

# **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**

#### **State Residency**

#### **NATURE OF THE PROCEEDINGS:**

Delaware Health and Social Services (“Department”) / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend the Delaware Division of Social Services Manual regarding *State Residency*. 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 July 2011 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by July 31, 2011 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 and effect of this proposal is to amend the Division of Social Services Manual (DSSM) regarding *State Residency*.

#### **Statutory Authority**

- 42 CFR §435.403, *State residence*;
- State Medicaid Manual, Eligibility Requirements, Section 33230, *State Residence*

#### **Background**

Federal regulation at 42 CFR §435.403 says that a State agency must provide Medicaid services to eligible residents of that State. Specifically, a resident is someone who lives in Delaware with the intention to remain permanently or for an indefinite period of time, or someone living in Delaware, having entered with a job commitment or for the purpose of seeking employment, whether or not the individual is currently employed. The individual must live in Delaware and meet all other eligibility requirements in order to receive Medicaid benefits.

#### **Summary of Proposal**

Each State Medicaid agency has specific guidelines for determining whether an individual satisfies the Federal criteria defining eligibility and State residency.

As such, the Division of Medicaid and Medical Assistance (DMMA) is revising the appropriate sections of the Division of Social Services Manual (DSSM) to clarify that an individual must be a Delaware resident in order to receive Delaware Medicaid. A primary residence may be excluded from eligibility if the individual intends to return to the primary residence. An individual will not be considered a Delaware resident if they intend to return to a primary residence located in another state.

The proposed changes affect the following policy sections:

- DSSM 14110.8.2, Exceptions**  
**DSSM 20310.1, Intent to Return; and,**  
**DSSM 20320.4.1, Intent to Return.**

#### **Fiscal Impact Statement**

The proposed revisions impose no increase in cost on the General Fund.

#### **SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE AND EXPLANATION OF CHANGE(S)**

The Delaware Developmental Disabilities Council (DDDC), the Governor’s Advisory Council for Exceptional Citizens (GACEC) and, the State Council for Persons with Disabilities (SCPD) offered the following similar observations and recommendations summarized below. The Division of Medicaid and Medical Assistance (DMMA) has considered each comment and responds as follows.

First, in the general residency section, DMMA proposes to consider a person institutionalized in Delaware a non-resident under the following circumstances:

e. Exception when an institutionalized individual intends 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.

There are multiple problems with this approach.

A. If the institutionalized individual has a guardian or has an I.Q. of 49 or less, federal regulations render the individual's "intent" immaterial. See 42 C.F.R. §435.403(c).

**Agency Response:** That is correct. This exception does not apply to institutionalized individuals with a guardian or an IQ of 49 or less. The individual would/could be a considered a Delaware resident. Property owned in another state would be a counted resource unless it is used by a spouse and/or dependent relative during the individual's absence. To enhance clarification, DMMA adds the phrase "is capable of indicating their intent" to item "e" of DSSM 14110.8.2 above.

B. Likewise, the "next of kin" arguably determines place of abode/residency for individuals residing in licensed long-term care facilities who are determined incompetent by the attending physician. See Title 16 Del.C. §§1121(34) and 1122.

**Agency Response:** The individual would/could be a considered a Delaware resident. Property owned in another state would be a counted resource unless it is used by a spouse and/or dependent relative during the individual's absence.

C. If the individual intends to return to a former residence on a temporary basis, Delaware residency should be unaffected. See 42 C.F.R. §435.403(j)(3) which recites as follows:

(3) The agency may not deny or terminate a resident's Medicaid eligibility because of that person's 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.

For example, if an individual's elderly parent developed a terminal illness and the individual returns to the out-of-state family home to provide temporary care, the proposed DMMA standard would compel a finding of non-Delaware residency contrary to federal law.

**Agency Response:** This exception does not preclude an individual's right to a temporary absence out of the state of Delaware.

Second, in the context of long-term care, DMMA is narrowing the resource exclusion for a principal place of residence if the individual intends to return home. See proposed §§20310.1.1 and 20320.4.1. The current regulations would exclude the residence even if out-of-state. The proposed regulations would only permit a resource exclusion if the residence is in Delaware. We could not locate any federal law or regulation which requires Delaware to only exclude a Delaware principal place of residence. The analogous SSI resource regulation [20 C.F.R. §416.1212] excludes the value of the principal place of residence regardless of location. Moreover, it is anomalous to exclude an out-of-state principal residence if used by a spouse or dependent relative. See §20310.1.2. Finally, the following illustrations would appear to undermine the validity of the proposed regulation:

A 20 year old with a principal place of residence in Elkton, Maryland suffers a traumatic brain injury in a motorcycle accident. He undergoes rehabilitation in Delaware with expectation of recovery and returning home in 1 year and is appointed a Delaware guardian prior to placement in an institution. The 20 year-old's state of residence is that of the guardian by operation of law pursuant to 42 C.F.R. §435.403(h)(4)(i). The 20 year old is a Delaware resident for Medicaid purposes but his Maryland principal place of residence should be an exempt resource.

An 80 year old living alone in Pennsylvania experiences a stroke, is no longer able to live independently, and is "taken in" by her adult daughter living in Delaware to provide care. After 3 months, the daughter realizes her mother requires more care than the family can provide. The mother applies and is admitted to a Delaware nursing home located near the daughter's residence to facilitate regular visits. The mother has the capacity to declare, and does declare, that she likes the nursing home and intends to remain there indefinitely (e.g. as long as she needs that level of care). This satisfies requirements of Delaware residency for Medicaid purposes [20 C.F.R. §435.403(i)]. The mother also declares that, if she sufficiently recovers from the effects of the stroke, she intends to return to her principal residence in Pennsylvania (with or without part-time caregivers). This satisfies the federal requirements to exclude the Pennsylvania residence.

**Agency Response:** DMMA is narrowing the resource exclusion for a principal place of residence if it is located out of the state of Delaware. The individual would be able to pursue Medicaid through the state where their primary residence is located.

## FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the July 2011 *Register of Regulations* should be adopted.

**THEREFORE, IT IS ORDERED**, that the proposed regulation regarding *State Residency* is adopted and shall be final

effective September 10, 2011.

Rita M. Landgraf, Secretary, DHSS

## **DMMA FINAL ORDER REGULATION #11-37**

### **REVISIONS:**

#### **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 [intends 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.

*(Break in Continuity of Sections)*

#### **20310.1.1 Intent to Return**

The principal place of residence, if located in Delaware, may be excluded if the individual intends to return home after any length of time.

Temporary Institutionalization - If the attending physician has certified that a recipient is likely to return to his own home within a definite period (not to exceed 2 months) up to \$75.00 per month may be protected for maintenance of the home.

*(Break in Continuity of Sections)*

#### **20320.4.1 Intent to Return**

~~The individual intends to return home. The applicant must be able to express the desire to return home to their principal place of residence located in Delaware. The record must include a written statement of intent to return to the home. If applicant gives intent verbally to DSS social worker this should be noted as part of the case record. The case record must indicate if the applicant gives intent verbally to DMMA social worker.~~

~~If the statement is written by someone other than applicant writes the statement, there must be an indication that this is in fact the intent of the applicant (i.e. signature or mark of applicant). If an institutionalized applicant/recipient is mentally capable of indicating that he intends to return to his principal place of residence in Delaware (even if medical evidence indicates that he will never recover sufficiently to return home), then the home may be excluded as a resource. In no case can the family declare this intent for the applicant/recipient.~~

**15 DE Reg. 362 (09/01/11) (Final)**