trust is a revocable or irrevocable trust established with the assets of a client under age 65 who meets the Supplemental Security Income (SSI) program's disability criteria. The trust must be established for the client's benefit by his parent, grandparent, legal guardian, or a court.

**Summary of Proposed Change**

The purpose of this amendment is to correct a procedural error in the DSSM policy manual and to provide consistency with the Social Security's Program Operations Manual System (POMS) for the purposes of determining eligibility for Long Term Care Medicaid. Guidance for this regulatory action is based on POMS SI 01120.203.

Current policy states *"The Medical Review Team (See Section 20102.2.2) has determined that the individual is disabled using the State of Delaware's Determination of Disability for Medicaid procedure."* Determining disability is not a function that is performed by the Medical Review Team. The revised policy states that the individual should be disabled according to the SSI standards.

**DMMA PROPOSED REGULATION #06-51**

**REVISION:**

**20400.9**      **Exceptions to the Trust Eligibility Policy**

Two exceptions to the trust eligibility policy are Special Needs Trusts and Pooled Trusts for disabled individuals.

#### **20400.9.1 Special Needs Trusts**

A special needs trust contains the assets of an individual under age 65 who is disabled. It is established for the benefit of the individual by a parent, grandparent, legal guardian of the individual or a court. The trust may also contain the assets of other individuals.

##### **20400.9.1.1 Treatment of Special Needs Trusts**

For individuals under age 65 the exceptions to the Medicaid eligibility rules continue even after the individual becomes age 65. No additional assets may be added to the trust after the individual reaches age 65. If assets are added they will not be exempted and are subject to penalties. To qualify as a special needs trust, the following conditions must exist:

- The trust must be established solely for the needs of a disabled individual who is under age 65.
- ~~The individual is receiving either Title II or SSI benefits as a disabled individual. (In this case we would accept the disability determination made for these programs disabled as defined by the SSI program in 1614(a)(3) of the Act.~~
- The trust must be established by the disabled individual's parent(s), grandparent(s), legal guardian(s) or a court.
- ~~The Medical Review Team (See Section 20102.2.2 ) has determined that the individual is disabled using the State of Delaware's Determination of Disability for Medicaid procedure.~~

In addition to the above criteria, the trust must state that upon the individual's death all remaining assets and funds should be paid to the State agency up to the amount paid in Medicaid benefits on the individual's behalf.

**10 DE Reg. 965 (12/01/06) (Prop.)**