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

Long Term Care Medicaid
20400.9.1.1 Treatment of Special Needs Trusts

NATURE OF THE PROCEEDINGS

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend a rule in the Division of Social Services Manual (DSSM) used to determine eligibility for the Medicaid Long Term Care Program. 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 December 2006 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by December 31, 2006 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSED CHANGE

Statutory Authority

Section 1917(d)(4)(A) of the Social Security Act, *Liens, adjustments and recoveries; transfer of assets*

Background

In 1993, Congress created an exception under the amendments to the Omnibus Budget and Reconciliation Act (OBRA '93) which specifically authorized the use of Supplemental Needs Trusts for the benefit of individuals who are under the age of 65 years and disabled according to Social Security standards. The Social Security Operations Manual authorizes the use of Supplemental Needs Trusts to hold non-countable assets. A special needs trust is a revocable or irrevocable trust established with the assets of a client under age 65 who meets the Supplemental Security Income (SSI) program's disability criteria. The trust must be established for the client's benefit by his parent, grandparent, legal guardian, or a court.

Summary of Proposed Change

The purpose of this amendment is to correct a procedural error in the DSSM policy manual and to provide consistency with the Social Security's Program Operations Manual System (POMS) for the purposes of determining eligibility for Long Term Care Medicaid. Guidance for this regulatory action is based on POMS SI 01120.203.

Current policy states *"The Medical Review Team (See Section 20102.2.2) has determined that the individual is disabled using the State of Delaware's Determination of Disability for Medicaid procedure."* Determining disability is not a function that is performed by the Medical Review Team. The revised policy states that the individual should be disabled according to the SSI standards.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE

The State Council for Persons with Disabilities (SCPD) offered the following observations and recommendations summarized below. DMMA has considered each comment and responds as follows:

SCPD understands that the rationale for the amendments is to correct some references to achieve conformity with federal standards. The current regulation literally requires the trust beneficiary to be a current SSI or SSDI beneficiary. To the contrary, federal law only requires the beneficiary to meet SSI medical disability standards.

First, it is preferable for DMMA to delete the reference to conducting the disability assessment based on DDS criteria. SCPD previously endorsed substituting a reference to SSI standards for DDS standards in the context of pooled trusts. See DMMA final regulations adopted at 10 **DE Reg**. 558 (September 1, 2006).

Agency Response: DMMA acknowledges the concurrence.

Second, it is likewise preferable to delete the requirement that the beneficiary be "receiving either Title II or SSI benefits". The attached SSA POMS SI 01120.203 and Section 1614(a)(3) of the Social Security Act only require that the beneficiary meet SSI medical disability criteria.

Agency Response: The receipt of either Title II or SSI benefits provides staff with the knowledge that the client meets the medical criteria without requiring additional proof.

Third, DMMA's deletion of the reference to the Medical Review Team determining eligibility is problematic. The Division recites as follows:

Determining disability is not a function that is performed by the Medical Review Team. The revised policy states that the individual should be disabled according to the SSI standards.

The concern with these statements is that some expert needs to make a medical decision that the beneficiary meets the SSI medical disability standards. If the beneficiary is a current SSI recipient, then DMMA can simply defer to that status. However, there will be some individuals who are not current SSI recipients who nevertheless meet SSI medical disability standards. If the Medical Review Team will not perform the necessary assessment for such individuals, who will?

For these reasons, DMMA may wish to consider revising its second bullet as follows:

The individual meets the medical disability standards of the SSI program as defined in Section 1614(a)(3) of the Act. For current SSI or SSDI beneficiaries, DMMA will defer to the SSA's determination of medical disability. For non-SSI or SSDI beneficiaries who have already been determined to meet SSI medical disability standards as a prerequisite for eligibility for other DMMA programs (e.g. CCADP), DMMA will defer to that determination. For other individuals, the determination that the individual meets SSI medical disability standards will be made by the Medical Review Team (described in §20102.2.2) or receipt of expert medical certification acceptable to the Division.

Agency Response: See DSSM 20350.10.2 for disability determination criteria. DMMA has made no change to the rule language based on this comment.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the *December 2006 Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Division of Social Services Manual related to proof of disability used in determining eligibility for the Medicaid Long Term Care Program is adopted and shall be final effective February 10, 2007.

Vincent P. Meconi, Secretary, DHSS, 01/16/2007

DMMA FINAL ORDER #07-05
REVISION:

20400.9 Exceptions to the Trust Eligibility Policy

Two exceptions to the trust eligibility policy are Special Needs Trusts and Pooled Trusts for disabled individuals.

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. The trust may also cntain 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 a disabled individual who is under age 65.
- The individual is ~~receiving either Title II or SSI benefits as a disabled individual. (In this case we would accept the disability determination made for these programs~~ disabled as defined by the SSI program in 1614(a)(3) of the Act.
- The trust must be established by the disabled individual's parent(s), grandparent(s), legal guardian(s) or a court.
- ~~The Medical Review Team (See Section 20102.2.2) has determined that the individual is disabled using the State of Delaware's Determination of Disability for Medicaid procedure.~~

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) (Final)