

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF MEDICAID AND MEDICAL ASSISTANCE
Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)
16 **DE Admin. Code** 20620

FINAL

ORDER

Guardianship Fees - Post-Eligibility Protection of Income

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance initiated proceedings to amend Delaware Social Services Manual (DSSM) 20620.1 regarding Guardianship Fees - Post-Eligibility Protection of Income, specifically, to align language with the recently approved Title XIX Medicaid State Plan allowing Medicaid recipients institutionalized in long-term care facilities to retain an allowance of income to pay for guardianship costs. 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 December *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by December 31, 2022, 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 proposed regulation is to advise the public that Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) is proposing to revise Division of Social Services Manual (DSSM) section 20620.1 to align with the CMS approved language.

Background

Medicaid recipients, 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 that is reasonable in amount for clothing and other personal needs of the individual while in the institution.

Some institutionalized recipients may be appointed a guardian by the Court to make medical or financial decisions. There can be cost associated with services provided by the guardian. The services may include, but not be limited to, receiving and depositing income, paying bills, or maintaining accounts. 25 DE Reg. 866 (03/01/22) amended Title XIX Medicaid State Plan to allow Medicaid recipients institutionalized in long-term care facilities to retain an allowance of income to pay for guardianship not to exceed \$100 and to include the establishment of a guardianship (to include attorney's fees) not to exceed \$750.

DMMA published revisions to the Title XIX Medicaid State Plan and the Division of Social Services Manual (DSSM) 20620.1 regarding guardianship fees and post-eligibility treatment of income that were adopted as final in August of 2022. DMMA subsequently submitted the Title XIX Medicaid State Plan changes to the Centers for Medicare and Medicaid Services (CMS). After review and discussions with CMS, gross earned income was revised to gross income; this change must be revised in Section 20620.1 of the DSSM.

Statutory Authority

§1902(a)(50)(q) of the Social Security Act

§1902(a)(14)(l) of the Social Security Act

Purpose

The purpose of this proposed regulation is to advise the public that Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) is proposing to revise Division of Social Services Manual (DSSM) section 20620.1 to align with the CMS approved language.

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 440.386 and the state public notice requirements of Title 29, Chapter 101 of the **Delaware Code**, DHSS/DMMA gave public notice and provided an open comment period for 30 days to allow all stakeholders an opportunity to provide input on the proposed regulation. Comments were to have been received by 4:30 p.m. on December 31, 2022.

Centers for Medicare and Medicaid Services Review and Approval

The provisions of this state plan amendment (SPA) are subject to approval by the Centers for Medicare and Medicaid Services (CMS). 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 Manuals and Communications Update

Also, there may be additional provider manuals that may require updates as a result of these changes. The applicable Delaware Medical Assistance Program (DMAP) Provider Policy Specific Manuals and/or Delaware Medical Assistance Portal 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 DMAP updates. DMAP updates are available on the Delaware Medical Assistance Portal website: <https://medicaid.dhss.delaware.gov/provider>

Fiscal Impact Statement

There is no anticipated increase in the fiscal impact from the original publication to align with the CMS approved language.

Summary of Comments Received with Agency Response and Explanation of Changes

There were no comments received during the public comment period.

FINDINGS OF FACT:

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

THEREFORE, IT IS ORDERED, that the proposed regulation to amend Delaware Social Services Manual (DSSM) 20620.1 regarding Guardianship Fees - Post-Eligibility Protection of Income, specifically, to align language with the recently approved Title XIX Medicaid State Plan allowing Medicaid recipients institutionalized in long-term care facilities to retain an allowance of income to pay for guardianship costs, is adopted and shall be final effective February 11, 2023.

1/13/23

Date of Signature

Molly Magarik, Secretary, DHSS

20000 Medicaid Long Term Care

20620.1 Personal Needs Allowance

20620.1.1 \$50.00 per month of available income is to be protected for the Medicaid recipients recipient's direct personal needs; or

20620.1.2 If the recipient regularly attends a rehab/educational program off the grounds of his or her long-term care facility, including employment for the purpose of rehabilitation in a sheltered workshop, \$50.00 per month will be protected; or

20620.1.3 For 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 the current SGA amount in a calendar year, this is considered SGA and 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 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.

20620.1.4 For nursing facility residents requiring a court appointed guardian, the following amounts will be deducted from the gross ~~earned~~ income:

i. Monthly guardianship fees not to exceed \$100

ii. Initial establishment of a guardianship (to include attorney's fees) not to exceed \$750

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

26 DE Reg. 108 (08/01/22)

26 DE Reg. 694 (02/01/23) (Final)