

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 14110 and 14340

FINAL

ORDER

Documentation of State Residency

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services (“Department”) / Division of Medicaid and Medical Assistance initiated proceedings to amend Division of Social Services Manual (DSSM) regarding state residency documentation requirements, specifically, to align policy with current practice. The Department’s proceedings to amend its regulations were initiated pursuant to 29 Delaware Code Section 10114 and its authority as prescribed by 31 Delaware Code Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 Delaware Code Section 10115 in the August 2019 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by September 3, 2019 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSAL

Effective for services provided on and after October 11, 2019 Delaware Health and Social Services/Division of Medicaid and Medical Assistance (DHSS/DMMA) proposes to amend the Division of Social Services Manual (DSSM) sections 14340, 14340.1, 14110.1, 14110.2, 14110.3, 14110.4, 14110.5, 14110.6, 14110.7, 14110.8, 14110.8.1, and 14110.8.2 regarding state residency documentation requirements, specifically, to align policy with current practice.

Background

Each state must provide Medicaid to eligible residents including residents who are absent from the State. Additionally, evidence of immigration status may not be used to determine that an individual is not a State resident. The proposed amendment incorporates the current residency requirements at 42 Code of Federal Regulations §435.403 into the Delaware Division of Social Services Manual (DSSM).

Statutory Authority

42 CFR 435.403

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 were to have been received by 4:30 p.m. on September 3, 2019.

Provider Manuals and Communications Update

A newsletter system is utilized to distribute new or revised manual material and to provide any other pertinent information regarding manual updates. Updates are available on the Delaware Medical Assistance Portal website: <https://medicaid.dhss.delaware.gov/provider>

Fiscal Impact Statement

There is no anticipated fiscal impact to the agency.

Summary of Comments Received with Agency Response and Explanation of Changes

The following summarized comments were received:

Comment: Two commenters indicated that the federal citations for 14110.6, 14110.7 and 14110.9 are incorrect.

Agency Response: DMMA corrected the error.

Comment: Two commenters suggested in Section 14110.8(c) it would be more clear to add another “or” between the first two bullet points. The addition would clarify that for an institutionalized individual who is neither married nor emancipated, the state of residence is the state of residence of the parent/legal guardian at the time of placement; OR the current state of residence of the parent/legal guardian.

Agency Response: DMMA agreed and the change was made.

Comment: Two commenters suggested in Section 14110.9(c) it would be clearer to add another “or” between the first two bullet points. The addition would clarify that for any institutionalized individual who became incapable of indicating intent before age 21, the state of residence is that of the parent applying for Medicaid on behalf of the individual; OR the state of residence of the parent/legal guardian at the time of placement.

Agency Response: DMMA agreed and the change was made.

Comment: Two commenters questioned if in Section 14110.11(b) on institutionalized individuals capable of indicating intent, the agency should clarify whether this policy only applies to institutionalized individuals age 21 or over. The commenters also suggested adding a citation to the applicable federal regulation.

Agency Response: DMMA appreciates the comment and after reviewing the federal regulations at 42 CFR 435.403 State Residency, DMMA is withdrawing this section and finds no federal guidance for Delaware related to this issue.

DMMA is pleased to provide the opportunity to receive public comments and greatly appreciates the thoughtful input given by:

- Governor’s Advisory Council For Exceptional Citizens
- State Council for Persons with Disabilities

FINDINGS OF FACT:

The Department finds the proposed changes as set forth in the August 2019 *Register of Regulations* should be adopted with additions. The Department finds that the proposed does not require further public notice or comment under the APA because the amendments are non-substantive pursuant to 29 Del.C. §10118(c).

THEREFORE, IT IS ORDERED, that the proposed regulation to amend Division of Social Services Manual (DSSM) regarding state residency documentation requirements, specifically, to align policy with current practice, is adopted and shall be final effective October 11, 2019.

9/12/19

Date of Signature

Kara Odom Walker, MD, MPH, MSHS, Secretary,
DHSS

14110 State Residency

An applicant or beneficiary must be a Delaware resident.

17 DE Reg. 503 (11/01/13)

14110.1 Definitions

The following words and terms, when used in the context of these policies, will have the following meaning unless the context clearly indicates otherwise:

~~“Incapable of Indicating Intent to Reside in Delaware” means one of the following applies to the individual:~~

- ~~individual has an I.Q. of 49 or less or has a mental age of 7 or less.~~
- ~~individual is judged legally incompetent.~~
- ~~individual is found incapable of indicating intent based on medical documentation obtained from physician, psychologist, or other person licensed by the State in the field of mental retardation.~~

Per 42 CFR 435.403(b), “Institution” has the same meaning as Institution and Medical Institution as defined in 42 CFR 435.1010. For purposes of state placement, the term also includes foster care homes, licensed as set forth in 45 CFR 1355.20, and providing food, shelter, and services to one or more persons unrelated to the proprietor.

Per 42 CFR 435.403(c), an individual is “Incapable of indicating intent” if the individual –

- Has an I.Q. of 49 or less or has a mental age of 7 or less, based on tests acceptable to the Delaware Division of Developmental Disabilities;
- Is judged legally incompetent; or
- Is found incapable of indicating intent based on medical documentation obtained from a physician, psychologist, or other person licensed by the State in the field of intellectual disability.

17 DE Reg. 503 (11/01/13)

14110.2 Placement by State in an Out-Of-State Institution

(42 CFR 435.403 (e))

An individual who is placed in an institution in another State by a Delaware agency including an entity recognized under State law as being under contract with the State for such purposes is considered a Delaware resident. The State arranging or actually making the placement is considered as the individual's State of residence. Any action beyond providing

information to the individual and the family constitutes arranging or making a State placement.

17 DE Reg. 503 (11/01/13)

14110.3 Actions which do not Constitute State Placement

(42 CFR 435.403 (e))

The following actions do not constitute State placement:

- a. Providing basic information to the individual about another State's Medicaid program and information about the availability of services and facilities in another State.
- b. Assisting an individual in locating an institution in another State, provided the individual is capable of indicating intent and independently decides to move.
- c. A When a competent individual leaves the facility in which he/she is placed by State, the individual's State of residence for Medicaid purposes is the State where the individual is physically located.

17 DE Reg. 503 (11/01/13)

14110.4 Lack of Appropriate Facility

(42 CFR 435.403 (e))

Where a placement is initiated by a State because the State lacks a sufficient number of appropriate facilities to provide services to its residents, the State making the placement is the individual's State of residence.

17 DE Reg. 503 (11/01/13)

14110.5 [Reserved]

14110.6 Individuals Receiving a State supplementary payment (SSP)

Per 42 CFR ~~[438.403(f)]~~ 435.403(f)]

Individuals of any age who are receiving an SSP, the State of residence is the State paying the SSP.

14110.7 Individuals Receiving Title IV-E Payments

Per 42 CFR ~~[438.403(g)]~~ 435.403(g)]

Individuals of any age who are receiving Federal payments for foster care or adoption assistance under title IV-E of the Social Security Act, the State of residence is the State where the child lives.

14110.5 [~~14110.8~~ 14110.8] Individuals Under Age 21

42 CFR 435.403(i)

For an individual under age 21 who is not eligible for Medicaid based on receipt of assistance under title IV-E of the Act, as addressed 14110.7 of this section, and is not receiving a State supplementary payment, as addressed in paragraph 14110.6 of this section, the State of residence is as follows:

- a) For an individual who is capable of indicating intent and is married or emancipated from his or her parent, and is not residing in an institution, the State of residence is where the individual is living; and
 - intends to reside including without a fixed address, or
 - has entered the state with a job commitment or seeking employment (whether or not currently employed).
- b) For an individual not described in a) and not living in an institution, the State of residence is:
 - the state where the individual resides including without a fixed address; or
 - the State of residency of the parent or caretaker, in accordance with 14110.9 of this section, with whom the individual resides.
- c) For an institutionalized individual who is neither married nor emancipated, the State of residence is:
 - the parent's or legal guardian's State of residence at the time of placement (if a legal guardian has been appointed and parental rights are terminated, the State of residence of the guardian is used instead of the parent's); **[or]**
 - the parent's or legal guardian's current State of residence if the individual is institutionalized in that same State (if a legal guardian has been appointed and parental rights are terminated, the State of residence of the guardian is used instead of the parent's); or
 - the State of residence of the individual who files an application is used if the individual has been abandoned by the parents (including deceased parents)[,] and there is no legal guardian, and is institutionalized in that state.

17 DE Reg. 503 (11/01/13)

14110.6 [14100.9 14110.9] Individuals Age 21 and Over
42 CFR ~~435.503(h)~~ 435.403(h)]

For an individual over age 21 who is not eligible for Medicaid based on receipt of assistance under title IV-E of the Act, as addressed 14110.7 of this section, and is not receiving a State supplementary payment, as addressed in paragraph 14110.6 of this section, the State of residence is as follows:

- a) For an individual not residing in an institution, the State of residence is the state where the individual is living and:
 - intends to reside including without a fixed address; or
 - has entered the state with a job commitment or seeking employment (whether or not currently employed).
- b) For an individual not residing in an institution and who is not capable of stating intent, the State of residence is the state where the individual is living.
- c) For any institutionalized individual who became incapable of indicating intent before age 21, the State of residence is: ~~the parent's or legal guardian's State of residence at the time of placement or if a legal guardian is appointed and parental rights are terminated, the State of residence of the guardian is used.~~
 - That of the parent applying for Medicaid on the individual's behalf, if the parents reside in separate States (if a legal guardian has been appointed and parental rights are terminated, the State of residence of the guardian is used instead of the parent's); [or]
 - The parent's or legal guardian's State of residence at the time of placement (if a legal guardian has been appointed and parental rights are terminated, the State of residence of the guardian is used instead of the parent's); or
 - The current State of residence of the parent or legal guardian who files the application if the individual is institutionalized in that State (if a legal guardian has been appointed and parental rights are terminated, the State of residence of the guardian is used instead of the parent's).
 - The State of residence of the individual or party who files an application is used if the individual has been abandoned by his or her parent(s), does not have a legal guardian and is institutionalized in that State.
- d) For any institutionalized individual who became incapable of indicating intent at or after age 21, (irrespective of any type of guardianship) the State of residence is the state in which the individual is physically present, except where another state makes a placement.
- e) For any other institutionalized individual, the State of residence is the state where the individual is living and intends to reside.

17 DE Reg. 503 (11/01/13)

14110.7 14110.10 Specific Prohibitions for Denial or Termination of Eligibility
42 CFR 435.403(j); 42 CFR 435.956(c)(2)

Per 42 CFR 435.956(c)(2), Evidence of immigration status may not be used to determine that an individual is not a State resident.

A State cannot deny Medicaid eligibility to otherwise qualified resident of the State because:

- a) ~~to an otherwise qualified resident of the State because the~~ The individual's residence is not maintained permanently or at a fixed address.
- b) ~~because of a durational residence requirement.~~ The individual has not resided in the State for a specific period of time; or
- c) ~~to an institutionalized individual because the~~ An institutionalized individual did not establish residence in the community prior to admission to an institution.
- d) ~~or terminate a resident's Medicaid eligibility due to temporary absence from the State if the person intends to return when the purpose of the absence has been accomplished, unless another State has determined that the person is a resident there for purposes of Medicaid.~~
- e) ~~or wait to approve Medicaid eligibility in situations where the individual has moved to Delaware from another State and the Medicaid case is still open in the former State. The individual is no longer a resident of the former State and is ineligible in that State. The case may not be closed yet due to administrative processes.~~

A State cannot terminate Medicaid eligibility for an otherwise qualified resident of the State due to temporary absence from the State if the person intends to return when the purpose of the absence has been accomplished, unless another State has determined that the person is a resident there for purposes of Medicaid.

A State cannot wait to approve Medicaid eligibility in situations where the individual has moved to Delaware from another State and the Medicaid case is still open in the former State. The individual is no longer a resident of the former State and is ineligible in that State. The case may not be closed yet due to administrative processes.

17 DE Reg. 503 (11/01/13)

14110.8 14110.11 Exceptions to General Residency Rules

When ~~[one of]~~ the following exists, it supersedes the general residency rules:

- a) An individual receiving a State Supplementary Payment is a resident of the State making the payment.
- b) An individual receiving Federal payments for foster care under title IV-E of the Social Security Act, and an individual for whom there is an adoption assistance agreement in effect under title IV-E of the Social Security Act, is a resident of the State where the individual is living.
- c) An individual to be placed in an institution in another state is a resident of the State that arranges the placement.
- d)a) When two or more States cannot resolve which State is the State of residence, the State in which the individual is physically located is the State of residence.
- e)~~[b]~~ An institutionalized individual capable of indicating their intent to return home to their principal place of residence is a resident of the State where their principal place of residence is located. [When an institutionalized individual is capable of indicating their intent to return home to their principal place of residence located in another state, the individual will not be considered a Delaware resident since their intent is not to remain in Delaware.]

17 DE Reg. 503 (11/01/13)

14110.8.1 Prohibitions

A State cannot deny Medicaid eligibility:

- a. to an otherwise qualified resident of the State because the individual's residence is not maintained permanently or at a fixed address.
- b. because of a durational residence requirement.
- c. to an institutionalized individual because the individual did not establish residence in the community prior to admission to an institution.
- d. or terminate a resident's Medicaid eligibility due to temporary absence from the State if the person intends to return when the purpose of the absence has been accomplished, unless another State has determined that the person is a resident there for purposes of Medicaid.
- e. or wait to approve Medicaid eligibility in situations where the individual has moved to Delaware from another State and the Medicaid case is still open in the former State. The individual is no longer a resident of the former State and is ineligible in that State. The case may not be closed yet due to administrative processes.

14110.8.2 Exceptions

When one of the following exists, it supersedes the general residency policy.

- a. Exception for individuals receiving a State Supplementary Payment, the State of residence is the State making the payment.
- b. Exception for individuals of any age who are receiving Federal payments for foster care under title IV-E of the Social Security Act, and individuals for whom there is an adoption assistance agreement in effect under title IV-E, the State of residence is the State where the individual is living.
- c. Exception where a State or agency of the State, including an entity recognized under State law as being under contract with the State, arranges for an individual to be placed in an institution in another State, the State arranging that placement is the individual's State of residence.
- d. Exception when residency is disputed – When two or more States cannot resolve which State is the State of residence, the State in which the individual is physically located is the State of residence.
- e. Exception when an institutionalized individual is capable of indicating their intent to return home to their principal place of residence located in another state, the individual will not be considered a Delaware resident since their intent is not to remain in Delaware.

15 DE Reg. 362 (09/04/11)

14340 Ineligible Aliens

Some aliens may be lawfully admitted to the U.S. as a nonimmigrant for a temporary or specified period of time. These aliens are not eligible for Medicaid because of the temporary nature of their admission status. An ineligible alien is not eligible for emergency services and labor and delivery only. A U.S. born child of an ineligible alien is also not eligible for Medicaid.

The following categories of individuals are ineligible aliens:

- Foreign students

- Visitors for business or pleasure, including exchange visitors
- Temporary workers including agricultural contract workers
- Foreign government representatives on official business and their families and servants
- Aliens in travel status while traveling directly through the U.S.
- Crewmen on shore leave
- Treaty traders and investors and their families
- Members of foreign press, radio, film, or other information media and their families

Ineligible aliens may present the following documentation:

- Form I-94 Arrival-Departure Record with codes other than those listed for qualified aliens, such as a nonimmigrant code
- Form I-185 Canadian Border Crossing Card
- Form I-186 Mexican Border Crossing Card
- Form I-95A Crewman's Landing Permit

13 DE Reg. 1540 (06/01/10)

14340.1 Medicaid Eligibility for Certain Ineligible Aliens

In some cases, an alien in a currently valid nonimmigrant classification may meet state residency requirements. The alien may possess valid employment authorization documents such as Form I-688B or Form I-766.

In these cases, the nonimmigrant may be eligible for emergency services and labor and delivery only. Ineligible aliens are not eligible for any long term care Medicaid program. A U.S. born child of one of these aliens may be eligible for full Medicaid.

13 DE Reg. 1540 (06/01/10)

23 DE Reg. 303 (10/01/19) (Final)