



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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The Honorable John Carney
Governor

John McNeal
SCPD Director

MEMORANDUM

DATE: November 30, 2017

TO: Ms. Nicole Cunningham, DMMA
Planning & Policy Development Unit

FROM: Ms. Jamie Wolfe, Chairperson
State Council for Persons with Disabilities

RE: 21 DE Reg. 387 [DMMA Proposed Special Need Trust Regulation (11/1/17)]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Medicaid and Medical Assistance (DMMA) proposal to amend the special needs trusts sections of the Delaware Social Services Manual (DSSM). The proposed regulation was published as 21 DE Reg. 387 in the November 1, 2017 issue of the Register of Regulations.

Background is provided in the attached August 2, 2017 CMS guidance. Historically, a parent, grandparent, guardian, or court could establish a special needs trust containing the assets of an individual under age 65 with a disability. To qualify as an exempt asset for purposes of Medicaid, the trust was required to direct repayment of all medical assistance paid by the state on the individual's behalf upon the individual's death.

Section 5007 of the federal CURES Act amended the special needs trust standards to allow a beneficiary to establish such a trust in addition to a parent, grandparent, guardian or court. The new authorization is effective for trusts established on or after December 13, 2016.

DMMA is now amending its regulations to conform to the change in federal law. However, the revision to §20400.9.1 is grammatically incorrect and contains the wrong effective date. The Division should consider the following revision:

~~[For]~~ Special Needs Trusts created on or after December 13, 201~~[76]~~ 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.

Subject to correcting the above section, the SCPD is endorsing the proposed regulation since the initiative benefits individuals with disabilities and implements federal law.

Thank you for your consideration and please contact SCPD if you have any questions regarding our position on the proposed regulation.

cc: Mr. Steve Groff, DMMA
Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

21reg387 dmma special need trust 11-27-17



Center for Medicaid and CHIP Services

SMD # 17-001

**RE: Implications of the Cures Act
for Special Needs Trusts**

August 2, 2017

Dear State Medicaid Director:

Section 5007 of the 21st Century Cures Act (the "Cures Act"), Pub. L. No. 114-255, supports the independence of individuals with disabilities by permitting them to set up a special needs trust on their own behalf, rather than having to rely on a third party to do so. Special needs trusts generally permit individuals living with disabilities who are under age 65 to set aside assets to meet their needs without impacting their eligibility for Medicaid. This letter provides guidance to states on the implications of section 5007 of the Cures Act, entitled "Fairness in Medicaid Supplemental Needs Trusts," for individuals who have disabilities.

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. In the case of a revocable trust, the general rule is that the corpus is considered an available resource to the individual; any distributions from the corpus to or for the benefit of the individual are considered income to the individual; and any distributions or payments from the corpus used for other purposes are treated as an asset transfer subject to the provisions of section 1917(c) of the Act. Under section 1917(c) of the Act, an asset transfer may result in a coverage penalty if the individual seeks coverage of nursing facility or other long-term services and supports but did not receive fair market value in return for the transfer.

In the case of an irrevocable trust, if payments may be made to or for the individual's benefit from any portion of the corpus, that portion is considered an available resource to the individual, and payments from that portion made to or for the individual's benefit are considered income to the individual; otherwise, any payment made from the portion of an irrevocable trust that may be used for the individual's benefit is treated as an asset transfer subject to section 1917(c) of the Act. Further, if the individual's income or assets are used to fund an irrevocable trust, any portion of the corpus funded by such income or assets from which no payment may be made to or for the benefit of the individual under any circumstances shall be treated, under section 1917(d)(3)(B) of the Act, as an asset transfer subject to section 1917(c) of the Act.¹

¹ If only a portion of the individual's assets placed in the trust is unavailable to or for the benefit of the individual, that portion is considered an asset transfer subject to the rules of section 1917(c) of the Act.

Under section 1917(d)(4) of the Act, certain types of trusts (“section 1917(d)(4) trusts”) are not subject to the rules set forth in section 1917(d)(3) of the Act described above, but instead, are most commonly evaluated under the general trust rules of the supplemental security income program (SSI) program.² Under these rules, the corpus of a revocable trust which is funded with an individual’s assets and which can be used for the individual’s benefit is generally a countable resource to the individual, but distributions from the trust for the individual’s benefit are considered a conversion of a resource (instead of as countable income, as is generally the case under section 1917(d)(3) of the Act). Under general SSI trust rules, the corpus of an irrevocable trust funded with an individual’s assets is not generally a countable resource to the individual, even if the corpus may be used for the individual’s benefit, although payments from the irrevocable trust to the individual or on his or her behalf will generally be countable income to the individual.

Section 1917(c)(2)(B)(iv) of the Act also exempts from asset transfer penalties transfers of income or assets to a trust which is established solely for the benefit of a person with a disability under age 65. Thus, the application of SSI rules regarding irrevocable trusts, in conjunction with section 1917(c)(2)(B)(iv) of the Act, means that an irrevocable special needs trust described in section 1917(d)(4)(A) of the Act, established for a person with a disability who is under age 65 using the individual’s own assets, is neither counted as a resource nor subject to the transfer-of-asset penalties.

Special Needs Trusts Under the Cures Act

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.³

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.

Specifically, section 5007(a) of the Cures Act amended section 1917(d)(4)(A) of the Act to add “the individual” (i.e., the trust beneficiary) to the list of people who may establish a special needs

² See SI 01120.200 of the Social Security Administration’s Program Operations Manual System (POMS), “Trusts, General – Including Trusts Established Prior to 1/1/00, Trusts Established with the Asset of Third Parties and Trusts Not Subject to Section 1613(e) of the Social Security Act,” available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120200>.

³ While a special needs trust must be established using income or assets of the trust beneficiary, third party contributions to a special needs trust are permitted, provided that the individual is the sole beneficiary of the trust. (See Section 3259.7(A) of the State Medicaid Manual.)

trust on the individual's behalf. This means that a trust established on or after December 13, 2016, 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 other defining features of a special needs trust remain unchanged under the amendments made by the Cures Act – i.e., the individual must be under age 65 and have a disability; the trust must be funded, at least in part, with the individual's own income or assets; and the terms of the trust must direct that amounts remaining in the trust upon the death of the individual will be paid to the state up to an amount equal to total medical assistance paid. Trusts established prior to December 13, 2016, by an individual with a disability for his or her own benefit do not qualify as a special needs trust. However, trusts established by an eligible third party before and after this date still qualify as a special needs trust.

Please update your state's Medicaid trusts rules accordingly. If you have any questions, please contact Gene Coffey at (410) 786-2234, or gene.coffey@cms.hhs.gov, or your SOTA team lead.

Sincerely,

/s/

Brian Neale
Director