

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF MEDICAID AND MEDICAL ASSISTANCE
Statutory Authority: 31 Delaware Code, Ch. 5, Section 512 (31 **Del.C.** §512)

PROPOSED

PUBLIC NOTICE

DRA 2005 Income First Rule

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) intends to amend the Division of Social Services Manual (DSSM) regarding Section 6013 of the Deficit Reduction Act (DRA) of 2005 requiring all states follow the "Income First" rule.

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) 255-4454 by August 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 PROPOSAL

Statutory Authority

Section 1924 of the Social Security Act (42 U.S.C. 1396r-5(d)), as amended by the Deficit Reduction Act of 2005 (Public Law 109-171), enacted on February 8, 2006

Background

When one spouse enters a long-term care facility and the other remains in the community, the Division of Medicaid and Medical Assistance (DMMA) makes an attribution of the couple's financial resources to allocate the amount of resources to be protected for the community spouse. If the couple believes that the amount of protected resources will not generate enough income for the community spouse, the couple can appeal the attribution decision. The amendment to the Division of Social Services Manual (DSSM) codifies the way income is considered for the appeal decision on whether to protect a higher amount of resources.

The Deficit Reduction Act (DRA) of 2005, Section 6013 amends the Federal Medicaid statute to require the application of "Income First" rule in applying community spouse's income before assets in providing support of the community spouse.

Section 6013 mandates that the State must consider all income of the institutionalized spouse that can be allocated to the community spouse, in order to bring the community spouse's income up to the minimum monthly maintenance needs allowance (MMMNA), before raising the community spouse's resource allowance to adequately provide for that income.

This mandate of the income first rule applies to transfers and allocations made on or after the date of enactment by individuals who become institutionalized spouses on or after such date.

Summary of Proposed Change

The Minimum Monthly Maintenance Needs Allowance (MMMNA) is the amount of money necessary to raise the community spouse's income to the level of his/her monthly needs, and shall be obtained from the monthly income of the institutionalized spouse. In cases where the client became an institutionalized spouse on or after February 8, 2006, the community spouse resource allowance must use all of the client's available income and the community spouse's income to meet the community spouse's MMMNA before any resources are used to generate interest income to meet the allowance.

Prior to enactment of the Deficit Reduction Act of 2005, using the income first methodology was optional. Under the new federal law, using income first is mandatory in all situations. Although the Department's calculation for the needs of the spouse of the client uses income first, States were not required to use the income first methodology. The new rules at DSSM 20950.1 and 20970.1 include language which requires DMMA to use an income first approach before allocating additional resources to the community spouse. All available income of the institutionalized spouse must be considered before allocating additional resources to the community spouse.

DMMA PROPOSED REGULATION #06-29

REVISIONS:

20950 Initial Eligibility Determinations

Determine couples' combined countable resources for the month of application. Deduct from the couples' countable resources owned at the time of application a protected amount which is the greater of the following amounts:

the community spouse resource allowance (provided it does not exceed the maximum)

OR

the current State spousal share (\$25,000)

Compare the remaining resources to the Medicaid resource limit of \$2,000. If the remaining resources are over \$2,000, the institutionalized spouse is ineligible until the combined countable resources are reduced to the greater of the following:

the community spouse resource allowance plus \$2000

OR

the current State spousal share (\$25,000) plus \$2,000

An institutionalized spouse who (or whose spouse) has excess resources shall not be found ineligible per Section 1924 (c)(3)(C) of the Social Security Act where the state determines that denial of eligibility on the basis of having excess resources would work an undue hardship. Resources may be depleted in whatever manner the client/spouse wishes as long as there is no transfer for less than fair market value. See Section 20350.6 Transfer of Assets.

Once eligibility has been established, resources not used to determine eligibility for institutionalized spouses (i.e., the amount of spousal resource allowances) may be transferred to community spouses to assist such spouses in meeting their needs in the community. Thus, resources are not merely deemed available (or attributed) to community spouses in initial eligibility periods, but are actively made available to meet their needs in the community. Spouses who intend to transfer resources for this purpose are encouraged to do so as soon as is practicable before the first regularly scheduled redetermination of eligibility under.

Resources transferred to community spouses as well as other specified parties, without receiving fair market value for the property transferred, do not adversely affect continuing eligibility of institutionalized spouses. See Section 20350.6 Transfer of Assets

NOTE: Although the revised transfer of assets provisions allow the institutionalized spouse to transfer all of his or her resources to the community spouse without regard to the resource allowance, the initial eligibility determination will still attribute resources in excess of the community spouse allowance to the institutionalized spouse.

After eligibility has been determined the eligibility worker must provide a written notice to both spouses including the following information as appropriate:

- the amount of combined countable resources at the beginning of the first continuous period of

- institutionalization;
- the method used to compute the community spouse resource allowance, and
- institutionalized spouses' right to rebut through a fair hearing ownership or availability of income and resources.

20950.1 Application of “Income First” Rule in Applying Community Spouse’s Income Before Assets in Providing Support of Community Spouse

This policy relates to the procedure described in §1924(d) of the Social Security Act (42 U.S.C. §1396r-5) for increasing the amount of the married couple’s resources that are not counted in determining the institutionalized spouse’s eligibility for Medicaid, in order to protect income for the spouse who is remaining in the community (community spouse).

Section 6013 of the Deficit Reduction Act of 2005 (Public Law 109-171), enacted on February 8, 2006, mandates the State must consider all income of the institutionalized spouse that can be allocated to the community spouse, in order to bring the community spouse’s income up to the minimum monthly maintenance needs allowance (MMMNA), before raising the community spouse’s resource allowance to adequately provide for that income.

The income first methodology requires that an institutionalized spouse who applies for Medicaid must first divert income to his or her community spouse (who is not applying for Medicaid) before the institutionalized spouse may increase the amount of the couple’s resources that would be protected from consideration in evaluating the institutionalized spouse’s Medicaid eligibility. This is referred to as the “income first” methodology for determining the extent of protection of the couple’s assets and applies to transfers and allocations of income and resources made on or after the date of enactment by individuals who become institutionalized spouses on or after such date.

(Break In Continuity of Sections)

20970 Fair Hearings

Either spouse can appeal the computation of the 1/2 spousal share, how resources are calculated for initial eligibility purposes, or the amount of the community spouse resource allowance. In addition, if either spouse establishes that the resource allowance is inadequate to bring the community spouse's income up to the minimum income allowance level + excess shelter, the resource allowance can be increased so that this level is reached.

This would likely occur in instances in which the spouses' combined income falls below the minimum income allowance level. The community spouse may need income generated from resources to supplement existing income. Hearings requested on the basis of these computations must be conducted within 30 days from the date of request.

20970.1 Income First Policy for Increasing the Spousal Resource Allowance to Compensate for Insufficient Income

In nursing facility cases with a community spouse, the institutionalized spouse can make a request or file an appeal to increase the community spouse resource allowance (CSRA) to produce additional income for the community spouse. The hearing officer, as appropriate, may then increase the CSRA to an amount that is adequate to produce income that equals, but does not exceed, the MMMNA.

For Home and Community Based Services Waiver applicants/recipients see DSSM 20720.2.

10 DE Reg. 283 (08/01/06) (Prop.)