

**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 20400

**PROPOSED**

**PUBLIC NOTICE**

**Special Needs Trust**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code), 42 CFR §447.205, 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 Delaware Social Services Manual (DSSM) regarding Special Needs Trust, specifically, *to add the beneficiary to the list of people able to establish a trust on their behalf.*

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, Planning, Policy and Quality Unit, Division of Medicaid and Medical Assistance, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906, by email to [Nicole.M.Cunningham@state.de.us](mailto:Nicole.M.Cunningham@state.de.us), or by fax to 302-255-4413 by 4:30 p.m. on December 1, 2017. Please identify in the subject line: Special Needs Trust.

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 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 Delaware Social Services Manual (DSSM) regarding Special Needs Trust, specifically, *to add the beneficiary to the list of people able to establish a trust on their behalf.*

**Statutory Authority**

- Section 5007 of the 21st Century Cures Act

**Background**

Section 1917(d)(3) of the Social Security Act (the Act) prescribes the rules state Medicaid agencies must apply in evaluating funds in, contributions to, and distributions from, trusts that are funded with a Medicaid applicant's or beneficiary's own assets. For a trust to meet the definition of a "special needs trust" described in section 1917(d)(4)(A) of the Act, the trust must: contain the assets of an individual under age 65 who has a disability; be established for the benefit of such individual; and direct that the state will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid by the state on the individual's behalf. Prior to the Cures Act, a special needs trust also had to be established by a parent, grandparent, legal guardian of the individual, or a court.

The requirement that a third party establish a special needs trust, which is not imposed on the other section 1917(d)(4) trusts, was identified by many stakeholders as a barrier to maximizing the independence of people with disabilities. Section 5007(a) of the Cures Act addressed this criticism for special needs trusts established on or after the date of the law's enactment, December 13, 2016.

**Summary of Proposal**

*Purpose*

The purpose of this proposed regulation is to add the individual with a disability under age 65 to the list of individuals able to establish a Special Need Trust.

*Summary of Proposed Changes*

Effective for services provided on and after December 13, 2016 Delaware Health and Social Services/Division of Medicaid and Medical Assistance (DHSS/DMMA) proposes to amend Delaware Social Services Manual (DSSM) to add the beneficiary to the list of people able to establish a trust on their behalf.

*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 proposed regulation. Comments must be received by 4:30 p.m. on December 1, 2017.

#### *Provider Manuals Update*

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 Delaware Medical Assistance Provider Portal website: <https://medicaid.dhss.delaware.gov/provider>.

#### **Fiscal Impact**

DMMA is proposing a policy change to expand the list of individuals able to establish a Special Need Trust. The Special Needs Trust is an excluded resource for Medicaid. There is no anticipated fiscal impact to the agency as a result of this proposed change in program policy.

#### **AMENDED**

#### **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.

For Special Needs Trusts created on or after December 13, 2017 by an individual with a disability under age 65 for his or her own benefit can qualify as a special needs trust, conferring the same benefits as a special needs trust set up by a parent, grandparent, legal guardian or 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 an individual with a disability who is under age 65.

The individual is disabled as defined by the SSI program in 1614(a)(3) of the Act.

The trust must be established by the parent(s), grandparent(s), legal guardian(s) of an individual with disabilities or a court.

#### **For trusts created on or after 12/13/2016:**

The trust must be established by the disabled individual under age 65 for his or her own benefit, the disabled individual's parent, grandparent, legal guardian or court.

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. 1302 (02/01/07)**

**15 DE Reg. 202 (08/01/11)**

**21 DE Reg. 387 (11/01/17) (Prop.)**