#14-477-63

Original: 2299

Office of Income Maint...
Bureau of Policy

NOV 0 7 2002

REFER TO: Karole Aldridge
Willie
OLC
Hoover
File

NAMI PENNSYLVANIA

Delaware County Chapter

P.O. Box 1493
Havertown, PA 19083

Letter was #14-477-19
Accepted to the waiver.

November 1, 2002

Edward Zogby, Director
Bureau of Policy
Department of Public Welfare
Room 431 Health & Welfare Building
Harrisburg, PA 17120

Dear Mr. Zogby:

I am writing on behalf of the Delaware County Chapter of the NAMI- PA (Pennsylvania's Voice on Mental Illness). Our Chapter has membership in excess of 200 families in Delaware County.

I have learned with alarm that DPW is proposing regulations to eliminate NMP spend down under Medical Assistance. This can only be a humanitarian disaster for approximately 7,000 Pennsylvania citizens who are dependent on NMP spend down.

Many of the 7,000 individuals suffer severe mental illnesses. Their mental stability and ability to live in the community are achieved only with medications which often cost hundreds of dollars per month. (The Medical Assistance cost, of course, is less because of negotiated reimbursement rates.) These people often receive Social Security disability benefits only a little above the threshold for regular Medical Assistance. If they are forced to buy their medications on their own, they will be thrown into utter poverty. There is a danger that many of them will forgo medication, and then decompensate and be back in the hospital at much greater expense to the public. Some will find themselves unable to afford a place to live and will end up living on the street or staying in make shift shelters such as church basements.

How can Pennsylvania balance its budget on the backs of its most needy and vulnerable citizens? That will be a humanitarian disaster right in our own backyard - not in some war-torn overseas country.

Therefore, I urge you on behalf of both the directly affected individuals and their families and loved ones not to issue the regulations which will deprive our neediest citizens of the opportunity to get prescriptions under the NMP spend down plan.

Respectfully yours,

Daniel R. Fredland
Secretary

cc: Independence Regulatory Review Commission
Editor, *Delaware County Daily Times*

d:\nami\corresp\zogby.11-1-02

MONTGOMERY BAR ASSOCIATION

100 West Airy Street / PO Box 268 / Norristown, PA 19404-0268
(610) 279-9660 / FAX (610) 279-4321
E-Mail: mail@montgomerybar.org

#14-478-39

November 1, 2002

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Dear Commission Director:

At its meeting on October 24, 2002 the Board of Directors of the 2000 member Montgomery Bar Association, the third largest county bar association in the Commonwealth, passed the enclosed resolution.

I am delivering it to you so that you have the perspective of our Association when determining how to address the issue for the benefit of all of the citizens of this great Commonwealth.

The Montgomery Bar Association will track this issue for any future follow up that may be required. We at the Montgomery Bar Association stand ready, willing and able to assist you in the analysis that is necessary to address this issue. Should you wish to discuss this issue further with the Montgomery Bar Association or need our help to develop the appropriate position on the issue, please contact: Robert C. Gerhard, Esq., MBA Elder Law Comm. Chair, Ph: 215-885-6780 or Michelle C. Berk, Esq., Elder Law Comm. Vice Chair, Ph: 215-793-4800.

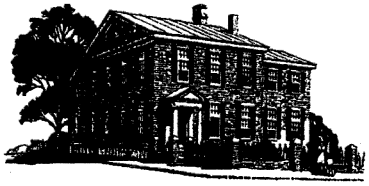
Thank you for allowing the Montgomery Bar Association to provide its expertise on this issue.

Serving the Profession and the Community since 1885

Very truly yours,

Keith B. McLennan, Esquire
President

Cc:
Edward J. Zogby, Director Department of Public Welfare ✓
Honorable Harold F. Mowery, Jr., Senate Comm. on Public Health & Welfare
Honorable Dennis M. O'Brien, House Comm. on Health and Human Services
John R. Howland, Esq., Secretary, MBA
Robert C. Gerhard, Esq., MBA Elder Law Comm. Chair
Michelle C. Berk, Esq., MBA Elder Law Comm. Vice Chair



MONTGOMERY BAR ASSOCIATION

100 West Airy Street / PO Box 268 / Norristown, PA 19404-0268
(610) 279-9660 / FAX (610) 279-4321
E-Mail: mail@montgomerybar.org

RESOLUTION OF THE MONTGOMERY BAR ASSOCIATION

WHEREAS, the Department of Public Welfare has proposed a change in the existing "resource-first" approach for calculating the applicable allowances for low-income individuals with a spouse in a nursing facility to an "income-first" approach;

WHEREAS, implementation of the existing resource-first methodology has withstood the test of years since the implementation of the settlement agreement reached under *Hurly v. Houstoun*;

WHEREAS, the proposed changes will adversely effect senior citizens across the Commonwealth by increasing the risk of spousal impoverishment; particularly when the institutionalized spouse dies and the supplemental income directed to the community spouse to meet his or her minimum monthly needs allowance is reduced or discontinued as would be the case under the income-first approach;

WHEREAS, the proposed changes have been referred to the Elder Law Committee, General Practice Committee, and the Probate ant Trusts Section of the Montgomery Bar Association for study, comment, and recommendation;

NOW, therefore, be it RESOLVED as follows:

The Board of Directors of the Montgomery Bar Association supports the existing resource-first methodology established under the case of *Hurly v. Houstoun* for determining eligibility for nursing facility care for institutionalized individuals who have community spouses with income below the monthly maintenance needs allowance.

BE IT FURTHER RESOLVED THAT:

The Montgomery Bar Association opposes the recently promulgated regulations at 55 Pa. Code Chapters 178 and 181 that abandon the existing *Hurly* appeal procedure and for all practical purposes changes Pennsylvania from a resource-first state to an income-first state thereby denying numerous low-income senior citizens in the Commonwealth the opportunity to avoid impoverishment when a spouse requires nursing home care.

The foregoing was approved by the Board of Directors on October 24, 2002.

John R Howland

John R. Howland, Secretary

Serving the Profession and the Community since 1885

#14-478-38

Original: 2299

SCALES ELDER LAW *The Elder Law Office of* **KEMP SCALES**

MEMBER
National Academy of
Elder Law Attorneys

PARK BUILDING
115 SOUTH WASHINGTON STREET
POST OFFICE BOX 346
TITUSVILLE, PENNSYLVANIA 16354

TELEPHONE: (814) 827-2788
FAX: (814) 827-9521
E-MAIL: KEMP@SCALESELDERLAW.COM
INTERNET: WWW.SCALESELDERLAW.COM

KEMP C. SCALES, ESQUIRE
JOHN S. KOOKOGEY, ESQUIRE (OF COUNSEL)

Office of Income Maintenance
Bureau of Policy

NOV 0 6 2002

REFER TO: Kazole Aldridge
Willie
OLC
Hoover
File

November 1, 2002

Department of Public Welfare
Attention: Ed Zogby
Office of Income Maintenance
Bureau of Policy, Room 431
Health and Welfare Building
Harrisburg, PA 17120

Re: Proposed Rulemaking changes to Medical Assistance regulations

Dear Mr. Zogby:

I am writing to you regarding the Proposed Rulemaking changes by your office to Pennsylvania's Medical Assistance eligibility requirements, as published in the *Pennsylvania Bulletin* on October 4, 2002. I am particularly concerned about the first proposed revision, to change the Medical Assistance eligibility rule for the spouse of someone in a nursing home from the current "resource-first" approach to an "income-first" approach. Because of my work as an elder law attorney, helping Pennsylvania seniors find ways to pay for the economically devastating costs of nursing home care, I am personally acquainted with the serious effect this proposed change in the law to an "income-first" approach will have on many seniors.[1]

Certainly finding ways to save the state money when the state budget is facing a serious deficit is vitally important. But what is particularly troubling to me is that the people who will be directly affected by this change are one of the most vulnerable groups in our state, elderly widows and widowers living on limited income, with limited resources, who had a spouse in a nursing home. Is this really the group your office should be targeting? After all, the very downturn in the economy that has created this budget crisis for Pennsylvania and other states has also created a crisis for this already vulnerable group, who in many cases have seen their retirement savings shrink dramatically

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[1] As an example of the "economically devastating" cost of nursing home care, the one nursing home in my home town of Titusville, Pennsylvania (population under 7,000) costs $65,000 a year, and that's just for room and board – prescription drugs and physical therapy can add another $5,000 to $10,000 a year. Very few of the seniors I work with have anywhere near enough savings to afford that kind of expense.

in the past year through a falling stock market or the bankruptcy of businesses such as Agway which held part of their modest savings.

The current "resource-first" approach available in Pennsylvania for an elder with income below a certain minimum level living at home (the "community spouse") who has a spouse in a nursing home (the "institutionalized spouse") is to have additional resources of the institutionalized spouse transferred to the community spouse. The amount of resources that may be transferred depends upon the income of the community spouse. The federal Medicaid law guarantees a current minimum monthly income to the community spouse of at least $1,452. But many of my clients who have a spouse in a nursing home have monthly incomes well below this figure. This is particularly true of elderly women, whose sole income is often their meager Social Security retirement check.[2] If her income is $600 per month, she can get enough of her husband's resources transferred to her (rather than spent on his nursing home care) to generate the additional $852 a month of income needed to meet her minimum needs.

Now it's true that the proposed change to an "income-first" approach would still permit her to get $1,452 per month by having $852 per month of her husband's income transferred to her.[3] So as long as her husband is alive, she is no worse off than under the "resource-first" approach. But, and here's the catch, once her husband dies, she will only be entitled to one Social Security income check, not two. And so her income will drop immediately. And substantially. Because by definition it is only elders on limited incomes – that is, incomes less than the minimum level guaranteed by the Medicaid law – that are concerned about this whole procedure in the first place, and the loss of even a few hundred dollars a month for such folks will necessarily be "substantial."

On the other hand, if Pennsylvania continues with its current "resource-first" approach, this elderly woman would be in much better shape financially after her husband died than under the "income-first" approach. When her husband first applied for Medicaid, rather than take $852 of his income, she could have instead chosen to keep more of their resources – enough more to permit her to purchase an immediate annuity that could generate the $852 per month of additional income. The significant difference here is that these additional resources, unlike the income, will not disappear when her husband dies. At the very time when she is dealing with the loss of her husband, she will not also be faced with the loss of income for the rest of her life.

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[2] In my experience, older women with spouses in a nursing home have often worked at home most of their lives and have very limited Social Security income and so are particularly dependent on their husband's Social Security and pension to make ends meet.

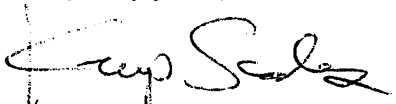
[3] This approach may prove unworkable in practice in many cases, as the income of the spouse in the nursing home is often largely (and sometimes solely) his monthly Social Security check. A recent case in the Second Circuit, *Robbins vs. DeBuono*, 281 F.3d 197 (2d Cir. 2000), held that requiring an institutionalized spouse to transfer his Social Security income to his community spouse would be in violation of federal law.

That's my concern, that this proposed change targets elderly widows and widowers who had a spouse in a nursing home, a particularly vulnerable group of our citizens and hardly the first people who come to mind as being the ones who shoulder the burden of the State's budgetary crisis.

Will the cost savings from this proposed change be so significant that they outweigh the foreseeable adverse impact on these elders? The DPW's estimate of the "projected annualized savings" from the change is $47,222 million. That sounds like a lot. But, first of all, less than half of it – $21,396 million – is the projected savings "in State funds." In other words, about 55% of the savings are being passed along to the federal government. Second, the Proposed Rulemaking does not mention the issue addressed recently by the Second Circuit in *Robbins vs. DeBuono,* referred to above, which held that to compel a spouse in a nursing home to transfer his Social Security income to his community spouse would violate the federal anti-alienation provisions of the Social Security Act. With the Social Security income of the nursing home spouse "off the table" – and, in my experience, Social Security retirement usually accounts for most, if not all, of the income of this spouse – how much would the projected savings to the state of this "income-first" approach <u>really</u> be? And finally, won't the restriction imposed by the switch to an "income-first" approach simply create a stronger incentive for seniors (at least seniors who consult with elder law attorneys) to use other available means of protecting their spouses and their life savings – such as purchasing annuities directly, or having the community spouse simply refuse to turn over excess resources to her husband in the nursing home? After all, both of these options are <u>expressly recognized</u> by the federal Medicaid law, but to date have not been widely used in Pennsylvania precisely because of its "resource-first" policy. Given the above, the projected cost savings of the switch to "income-first" may turn out to be very meager indeed.

Thank you for the opportunity to express my concerns about this proposed change in your current Medical Assistance regulations.

Very truly yours,



Kemp C. Scales

cc: The Honorable Harold F. Mowery, Jr.
Senate Committee on Public Health and Welfare
Pennsylvania Senate
Senate Box 203031
Harrisburg, PA 17120

The Honorable Dennis M. O'Brien
House Committee on Health and Human Services
Pennsylvania House of Representatives
P.O. Box 202020
Harrisburg, PA 17120

Richard Sandusky
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Original: 2299

#14-478-35

HIGH, SWARTZ, ROBERTS & SEIDEL LLP

MARLYN F. SMITH
STEPHEN G. YUSEM
GILBERT P. HIGH, JR.
PAUL BAKER BARTLE
D. BARRY PRITCHARD, JR.
THOMAS D. REES
LOIS A. NAFZIGER
MARY CUSHING DOHERTY
J. KENNETH CRONEY
JOHN A. GALLAGHER
CHERI D. ANDREWS
RONALD W. FENSTERMACHER, JR.
GREGORY L. NESTER
ERIC B. SMITH
CAREN E. MORRISSEY
ALAN W. FLENNER, P.E.
JAMES B. SHRIMP

ATTORNEYS AT LAW

40 EAST AIRY STREET
NORRISTOWN, PENNSYLVANIA 19404

ESTABLISHED 1914

(610) 275-0700
FAX (610) 275-5290
main@highswartz.com
www.highswartz.com

OF COUNSEL
RAYMOND M. SEIDEL
ROBERT B. DURHAM, JR.
GEORGE M. AMAN III
LINDLEY M. COWPERTHWAIT, JR.
JOHN P. GREGG
NANCY NEFF SOLNICK
KENNETH R. MYERS

November 1, 2002

Forwarded via Federal Express/Monday Delivery
Edward J. Zogby, Director
Bureau of Policy, Room 431
Health and Welfare Building
Harrisburg, PA 17120

Re: Proposed Rulemaking
55 PA Code, 178 and 181
"Income First Rule"

Dear Mr. Zogby:

I am writing to express my dismay and concern regarding the proposed changes to 55 PA Code 178 and 181 that would enact the "Income First Rule". The Medicare Catastrophic Coverage Act of 1988 included provisions that protect the spouse living at home (Community Spouse) from having her resources depleted when the other spouse (Institutionalized Spouse) is admitted to a long term care facility. The requirements of MCCA were designed to ensure that the Community Spouse would not be impoverished by the cost of the Institutionalized Spouse care.

First: This proposed rule making does not conform to the intentions of the General Assembly in the enactment of the statute on which the regulation is based. The statute is designed to protect and provide services for Pennsylvanian's most vulnerable citizens. This proposed rule making is inconsistent with that intent. The proposed regulations would do great harm to thousands of seniors in Pennsylvania who can least afford it.

Second: By requiring the Community Spouse to receive income first and eliminating the annuity rule, the Community Spouse will be even more impoverished if the Institutionalized Spouse dies. This will require the Commonwealth to provide additional services and benefits through other Welfare programs and will negate the savings of this proposed rule making. Under Hurly these elderly spouses are permitted to keep additional assets so that they can support themselves after the death of the Institutionalized Spouse.

One measure of a civilized society is how we treat our older citizens. The proposed rule making will change financial arrangements in determining eligibility for nursing home benefits for older married citizens and would undermine our claim as a civilized and compassionate Commonwealth.

As an elder law attorney, I have counseled hundreds of elderly citizens. There is great panic and fear when elderly people find their spouse is about to be confined to a nursing home permanently and they realize the financial devastation it will cause. It has been rewarding to advise them that their Commonwealth made provisions that may enable them to remain self-sufficient even after the death of their spouse. Why are we trying to balance the budget on the backs of these elderly, vulnerable people? Any consideration you can give in not enacting these new rules will be greatly appreciated.

Very truly yours,

Lois A. Nafziger

LAN/cpk

cc: Independent Regulatory Review Commission via Federal Express/Monday delivery
The Honorable Harold F. Mowery, Jr.
The Honorable Dennis M. O'Brien
David Sumner, Director of Policy, Fisher for Governor
Suzanne Itzko, Rendell for Governor

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Original: 2294

AARP Pennsylvania

#14-478-30

Office of Inspector General
Bureau of Policy

November 1, 2002

NOV 04 2002

Edward J. Zogby
Director, Bureau of Policy
Department of Public Welfare
Room 431, Health and Welfare Building
Harrisburg, PA 171201

REFER TO: Karole Aldridge
Willie
OLC
Homes
File

Dear Mr. Zogby,

AARP is writing regarding the publication of proposed rulemaking for the Department of Public Welfare in the October 5, 2002 Pennsylvania Bulletin.

AARP is concerned about the Department's plan to restore the "Income-First" rule in determining the amount of resources the spouse of a resident of a long-term care facility (referred to in the proposed regulation as a Community Spouse) is allowed to keep for his or her expenses. The proposed regulations cite the history of this issue and the legal case for the Department's proposal to implement this policy.

The Department claims that Pennsylvania will save $3.171 million through the implementation of this policy, along with three other changes in the Medical Assistance program. Nothing in the notice of the proposed regulations breaks this amount down, so it is impossible to determine what the savings of the change to the "Income-First" rule would be, or how many Pennsylvanians this would impact.

AARP is troubled about the effect of this proposed regulation on individuals across the Commonwealth. A Community Spouse would be forced to accept a significant reduction in the amount of funds available for their expenses. This would negatively impact a Community Spouse's ability to continue to live in their home and community. A Community Spouse must maintain a residence and live from day-to-day. In fact, many Community Spouses, while healthy enough to not require nursing home care despite being nursing home eligible, do need assistance to remain independent in their own homes. The current, "Resource-First" policy in place in Pennsylvania allows a Community Spouse a better chance to remain in the community. A change to an "Income-First" policy could result in many Community Spouses to be unable to remain in their homes for financial reasons. Because of Pennsylvania's rules regarding Medical Assistance and long-term care, a Community Spouse unable to afford the care and expense of living at home is likely to end up in a long-term care facility. This is a result the individual, who would undoubtedly prefer to remain in the community, does not want, and is a result the Commonwealth should not want, as this individual will quickly deplete all their resources and become eligible for Medical Assistance.

30 North 3rd Street, Suite 750 | Harrisburg, PA 17101 | 717-238-2277 | 717-236-4078 fax | 1-877-434-7598 TTY
James G. Parkel, President | William D. Novelli, Executive Director and CEO | www.aarp.org

AARP also considers the proposed rulemaking on this issue ill-timed. Members of the General Assembly rejected an opportunity to include this change in the Commonwealth's Budget, which was approved in June. In fact, the consideration of this issue prompted a bi-partisan group of legislators to propose legislation that would prohibit this change. The legislation has not been considered as of yet, and it seems prudent for the Department to delay consideration of this change until the will of the General Assembly is heard. In addition, the pending change of Administrations should factor into this issue. If the new Administration were to oppose this change, the cost and effort of rescinding it may equal the potential savings.

AARP's final point is the potential savings. Why have the proposed regulations not estimated the potential savings from this change? Even if this issue saved the bulk of the $3.1 million total of the four proposed changes, are the potential savings worth the impact on the lives of Community Spouses across the state? Have the increased costs to the Commonwealth of addressing the needs of Community Spouses with fewer resources, including the potential of Community Spouses requiring nursing home care, been factored into these figures?

AARP urges the Department of Public Welfare to withdraw this proposed change. The Department should look elsewhere for savings in the Medical Assistance program.

Sincerely,

Ray Landis
AARP State Legislative Representative

ORIGINAL: 2299

Elder Law Firm of
Marshall & Associates

REPLY TO:
Jersey Shore Office
303 Allegheny Street
Jersey Shore, PA 17740-1405
Telephone (570) 398-7603

Williamsport Office
49 E. Fourth Street, Suite 200
Williamsport, PA 17701-6355
Telephone (570) 321-9608

October 31, 2002

Department of Public Welfare
Edward J. Zogby, Director
Bureau of Policy, Room 431
Health and Welfare Building
Harrisburg, PA 17120

Dear Sir:

RE: Comments, Objections and Suggestions in Regard to Proposed Rulemaking (55 PA Code CHS 178 and 181 as Published at 32 Pa.B. 4854.

I am a board certified elder law attorney, and past Chair of the Pennsylvania Bar Association's Elder Law Committee. As an elder law specialist in private practice, I meet each month with many seniors who are struggling with the difficult issues that arise when they or their spouses are confronted with long term illness. This letter is written to express some of my concerns and to make some suggestions regarding the Department of Public Welfare's (the "Department's") proposed revision of the Medical Assistance (MA) eligibility requirements for long term care (LTC) services as published at 32 Pa.B. 4584.

Everyone understands that Pennsylvania is now faced with serious fiscal pressures. These financial constraints arise in part from the weakened economy which both limits revenue growth and expands the number of citizens who lack adequate health care coverage.

In this difficult financial environment, I agree that it is appropriate for the Department to consider ways to contain costs through cutting optional programs and services. The Department is charged with the difficult and complicated task of rationally and fairly expending Pennsylvania's limited Medicaid financial resources in a manner which will best promote the health and welfare of our citizens. It is critical that cuts such as those specified in these proposed regulations, if required, be implemented in a fashion that is well considered, fair, and even handed. It is equally important that the Department's authority to make the changes it proposes be clear and unequivocal.

My primary goal in making these comments is to provide the Department, the IRRC, and the Legislative standing committees with the practical viewpoint of a lawyer who specializes in elder law and who deals, on a daily basis, with the issues addressed in the proposed regulations. While I am admittedly an advocate for the elderly, my comments are intended to improve the regulations, so that each citizen of Pennsylvania will receive fair and equal treatment whether or not they are being represented by an elder law specialist.

My comments, objections, and suggestions to the proposed regulations fall into four general categories:

(1) Lack of Clarity: In many respects, the proposed regulations lack clarity. This is a particular problem because these regulations will need to be interpreted and implemented by county assistance caseworkers across Pennsylvania. Ambiguity will lead to disparate treatment of similarly situated applicants depending upon the county and the caseworker. Thus it is of great significance that the regulations be as unambiguous as possible. Regrettably, some sections of the proposed regulations are so unclear as to almost guarantee wide variations in interpretation by local county assistance offices that will lead to uneven and therefore unfair application of these rules.

(2) Statutory Conflict: In several respects, the proposed regulations seem to conflict with mandatory federal Medicaid statutes and regulations.

(3) Unreasonable intrusiveness and paperwork burdens: The costs, paperwork, and other burdens that will result from the implementation of fractional month transfer penalties will far outweigh any potential cost savings. The paperwork burden will be felt by both the public and private sector. As individuals bounce into and out of temporary Medicaid eligibility due to fractional month penalties on small transfers of assets, the need to file new PA 600s and other eligibility related paperwork will increase dramatically. Better alternatives exist which can save Medicaid dollars for the Department without creating the paperwork nightmare that will result from the regulations as stated in their current form. These less complicated alternatives are lawful, feasible, and more desirable than the Department's proposal.

(4) Costs to be borne by the regulated community. The proposed regulations will place new costs on Pennsylvania individuals and businesses who can least afford them. The regulated community that will bear the costs of these proposed regulations includes low-income community spouses, health care providers, especially nursing homes and local taxing authorities. Because Pennsylvania only provides 46% of Medicaid funding, Pennsylvania will realize only 46 cents of savings for $1.00 of cost borne by the regulated community. The harsh reality is that the costs of these regulatory changes to the regulated community will be more than double the savings realized by the Commonwealth.

(5) Policy: The change to an income-first methodology to limit spousal impoverishment is a policy decision of such import that should be left to the Legislature.

While I disagree with the wisdom of the cuts being proposed by the Department, I recognize the Department is acting responsibly in re-evaluating the rules governing eligibility for long term care services. I hope the Department will review my comments from the perspective of wanting to work together with the regulated community to achieve regulations which will be understandable and unambiguous enough to facilitate fair and even-handed treatment of applicants throughout Pennsylvania and which are in keeping with the intent of Executive Order 1996-1.

In the remainder of this letter I present my specific comments. Please note that the terms Medicaid, Medical Assistance, and MA are sometimes used interchangeably in this letter to refer to the Commonwealth's Medicaid program. In addition, the abbreviation "CS" is sometimes used in this letter to mean "community spouse," the abbreviation "IS" is sometimes used to mean "institutionalized spouse," and the abbreviation "CSRA" is

sometimes used to mean "Community Spouse Resource Allowance."

Comments Regarding Proposed Section 178.124 (b) The Change from Resource-First to Income-First

A. Background.

In 1988 Congress passed OBRA 88 (The "Medicare Catastrophic Act") in an attempt to limit the problem of "spousal impoverishment." While much of OBRA 88 was later repealed before its effective date, the spousal impoverishment provisions were retained. (Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq.)

Prior to OBRA 88, when one spouse needed nursing home care, Medicaid was available to help pay for the cost of the care if qualification requirements were met. However, in order to qualify for Medicaid, virtually all of the institutionalized spouse's income and assets were required to be spent on the cost of the care. This could have a devastating financial effect on the healthy spouse, especially if most of the income was received by the ill spouse. For example, consider a couple living on the husband's Social Security income of $800 per month and the wife's of $400 per month. They can get by on $1,200 a month income. But, if the husband needed nursing home care, the wife would have to live on only $400 per month. Congress recognized that no one should be forced to live at a poverty level just because their spouse fell prey to the wrong "uncovered" illness. In OBRA 88 Congress addressed the spousal impoverishment problem by mandating that state Medicaid rules must allow the non-institutionalized "community spouse" to retain a minimum income and asset allowance.

Currently, in 2002, these protected allowances are as follows: the community (non-institutionalized) spouse of a Medicaid eligible nursing facility resident is entitled to retain income of at least $1452 per month (the "minimum monthly maintenance needs allowance" or MMMNA). In addition, each state is required to set a minimum resource allowance for the community spouse (currently between $17,856 and $89,280 or one-half the value of the combined available resources of both spouses, whichever is higher, up to a maximum of $89,280, in 2002). Pennsylvania has chosen to set this minimum resource allowance for community spouses at the lowest possible figure - $17,856. In some cases, a greater amount can be protected through a fair hearing, 42 U.S.C § 1396r-5(e)(2), or by court order, 42 U.S.C § 1396r-5(f)(3). This community spouse resource allowance (CSRA) is in addition to $2,400 of resources allowed to the institutionalized spouse.

The question addressed in §178.124 is how the spousal resource allowance is to be calculated for low-income community spouses whose incomes fall below the minimum income allowance.

With the resource-first approach (which is currently used in Pennsylvania), the community spouse is allowed to retain and invest additional resources sufficient to bring her income up to the mandated minimum. Then, upon the death of the institutionalized spouse, the community spouse will be able to rely on those resources to continue to provide her with needed income.

With the income-first approach, potential income transfers from the institutionalized spouse are considered to be part of the community spouse's income for purposes of determining whether a higher CSRA is needed to provide the community spouse with the required income allowance. Indeed, the additional income needed can, in fact, be transferred from the institutionalized spouse to the community spouse to bring her up to the minimum income, provided the institutionalized spouse consents to the transfer. Through a change to the income-first approach, Pennsylvania will require the community spouse to spend down additional resources. Unfortunately, upon the death of the institutionalized spouse, the community spouse will be deprived of any further income transfers from the institutionalized spouse and will have insufficient remaining assets to produce the minimum income allowance. With income-first, after the death of the institutionalized spouse, the community spouse will virtually always have to get by with significantly less income and resources than under resource-first.

In §178.124 the Department proposes to change Pennsylvania from a resource-first methodology of protecting community spouses from impoverishment to an income-first approach.

Both the resource-first rule and the income-first rule apply only where there is a low-income community spouse - whose income is below the mandated minimum allowance. However, the income-first rule helps no community spouse who would not also be helped by the resource-first rule. The sole purpose of the income-first rule is to deny eligibility - thereby requiring the community spouse to spend additional assets on the institutionalized spouse's nursing home care. Although the institutionalized spouse's income will support the community spouse during the institutionalized spouse's lifetime, at his death, the community spouse's income will drop. The result is that the income-first approach may leave the community spouse destitute, but only after the death of the institutionalized spouse. The community spouse will always be better off, over the long run, with the resource-first approach since it will allow her to retain additional assets sufficient to generate the minimum required income, even at the cost of receiving less of the community spouse's income in the short run.

While the Department's proposed switch to this income-first approach may be a dubious policy decision, a United States Supreme Court decision in February of 2002 made it clear that a state could adopt either a resource-first or an income-first methodology. Wisc. Dep't of Health and Family Services v. Blumer, 525 U.S. ____, 122 S.CT. 962; 151 L.Ed.2d 395 (2002). However, as noted below, while Pennsylvania may adopt income-first, the specific methodology which the Department proposes to utilize raises serious legal issues.

B. <u>Issues Raised by Proposed Income-First Regulation (§178.124).</u>

While Pennsylvania is now free to choose to utilize either an income-first or resource-first methodology, the specific income-first regulation proposed by the Department raises a number of significant issues:

1. <u>*The Proposed Regulation Appears to Conflict with Federal Statutory Law*</u>. The specific income-first methodology proposed by the Department, which includes the attributing of the Social Security income of the Institutionalized Spouse to the

Community Spouse, appears to conflict with the anti-alienation provisions of the Social Security Act.

2. *The Proposed Regulation is Unclear in Regard to the Treatment of Spousal Refusal.* In rewriting the regulations regarding spousal impoverishment, the Department needs to clarify its treatment of the refusal of a spouse to make resources available.

3. *The Proposed Regulation Conflicts with Federal Law and Needs Clarification in Regard to the Treatment of Actuarially Sound Immediate Annuities Owned by Community Spouses*. In rewriting the regulations regarding spousal impoverishment, the Department needs to clarify the treatment of the purchase by the spouse of an actuarially sound immediate annuity and bring the regulation into conformity with Federal law.

4. *Other Aspects of the Regulation are in Need of Clarity*. The proposed income-first regulation is unclear and ambiguous to such a degree that implementation will be confusing, unreasonably difficult, and unfair to applicants for benefits.

5. *"Effective Date" Confusion*. The regulation is unclear regarding the persons who will be affected and the rules that will apply on the "effective date" of implementation.

6. *Policy Issues*. Is the proposed regulatory change to income-first a policy decision of such a substantial nature that it should be left to the legislative process?

I will address these issues in turn.

1. *The Methodology Used by the Department in §178.124(b) of the Proposed Regulations Appears to Conflict with Mandatory Federal Anti-Alienation Requirements Regarding Social Security Payments*.

   a. §178.124(b)(2)(viii) defines the institutionalized spouse's income as being the IS's total gross monthly income as described in §181.452(a). §181.452(a) (by incorporation of §181.101) specifically includes "social security benefits including Part B Medicare premiums" in the definition of the IS's total gross monthly income. Thus, under §178.124(b) of the proposed regulations the IS's Social Security income is included in the income which will be allocated to the CS.

   b. §178.124(b)(2)(viii) requires that the income of the institutionalized spouse, including Social Security income, be attributed to the community spouse for the purpose of determining the community spouse's Minimum Monthly Maintenance Needs Allowance (MMMNA).

   c. The Social Security Act at 42 U.S.C. §407 provides:

      "(a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any

bankruptcy of insolvency law."

d. Recently the Federal 2nd Circuit Court of Appeals held that when using an income-first approach, a state (in that case, New York) may not allocate the Social Security income of the IS to the CS without violating the anti-alienation provisions of the Social Security Act. *Robbins v. DeBuono,* 218 F.3d 197 (2nd Cir. 2000). The Court held that attributing (or deeming) the Social Security income of an IS to a CS (as proposed by the Department in §178.124(b)(2)(viii)) effectively alienates that income from the IS in violation of 42 U.S.C. §407.

e. New York state, while in many regards providing substantially more generous protections to community spouses than Pennsylvania,[1] did employ the income-first methodology which the Department proposes; that is, New York did impose an income-first methodology in the determination of the CSRA to determine whether the CS is entitled to retain additional resources. In so doing, New York State attributed the Social Security income of the IS to the CS. In regard to income-first, the New York's regulatory scheme was the same as Pennsylvania will implement with §178.124(b).

f. The 2nd Circuit Court of Appeals in Robbins v. DeBuono held that this attribution of the Social Security income violates 42 U.S.C. §407. Robbins v. DeBuono is thus precisely on point in regard to the Department's proposed §178.124(b)(2)(viii). The Department cannot legally allocate the Social Security income of the IS to the CS, as the Department proposes to do.

g. The question in Robbins was whether the state can deem the IS Social Security income to the CS in calculating the income of the CS for MMMNA and CSRA purposes. This is exactly the question that will arise when the proposed §178.124(b) is implemented. The Court in Robbins found that such deeming of the IS Social Security income to the CS constitutes an assignment of the IS income by "legal process" in violation of 42 U.S.C. §407(a).

"Because New York's income-first policy, which is implemented both during the fair hearing process and through the express threat of a

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[1] Like most states, New York is much more generous to, and protective of, the financial security of a low income community spouse than is Pennsylvania. For example, New York State sets the minimum CSRA at $74,820 while Pennsylvania has chosen to provide the community spouse with only the barest permissible minimum CSRA of $17,856. In addition, New York has regulations that comply with the federal Medicaid provision that the Community Spouse may refuse to use her assets beyond the protected CSRA to pay for the IS care. The spousal refusal option (discussed later in these comments), while clearly mandated under federal Medicaid law, is not addressed in Pennsylvania's regulations. This has the effect of further limiting the CS protections. In addition, Pennsylvania has taken an approach to the purchase of actuarially sound immediate annuities by spouses which is out of compliance with Federal law and has the chilling effect of denying this required protection to the community spouse, unless that community spouse is willing to take the issue to federal court (see discussion hereinafter). The Department should establish rules governing spousal refusal and clarify the rules governing the ownership of actuarially sound immediate annuities as part of this current re-writing of the rules regarding the spousal impoverishment rules.

> lawsuit, constitutes an explicit threat to use "legal process" against a community spouse who refuses to expend her husband's Social Security benefits on her own needs, and because threats - implicit or explicit - fall within our definition of "legal process," we hold that the income-first policy as applied to Social Security benefits violates Section 407." Robbins v. DeBuono, 218 F.3d 197, 202

h. The conclusion is that, while Pennsylvania may employ the income-first rule, it may not include the IS Social Security income in the income that is attributed to the CS in determining the CSRA. Pension and other income of the IS may be allocated to the CS, but not Social Security income.

Recommendation: Because of the conflict with the Social Security Act, §178.124 should be revised to provide that the Social Security income of the IS is excluded from the calculation of the IS total gross monthly income for purposes of determining the MMMNA under §178.124(b). The Regulation can continue to provide that pension and other income of the IS will be attributed to the CS in determining the CSRA.

2. *The Proposed Regulation is Unclear in regard to the Treatment of Spousal Refusal.*

a. Proposed §178.124 is a significant change in Pennsylvania's existing rules regarding the protection of community spouses from "spousal impoverishment." In rewriting the regulations regarding spousal impoverishment the Department needs to address the effects of the refusal of a community spouse to make resources available to an institutionalized spouse.

b. Federal law requires that states provide that the resources owned by the community spouse in excess of the CSRA do not make the institutionalized spouse ineligible if the community spouse refuses to make assets above the CSRA available, provided the institutionalized spouse assigns his support rights to the state. This has become to be known as "Spousal Refusal, and is mandated by 42 U.S.C. §1396r-5(c)(3). Pennsylvania's regulations are silent of spousal refusal, even though the provisions of 42 U.S.C. §1396r-5(c)(3) are mandatory and specifically supersede any other provisions of Medicaid law to the contrary.

Recommendation: Since the change to income-first will require community spouses to spend down their limited assets, potentially to as little as $17,856, it is likely that there will be a significant increase in the number of refusals by Community Spouses to make these assets available. As noted in the discussion above, the Department has failed to date to provide rules as to the implementation procedures for these spousal refusal situations, and the proposed regulations conflict with a mandatory federal Medicaid statute by failing to provide for eligibility of the institutionalized spouse when the conditions of 42 U.S.C. §1396r-5(c)(3) are met. For examples of regulations governing spousal refusal Pennsylvania could review and adopt regulations similar to those being used by other states such as New York or Florida.

3. *Conflict with Mandatory Federal Law and Need for Clarity in the Regulations. The Department Should Clarify that Transfer Penalties Under §178.174(d) do not Apply to the Purchase of an Actuarially Sound Immediate Annuity by the Community Spouse.*

a. As noted above, in 1988, Congress passed the "Medicare Catastrophic Act" (OBRA 98) which attempted to limit the problem of "spousal impoverishment." OBRA 88 also established mandatory rules prescribing the penalties that states are required to impose on transfers of assets for less than fair value for purposes of qualifying for Medicaid. Transfers of assets to a spouse or for the benefit of a spouse are specifically exempted from transfer penalties. 42 U.S.C. § 1396p(c)(2)(A).

b. OBRA 88 did not specifically address the treatment of annuities. But it is clear that an immediate annuity[2] can be purchased with payments that are likely to extend beyond the life expectancy of the purchaser/annuitant. The purchase of such an annuity can effectively amount to a transfer of assets to the extent that the annuity payments will likely exceed the life of the purchaser/annuitant/primary beneficiary. If the contingent beneficiary of such an annuity is someone other than the spouse of the purchaser or other exempt transferee, the purchase of such an non-actuarial annuity can amount to a non-exempt transfer of assets which will result in a Medicaid

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[2] There are several kinds of immediate annuities. Some may make payments for life, and others for a certain term of years. But all immediate annuities provide for periodic payments that are predetermined and specified when the contract is negotiated. Payments are made at various set intervals at least once each year. Immediate annuities are usually irrevocable contracts. Once the annuity has been purchased, the owner does not have the right to revoke the contract and obtain a refund (except for a "free-look" period of usually the first 30 days after purchase). Types of immediate annuities include the following:

1. Life only immediate annuities. This is an annuity under which the insurer promises to make periodic payments to the beneficiary (typically the annuitant) for the life of the annuitant. This kind of annuity produces the largest periodic payment among annuities that are guaranteed and continue for the life of the annuitant. No provision is made for heirs because the contract terminates on the death of the annuitant, and all remaining principal is retained by the insurance company. Accordingly, a substantial loss is incurred if the annuitant dies early. As a result, this type of annuity is used most often by individuals who require higher, guaranteed payments for the rest of their lives.

2. Life annuities with refund provisions. Providing for heirs becomes possible if the annuity contract is for a period certain (continuing for the greater of the life of the annuitant or a stipulated time period), or if it provides for a refund (guaranteeing total annuity payments at least equal to the premium received by the company). Under the Federal Medicaid guidelines, the purchase of this type of annuity will not create a transfer penalty so long as the period of the guarantee is not longer than the actuarial life expectancy of the annuitant.

3. Period certain annuities. These annuities have no life component. The period of the annuity payments is predetermined and does not depend on the survival of the annuitant. The payment is guaranteed and will be made either to the original beneficiary or, in the event of the original beneficiary's death, to contingent beneficiaries named in the policy. Therefore, the owner is assured of no loss in the value of his estate due solely to an early death. Under the Federal Medicaid guidelines, the purchase of this type of annuity will not create a transfer penalty so long as the period of the guarantee is not longer than the actuarial life expectancy of the annuitant.

eligibility penalty for the purchaser. On the other hand, immediate annuities are a legitimate, secure, and steady source of reliable retirement income of particular value to the elderly, and, if all payments from the annuity are likely to be received by the purchaser during the life expectancy of the purchaser, it is common sense that no transfer of assets has taken place.

c. In 1991 Christine Nye, Director of the Health Care Financing Administration, made the first published federal pronouncement regarding the issue of transfer penalties on the purchase of immediate annuities. Ms. Nye stated, "If the annuity is actuarially equal in value to the transferred resource, the transfer would be one in which fair market value is received and no penalty would be imposed. If not equal, the penalty under Section 1917 for failure to receive fair market value would be applied, that is, to deny payment for institutional services for a prescribed period of time." Letter to Regional Administrator, Region 4, Atlanta, January 24, 1991. The Nye letter continued, "While this is a big policy loophole, we see no way to close it absent legislation." Despite the Nye letter, in Pennsylvania, the Department's policy regarding immediate annuities remained unclear.

d. Congress had the opportunity to close the annuity "loophole" in 1993 (with OBRA 93) when it revisited the issue of transfer penalties. Instead however, Congress, while concentrating its efforts on transfer penalties, in general, and trusts, in particular, delegated the issue of the proper treatment of immediate annuity purchases to the Secretary of Health and Human Services. 42 U.S.C. §1396p(d)(6). The Secretary responded in 1994 with the issuance of Transmittal 64, which specifically authorized the purchase of immediate annuities without transfer penalty if the requirements of the Transmittal are met. 42 U.S.C. § 1396r-5(c)(1)(A) and 42 U.S.C. § 1396r-5(d)(1)(B).

e. Transmittal 64 only deals with the transfer penalty aspect of the annuity. It notes that annuities are usually purchased in order to provide a source of income for retirement but "are occasionally used to shelter assets so that individuals purchasing them can become eligible for Medicaid." The Transmittal then sets up a standard for states to use to distinguish between (1) those "annuities validly purchased as part of a retirement plan," and (2) "those annuities which abusively shelter assets." The purchase of the former carries no transfer penalty; while the latter can be penalized as transfers of assets for less than fair market value, if the transfer is not otherwise exempt. To assign annuities to the two categories the Transmittal notes that "a determination must be made with regard to the ultimate purpose of the annuity."

f. The Transmittal then provides a test for states to apply to determine the ultimate purpose of the annuity. "If the expected return on the annuity is commensurate with a reasonable estimate of the life expectancy of the beneficiary, the annuity can be deemed actuarially sound." The Transmittal then gives states specific directions which states are to follow in making this "actuarial soundness" test: "To make this determination, use the following

life expectancy tables..."

g. The Transmittal requires states to use Social Security tables rather than the more commonly used IRS actuarial tables. "The average number of years of expected life remaining for the individual must coincide with the life of the annuity. If the individual is not reasonably expected to live longer than the guarantee period of the annuity, the individual will not receive fair market value for the annuity based on the projected return. In this case the annuity is not actuarially sound and a transfer of assets for less than fair market value has taken place, subjecting the individual to a penalty. The penalty is assessed based on a transfer of assets for less than fair market value that is considered to have occurred at the time the annuity was purchased." Transmittal 64 to the State Medicaid Manual §3258.9 B.

h. Thus, Congress has mandated that states follow its transfer penalty rules and has specifically delegated the authority to create the transfer penalty rules applicable to annuities to the Federal regulators. Acting pursuant to this Congressional authority, the Federal regulators have developed the rules that states are required to follow and transmitted those rules to Pennsylvania. The use of these rules is mandatory on the states. However, in violation of the federal requirements, the Department has been imposing transfer penalties on some purchases of actuarially sound annuities. While the rules the Department is using in making its determination of when an annuity creates a transfer penalty are unclear and apparently subjective, it is without question that the Department has even imposed transfer penalties in regard to the purchase of actuarially sound immediate annuities purchased by a community spouse.

i. There is no question that the purchase of an actuarially sound immediate annuity by a community spouse can be used to enhance the income and thus the ultimate financial security of the community spouse. In a manner similar to the use of the resource-first methodology, the purchase of a single premium immediate annuity by a community spouse can lower the amount of resources that a community spouse will be required to spend down on the institutionalized spouse's cost of care. No doubt, this is why the Department views the purchase of at least some immediate annuities by a community spouse as a "loophole" whose use the Department wants to discourage.

j. The purchase of a single premium immediate annuity by a community spouse involves two fundamental provisions of Medicaid law.

- First, at the time of application for benefits, the assets of the community spouse are deemed available to the institutionalized spouse, but the income of the community spouse is not. 42 U.S.C. § 1396r-5(c)(1)(A) and 42 U.S.C. § 1396r-5(d)(1)(B). When an immediate annuity is purchased, available resources that would be deemed available to the institutional spouse are converted into an income stream for the community spouse that is not deemed available.
- Second, after the institutionalized spouse becomes eligible for

Medicaid, there is no further deeming of the assets of the community spouse to the institutionalized spouse. 42 U.S.C. § 1396r-5(4) Assets that the community spouse receives after the institutionalized spouse has qualified for Medicaid do not affect the eligibility of the institutionalized spouse for continued benefits.

The result of these two provisions is that a community spouse can purchase an immediate annuity and thereby convert otherwise available resources to an income stream for the sole benefit of the community spouse. This spend down of the couple's assets on the annuity can reduce the assets of the couple to the level needed for the institutionalized spouse to qualify for Medicaid.

k. While community spouses in most states can avail themselves of the option to purchase an actuarially sound annuity as a means of limiting spousal impoverishment, in Pennsylvania, the Department has been hostile to this use of annuities. However, in a recent opinion issued by the Federal District Court for the Eastern District of Pennsylvania, the Court determined that the plaintiff community spouse was likely to prevail on her argument that the Department's position on her purchase of an annuity was in violation of Federal law. (The Department thereupon settled the case and granted the application for Medicaid benefits). See Mertz v. Houstoun, 155 F.Supp.2d 415 (E.D. Pa. 2001).

l. In the Mertz case, DPW had penalized the purchase by a community spouse of an actuarially sound commercial immediate annuity in the same manner as would have occurred if the funds had been gifted. (Actually, the application for MA was initially approved by an understandably confused Lehigh County Assistance Office, but it later rescinded the approval). In support of its denial of benefits, the Department took the position that none of the resources in excess of the community spouse's CSRA could be used to purchase an actuarially sound commercial annuity if the spouse's income already exceeded the MMMNA.

m. In handing down his memorandum opinion, Federal District Court Judge Waldman made the finding that it was likely that Mertz would prevail on her claim against the Department. The Court concluded that "a couple may effectively convert countable resources into income of the community spouse which is not countable in determining Medicaid eligibility for the institutionalized spouse by purchasing an irrevocable actuarially sound commercial annuity for the sole benefit fo the community spouse." Mertz v. Houston, 155 F.Supp.2d 415 (July 30, 2001), p. 22.

n. The Court in Mertz went on to note: "It is not the role of the Court to compensate for an apparent legislative oversight by effectively re-writing a law to comport with one of the perceived or presumed purposes motivating its enactment. It is for the Congress to determine if and how this loophole should be closed." Mertz v. Houston, 155 F.Supp.2d 415 (July 30, 2001), p. 24.

Recommendation: One can sympathize with the difficulty of creating an easily understood method of expressing the income-first methodology in the regulations. This is a difficult set of concepts for the public, and even professionals, to understand. Still, the intrinsic complexity of the concepts underlying the income-first makes it all the more important that the regulations be "written in clear, concise and, when possible, nontechnical language" as required by Executive Order 1996-1. Since the rules still allow for the potential of an enhanced CSRA for the community spouse (if the deemed income from the IS is still insufficient to provide the MMNA), the public needs to be able to understand when they qualify for and should apply for MA. The Department should rewrite §178.2 and §178.124 in a less technical, more understandable, more easily applied fashion.

b. The Consequences of the "Effective Date" are Unclear.

The Department, in the preamble, states that "This proposed rulemaking will be effective upon publication in the Pennsylvania Bulletin as final-form rulemaking." But the consequences of this "effective date" are unclear. For example:

1. What individuals will be affected by the change to income-first? The "snapshot" date for determining the CSRA of the CS is the date of institutionalization of the IS. If the IS is institutionalized before the "effective date", but applies for MA after the "effective date", will the resource-first rules or the income-first rules be applied? Since the required CSRA snapshot date is the date of institutionalization, it appears that this date should be the date for determining whether the CSRA will be expanded for a low income community spouse. But the regulation is silent on this issue.

2. In implementing the resource-first methodology, the Department has entered into stipulated agreements with applicants specifying the enhanced CSRA. The regulations should clarify that all CRSAs established by stipulated agreement are grand-fathered and these individuals and spouses will continue to be governed by the resource-first rules under the Hurly settlement.

Recommendation: The Department should clarify the implications of the effective date of the regulations.

c. The Regulation is Unclear Regarding How the Community Spouse's Income is Determined.

a. The proposed regulation provides that the income of the community spouse considered in determining the minimum monthly maintenance needs allowance and CSRA to which the community spouse is entitled is to include "interest and other income generated by the community spouse resource determined under § 178.123." Yet there are no standards and no methodology provided regarding how this "income" that will be attributed to the community spouse will be determined by the Department. In the past, the Department has seemingly arbitrarily set an "interest rate" to be applied to these spousal resources without any rationale being provided. For a long

time, the assumed "interest rate" was 5% at a time when the average one year certificate of deposit was yielding less than 3%.

b. The proposed regulation is unclear as to what assets included in the CSRA are to be deemed to be income/interest producing for the community spouse. For example, how is life insurance with a cash value to be treated? This is a very common asset owned by a community spouse. It may or may not be an available asset depending upon the value of the policies. Are dividends on life insurance policies included as income? If so, to what extent? What are the rules regarding a second car or a vacation cabin or Timeshares and other non-income producing assets that are included in the CSRA? What other assets are included or excluded and to what extent when calculating the income/interest produced for the community spouse?

Recommendation: The Department should provide an objective method of calculating the income/interest rate to be applied to the community spouse resource allowance; it should define clearly exactly what assets are deemed to earn income for the community spouse for this purpose.

5. Policy Issues: In making the proposed regulatory change to income-first, is the Department making a policy decision of such a substantial nature that it should be left to the legislative process?

a. Except for situations involving low income community spouses who request to retain additional resources under the resource-first approach, Pennsylvania provides Community Spouses with only the very minimum resource allowance (CSRA). Only a community spouse with both low income and limited assets can raise the CSRA a little, to provide herself with a little additional income upon the death of the institutionalize spouse. By comparison, our neighboring New York State does follow an income-first approach - but it also provides community spouses with a minimum protected asset allowance of $74,820 versus the Pennsylvania's minimum of $17,856. Wisconsin, the source of the Blumer decision, legislatively established a $50,000 minimum community spouse resource allowance.

b. The change involves a significant cut in benefits to Pennsylvania's neediest low-income seniors. The proposed change is, in effect, a shifting of tax dollars with an increased asset based tax being placed on low income elderly community spouses. Unfortunately, most of the additional dollars paid by the low income community spouses of Pennsylvania will not remain in Pennsylvania but will be passed along to the federal government. This is an inefficient source of savings for the Commonwealth.

c. The savings to Pennsylvania's share of Medicaid spending (46%) are murky at best. Delaying Medicaid eligibility will, to some extent, shift the cost of care not only to the low income spouse, but also to the Commonwealth. For example, the change may actually raise the Commonwealth's cost for prescription drugs. [Once the institutionalized spouse qualifies for Medicaid, prescription drug costs are shifted to Medicaid (46% financed by Pennsylvania) and off of PACE (100% financed by Pennsylvania)]. This type of "cost" shifting, which will result from the change in

methodology, was apparently not addressed by the Department in its analysis of costs and savings.

d. The change means spousal impoverishment will no longer be prevented in Pennsylvania, but only delayed until the death of the institutionalized spouse. The change to income-first means that the community spouse will not be permitted to keep additional resources to provide her with the minimum income allowance. Instead, she will have to depend upon the institutionalized spouse's fixed income to raise her up to the level needed to avoid spousal impoverishment. However, when the institutionalized spouse dies, the institutionalized spouse's fixed income is, more often than not, gone. The community spouse then must live on her fixed income plus whatever income can be generated by the reduced level of resources she was permitted to retain. In short, once the institutionalized spouse dies, under the income-first rule, a community spouse will be left impoverished, without either the assets or the income necessary to assure independence. The result is that the switch to an income-first methodology means that, in Pennsylvania, the impoverishment of the community spouse will not be avoided - it will only be delayed.

e. The negative impact on the poor elderly in Pennsylvania will be out of proportion to the resulting savings. As noted above, most of the additional money taken from Pennsylvania's low income elderly will be passed on to the Federal Government. 54% of the "savings" achieved by draining the limited assets of Pennsylvania's low income elderly will be "saved" by the Federal Government, not Pennsylvania.

f. Resource -first protects only low income community spouses whose incomes are well below the minimum monthly standard established by Federal law. In addition to having low income, the community spouse will not qualify for the protection of resources under resource-first unless her resources are also so low that they cannot generate enough additional income, when combined with her fixed income, to raise her to the minimum allowance level. Only if she meets both the low income and low asset requirements will the community spouse be permitted to keep any additional resources under the current rules.

g. The Department could have proposed accompanying the switch to income-first with an increase in the community spouse's minimum CSRA beyond the bare minimum our state currently provides. This is the approach taken by many other states, like New York and Wisconsin that employ income-first. The community spouse can be protected from impoverishment either by using resource-first, or by raising the minimum CSRA. However, the Department suggests Pennsylvania do neither. It appears that the Department is satisfied to prevent spousal impoverishment only during the life of the institutional spouse. It ignores the significant effects on the public health and welfare that will result from the impoverishment of the community spouse AFTER the death of the institutionalized spouse. If we accept the goal of preventing spousal impoverishment, the Department should either retain the resource-first rule, or raise the minimum CSRA.

h. Taking more of the community spouse's limited assets to pay for the institutionalized spouse's nursing home care is short-sighted since the community spouse will need to turn to other public assistance programs to survive once the

institutionalized spouse died. The Department has not factored these future costs of supporting the impoverished spouse into its financial analysis.

i. The change will encourage the elderly to get divorced, when one spouse becomes ill, as one of the few means available to avoid community spouse impoverishment.

j. The change will encourage the elderly to employ the risky strategy of giving their assets away in order to protect them from long term care costs. In addition to the negative effects the increase in this planning strategy will have on the elderly, it will negatively impact both the state's Medicaid expenditures and inheritance tax revenues. The Department has not mentioned these future costs in its analysis.

k. Legislation has already been introduced on the subject (H.B. 2829). Other states, including Wisconsin and New York, as noted above, have decided this critical issue by means of legislation, not regulation. Legislation on this issue is so important that the issues of what states can do has gone all the way to the United States Supreme Court. Wisc. Dep't of Health and Family Services v. Blumer, 525 U.S. ____, 122 S.CT. 962; 151 L.Ed.2d 395 (2002).

l. As a policy matter, permitting the low income community spouse to retain assets will reduce the pauperization of the community spouse after the death of the institutionalized spouse. In most cases, the wife survives the husband, and her Social Security and pension income decreases after the death of the husband. If we accept the goal of protecting community spouses, especially the low income widows of Pennsylvania, from severe impoverishment after their husbands' deaths, we need to retain the "resources first" rule.

Recommendation. The proposed change to income-first is a policy decision of such substantial nature that the Department should defer to the Legislature on this issue. The Legislature can best address how Pennsylvania should protect community spouses from impoverishment. The proposed regulatory change will have such a dramatic effect on the health, welfare, and financial security of Pennsylvania's low income elderly that this decision should be made only by the Legislature, not by Administrative action. The Department should withdraw proposed §178.124(b).

Comments Regarding Proposed Section 178.174 (d) Proposed Changes in the Calculation of Transfer Penalties

A. Background.

When an individual, or the individual's spouse, transfers assets without adequate consideration, and that transfer it not exempt, 42 U.S.C. § 1396p(c)(1) requires that a penalty be imposed. In §178.174(d) the Department proposes to change the way in which these transfer penalties are calculated in Pennsylvania.

B. Issues Raised by Proposed Regulation (§178.174(d)).

Proposed §178.174(d) raises a number of questions and issues, including the following:

(1) §178.174(d) conflicts with mandatory federal requirements because the Regulation seems to impose a penalty on post-eligibility transfers by the community spouse.

(2) §178.174(d) conflicts with mandatory federal requirements and existing Department Regulations by imposing transfer penalties on transfers made exclusively for a purpose other than to qualify for Medical Assistance.

(3) The methodologies proposed in making the transfer penalty calculations are unclear; in particular, the Department should specify the methodology and standards it will employ in determining the penalty divisor.

(4) In revising the transfer penalty provisions, the Department should clarify the treatment of LERPs (Life Estates with Revocation Powers).

(5) §178.174(d) is likely to greatly increase the number and complexity of required reports and other paperwork both for the private sector and the public sector; the burdens and costs of §178.174(d) outweigh the benefits.

(6) §178.174(d) needs clarification as to implications and consequences of the "effective date."

(7) §178.174(d) needs clarification regarding the treatment of actuarially sound annuities.

I will address these issues in turn.

1. *§178.174(d) Conflicts with Mandatory Federal Requirements by Imposing Transfer Penalties on Post-Eligibility Transfers by a Community Spouse*.

a. Proposed §178.174(d) provides that "The period of ineligibility for an individual who is applying for, or receiving MA for NFC as defined in §178.2, including services in an ICF/MR facility, or a level of care in an institution equivalent to NFC, or home or community-based waiver services furnished under a Title XIX waiver and who disposes of assets for less than FMV begins in the month of the transfer provided that the date does not occur during an existing period of ineligibility."

b. Under §178.174(d), an individual is penalized for transfers made by the spouse of the individual. The result is mandated both by §178.174(d)(1) and §178.174(d)(2) and by §178.104(b) which provides that, "A transfer of assets by the community spouse to a person other than the institutionalized spouse is treated and affects the eligibility of the institutionalized spouse the same as a transfer by the institutionalized spouse."

c. By its terms §178.174(d) appears to apply evenly to transfers made after the institutionalized spouse has become eligible for Medical Assistance. The Section specifically states that it applies to an individual who is "applying for, or receiving MA for NFC" (emphasis added).

d. Thus it appears that the Department intends transfer penalties calculated

pursuant to §178.174(d) to apply to "post-eligibility" transfers made by either the recipient of MA or the spouse of the recipient.

e. §178.174(d) provides that any transfer (however small) made by a person receiving MA for NFC or the spouse of such person will result in a period of ineligibility for continued MA.

f. Under §178.174(d), a transfer penalty must be applied in the following situation. At the time husband enters the nursing home, husband and wife have total available assets of $50,000. The wife's CSRA is $25,000 and the husband's allowance is $2,400. Thereafter they spend down so that the wife has less than $25,000 in available assets and the husband has less than $2,400. Husband thereupon qualifies for MA. Three months later, wife gives her grandchildren $600 in Christmas presents. Under the proposed regulations, this transfer by the wife will make her husband ineligible for Medical Assistance for a period somewhat in excess of one day. This result, however unreasonable and intrusive, appears to be unequivocally mandated by §178.174(d).

g. The application of a transfer penalty to the gift from the wife to her grandchildren in the above situation is not only unreasonable, it appears to be in direct conflict with Federal statutory requirements, including Section 1924(c)(4) of the Social Security Act (42 U.S.C.A. § 1396r-5(c)(4)) which states:

> (4) Separate treatment of resources after eligibility for benefits established.
>
> During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this subchapter, no resources of the community spouse shall be deemed available to the institutionalized spouse.

42 U.S.C.A. § 1396r-5(a) provides that the provisions of this section supersede any other provisions of the law relating to determining transfer penalties.

h. Since the enactment of 42 U.S.C.A. § 1396r-5 there have been several letters issued from the Health Care Financing Administration (formerly called HCFA, now called the Centers for Medicare and Medicare Services or CMS) to the states and to private individuals advising that this section means that no penalties are to be imposed on transfers made by the community spouse after the institutionalized spouse has attained eligibility for Medical Assistance.

(1) For example, in February of 1995, Gary Wilks, then Associate Regional Administrator, Division of Medicaid for HCFA Region VIII, responded to an inquiry on this question as follows:

> "[W}e agree that after eligibility is determined for an institutional spouse (IS), the resources of the community spouse (CS) have no bearing on the

> institutionalized spouse's eligibility. Therefor, a CS who transfers a resource which is in his/her own name, after the eligibility for the IS has been established, does so without danger of affecting the IS's eligibility. This is clearly spelled our in Section 1924(c)(4) of the Social Security Act." (Letter from Gary Wilk, dated February 1995).

(2) Similarly, a letter from HCFA Region 1 Associate Regional Administrator Ronald Preston to Massachusetts attorney Susan H. Levin reiterated that a community spouse's transfer of assets does not affect her institutionalized spouse's eligibility if he is already receiving benefits. Preston wrote in part:

> "Your understanding of Federal statutory requirements is basically correct. Section 1924(c)(4) of the Social Security Act (42 U.S.C. § 1396r-5(c)(4)) concerns the separate treatment of resources after eligibility for benefits is established. This section provides that during the continuous period in which an institutionalized spouse is in an institution and after the month an institutionalized spouse is determined eligible for Medicaid, no resources of the community spouse are deemed available to the institutionalized spouse.
>
> Therefore, transfers of assets for less than fair market value made by a community spouse will have no effect on an institutionalized spouse if accomplished during the continuous period of institutionalization of the institutionalized spouse and after the month in which an institutionalized spouse's Medicaid eligibility is determined". (Quoted in The Elder Law Report, 2/97, Page 10).

i. The inapplicability of transfer penalties to post-eligibility transfers by the community spouse is not only required by Section 1924(c)(4) of the Social Security Act, it is also required by 42 U.S.C. § 1396p(c)(2)(C)(ii) which provides that transfers made "exclusively for a purpose other than to qualify for Medical Assistance" are not subject to transfer penalties. This federal exclusion requirement is included in the existing Pennsylvania regulations at §178.104(e)(3)(ii). It is common sense that if the institutionalized spouse is already receiving Medical Assistance, a transfer by the community spouse of her assets could not have been made for the purpose of qualifying him for Medical Assistance.

Recommendation: Clarification should be added to §178.174(d) to make it clear that transfer penalties do not apply to post-eligibility transfers by community spouses. This clarification is required to bring the section into compliance with mandatory federal Medicaid statutes and the Department's own regulations.

2. *§178.174(d) Conflicts with Mandatory Federal Requirements and Existing Department Regulations by Imposing Transfer Penalties on Transfers Made Exclusively for a Purpose Other Than to Qualify for Medical Assistance.*

a. In the scenario discussed above, assume that the $600 gift to the grandchildren was made by the individual who had already qualified for MA, out of his $2,400 allowance. This transfer is obviously made for a purpose other than to qualify for Medical Assistance, and thus may not be subject to penalty. Only relatively large transfers by an institutionalized individual on MA (e.g. of inherited funds which raise the resources of the MA recipient above the $2,400 limit) should be subject to the transfer penalties mandated by §178.174(d)

3. *The Methodologies the Department Will Utilize in Making the Transfer Penalty Calculations are Unclear; For Example, the Department Should Specify the Methodology and Standards it will Employ in Determining the Penalty Divisor.*

a. §178.174(d)(1) provides that the number of months of penalty is computed based upon the "average monthly cost to a private patient of NFC in effect in this Commonwealth at the time of application." The regulations should clarify:

(1) How does the Department determine this average monthly cost figure? What methodology is used?

(2) How frequently is this average monthly cost figure re-calculated and revised? It should be on some reasonable regular schedule, at least annually.

4. *In Revising the Transfer Penalty Provisions the Department Should Clarify the Treatment of LERPs.*

a. A LERP (Life Estate with Revocation Powers) deed is a deed where the grantor reserves a traditional life estate and also retains the power to sell the property and terminate the remainder interest (i.e. a life estate with power to sell and consume with a vested remainder subject to complete defeasance). If the life tenant does not consume the property or revokes the remainder, then upon the death of the life tenant, the property passes to the remainderman by operation of law. LERPs have been used for many years, in a number of states including Pennsylvania, mainly to avoid probate upon the death of the grantor. It is somewhat similar to naming a beneficiary on a asset, or creating an account that is payable on death.

b. Because Medical Assistance Estate Recovery in Pennsylvania is currently limited to the recovery against the probate estate of the recipient of benefits, assets that do not pass through probate are not subject to Estate Recovery.

c. Since the grantor/life tenant reserves the power to revoke the LERP, common sense says that no transfer of assets occurs when a LERP is created. This is the position that the federal Medicaid authority takes. See State Medicaid Manual, HCFA Transmittal 64 §3258.9. See also, the Department's Pennsylvania Nursing Care Handbook §440.97.

d. There are no Pennsylvania court decisions on the effects of a LERP in the

context of whether a LERP creates a transfer penalty in the Medicaid context. However, a LERP case was docketed with the Commonwealth Court, but was settled. Estate of James Grimes v. Department of Public Welfare, Docket No 2062 CD 2001. In Grimes, the Department held that the creation of the LERP was a transfer of a remainder interest and imposed a transfer penalty. The amount of the transfer was calculated as if the grantor did not retain any power to revoke the remainder interest.

e. At present, it is unclear whether the Department will impose a transfer penalty if a LERP is created. This is a difficult issue, and the Department's desire to limit the use of LERPs to avoid probate, and thus to avoid Estate Recovery, is understandable. However, the Department should establish a rule regarding the effect of LERPs for purposes of transfer penalties under §178.104 and proposed §178.174(d) rather than to continue to decide LERP cases on an ad hoc basis without regulatory standards.

5. There Will Be an Unreasonable Paperwork and Record Keeping Burdens Resulting from the Imposition of Fractional Month Penalties Under Proposed §178.174(d)(2).

a. Under §178.174(d)(2) a penalty will be imposed on any pre or post-eligibility transfer of assets by either the MA recipient or his or her spouse. Thus, if the community spouse gives $200 in presents to each of her three grandchildren for Christmas, she and her husband are made ineligible for continued MA for 1.129 days ($600/$5313= 1.129). The couple will have to report this transfer. If her husband is already receiving MA, either for a nursing facility or for home care, he will be knocked off the program for 1.129 days, and then will have to reapply. If the applicant is receiving home care services under the Waiver or Bridge programs, home care providers will have to be notified to cease providing the services pursuant to the care plan for the requisite penalty period. Care managers for the Area Agency on Aging will have to revise their care plans accordingly. If the MA recipient is institutionalized, the facility will have to revise its billings after it receives appropriate notice from the County Assistance Office. For example, prescription drugs provided to the nursing facility resident will not be covered by MA for that day. MA limits on the costs of those drugs will not apply. Since the institutionalized individual with have limited or no assets, the facility will need to seek payment from the community spouse for services and supplies provided during any short period of ineligibility. The community spouse may or may not be under any obligation to pay the facility. Is "paperwork nightmare" too strong a phrase to use to describe the Department's proposal to apply fractional penalties for any transfer proposal as set forth in §178.174(d)(2)? I don't think it goes far enough.

b. Under the regulations, a penalty is to be imposed on any transfer of any value. Thus a gift of an item valued at even $50 will have to be reported and will create a transfer penalty of .282324 days = 6.775 hours (if it is a 30 day month - will the number of hours of penalty vary if it is a 31 day month?). This is the result mandated by the proposed §178.174(d)(2).

c. The intrusiveness of requiring the spouses of MA recipients to report even small gifts to church or family members is even more offensive given that much of this

reporting and paperwork burden is placed on our already financially and emotionally overwhelmed elderly nursing home resident or home care recipient and his or her spouse. Significant burdens are also placed on others involved in the care of the MA recipient. It is hard to imagine that any savings to the Commonwealth are not far outweighed by the costs and burdens that will be placed on the regulated community.

d. As noted above, §178.174(d)(2) will penalize post-eligibility transfers by community spouses in violation of Federal law. At a minimum, §178.174(d) must be revised to make it clear that post eligibility transfers by the community spouse create no penalty for the MA recipient spouse.

e. The Regulations should clarify how the proposed fractional penalty will be applied. For example, will there be partial days of ineligibility? Will the penalty be different in a 28 day month vs. a 31 day month? When will the penalty be imposed? What transfers must be reported?

Recommendation: The Department should consider more reasonable alternatives that will save the state Medicaid dollars while avoiding the paperwork nightmare which is sure to result from the imposition of partial months of ineligibility for any small transfer of assets. My recommendation is that the Department stay with the simplicity of the current calculation of penalties in whole months. If the Department is convinced that fractional month penalties must be implemented, here are several suggestions as to how it might be achieved while minimizing, to some extent, the burdens and costs involved.

a. One alternative would be to keep the penalty for fractional months as specified in proposed section §178.104(d)(1), but only if the total transfer is large enough to impose a penalty in excess of one month. This would mean, for example, that a $6,000 transfer would create a penalty period of 1.129 months. To accomplish this change, proposed § §178.104(d)(2) which imposes penalties on small transfers of less than the penalty divisor (currently $5,313) would be deleted. This change, while retaining fractional month penalties for significant transfers, would avoid the paperwork and other costs and complications involved with imposing penalties of very small gifts. It would achieve most of the Department's goals without the problems.

b. Another alternative would be for the Department to impose penalties only if the total transfers in one month amount to 50% or more of the monthly penalty divisor. The current penalty divisor is $5,313. If this 50% or more methodology were utilized, small gifts would be ignored. But large gifts, in excess of $2,606 (½ of the penalty divisor) would result in a penalty. This would avoid the complexities and burdens of imposing penalties on the kinds of very small transfers that occur at Christmas and otherwise in normal life. To keep things simple, the penalty imposed on a non-exempt transfers of between $2,606 and $5,312 could be ½ month.

c. Another alternative would be for the Department to impose penalties only if the total transfers in a one month exceed a certain value. For example, transfers of $3,000 or under could be exempted meaning that small gifts would be ignored. This also would avoid many of the complexities and burdens of imposing penalties on very small transfers. Language similar to the following could be utilized:

> A person who is not in a pre-existing penalty period may transfer $3,000 per month without the transfer affecting the person's eligibility for MA or status as an MA recipient. However, persons who are in a penalty period are not permitted to make transfers and will have the amount of any transfers added into their penalty period calculation.

6. *The Regulations Need Clarity as to Implications and Consequences of the "Effective Date."*

a. The Department should clarify the effect of the "effective date" of these regulations in regard to transfers occurring prior to the effective date. §178.174(d) should make it clear that fractional month penalties apply only to transfers occurring after the effective date.

7. *§178.174(d) Needs Clarification Regarding the Treatment of Actuarially Sound Annuities.*

a. As presented above in my comments regarding Proposed § 178.124 (b) - the change to income-first - the Department needs to address its treatment of actuarially sound annuities. In addition to providing for the treatment of such annuities when purchased by a community spouse, the Regulations should specify under what specific conditions the purchase or ownership of an annuity by the married or unmarried applicant for Medical Assistance will create a transfer penalty under § 178.174 (d) and how the penalty is calculated. The standards should conform to the requirements of Federal law as discussed in the opinion in the Mertz case, cited above.

Comments Regarding Proposed Section 181.452(d) Proposed Changes in the Deductibility of Medical Expenses and Home Maintenance Expenses

While I don't contest the Department's authority to make the changes set forth in Proposed §181.452(d)(5)(iii) and by deletion of §181.452(d)(6), I do question the wisdom of these changes given the adverse effects they will surely have on the public interest in Pennsylvania.

a. The Department proposes to limit the income deductibility of unpaid medical expenses. If the MA recipient is not allowed to pay unpaid medical expenses in excess of $10,000, then the medical providers (mainly nursing homes) will have to write-off many charges. Is it good policy to take dollars from our Pennsylvania health care providers and pass along 54% of those funds to the federal government?

b. §181.452(d)(5)(iii) should make it clear that this change applies only to unpaid medical expenses incurred after the effective date of the regulatory change.

c. The Department proposes to eliminate the home maintenance deduction for short nursing home stays through deletion of §181.452(d)(6). This change will apply mainly

to individuals who own their own homes, but have virtually no other assets. All but $30 a month of the institutionalized MA recipients income must be contributed towards the cost of his care, leaving neither income nor assets with which to pay expenses such as local real estate taxes and insurance. The proposed change means that these individuals will no longer be able to keep enough of their income to pay school and other local taxes, or to insure their homes. Under this proposed change, 54% of the money that would have gone to local tax authorities or to insure the home, will instead be passed on to the federal government. Is this good policy for Pennsylvania?

Thank you for your attention to the complicated issues raised in this letter. I hope that these comments will assist the Department, the IRRC, and other reviewers in evaluating the proposed regulations and hopefully creating a more reasonable, rationale, legal, equitable, and workable system.

I appreciate the opportunity to comment on the proposed regulations, and your consideration of my concerns. If there are questions regarding these comments, or if I may be of assistance in any way, please do not hesitate to call on me.

Sincerely,

Jeffrey A. Marshall, J.D. CELA*

cc: The Honorable Harold F. Mowery, Jr.
Senate Committee on Public Health and Welfare
Pennsylvania Senate
Senate Box 203031
Harrisburg, PA 17120

The Honorable Dennis M. O'Brien
House Committee on Health and Human Services
Pennsylvania House of Representatives
P.O. Box 202020
Harrisburg, PA 17120

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

*Certified as an Elder Law Attorney by the National Elder Law Foundation pursuant to authorization by the Pennsylvania Supreme Court

HAP

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THE HOSPITAL & HEALTHSYSTEM ASSOCIATION OF PENNSYLVANIA Original; 2299

October 31, 2002

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REVIEW COMMISSION OFFICE

Office of Income Maintenance
Bureau of Policy

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REFER TO: Carole Aldridge
Willie
OLC
Howes
File

Feather O. Houstoun
Secretary
Department of Public Welfare
Commonwealth of Pennsylvania
333 Health and Welfare Building
P.O. Box 2675
Harrisburg, PA 17105-2675

Dear Secretary Houstoun:

On behalf of our 225 member hospitals and health care systems, The Hospital & Healthsystem Association of Pennsylvania (HAP) and the Delaware Valley Healthcare Association of HAP (DVHC) welcome this opportunity to comment on the proposed rulemaking published in the *Pennsylvania Bulletin* on October 5, 2002, regarding income provisions for categorically needy Non-Money Payment (NMP) and Medically Needy Only (MNO) spend-down eligibility and financial requirements for eligibility for Medicaid long-term care (LTC) services.

These two programs form a crucial safety net for Pennsylvania's most vulnerable citizens by enabling the aged, blind, or disabled or those with catastrophic medical expenses who are above the traditional Medicaid eligibility limits to receive necessary medical care through the Medicaid program. Therefore, HAP and DVHC contend that eliminating the NMP and curtailing the MNO spend-down programs will have negative consequences that far outweigh any savings for the commonwealth.

Since persons on Social Security Disability Insurance (SSDI) cannot receive Medicare for two years, NMP is a critical safety net, assuring services for these vulnerable individuals. Your department has suggested that some persons who were receiving NMP spend down will be able to move onto the Medical Assistance for Workers with Disabilities (MAWD) Program. This will not be an option if they are so disabled that they cannot work. Those individuals who will not qualify for health insurance through another public program will join the growing number of the uninsured. As you know, the uninsured are less likely to have access to primary and preventive health care and less likely to fill needed prescriptions. Therefore, there will almost certainly be a substantial increase in the uncompensated care burden now born by Pennsylvania's hospitals. Hospitals cannot continue to sustain the growing uncompensated care burden.

The individuals covered by these two programs are by definition aged, blind, disabled, or medically needy. Many of these individuals need medical care in order to continue living in a non-institutional setting. The high level of need for medical services that is inherent to those currently covered through these programs will not disappear. Necessary medical

4750 Lindle Road
P.O. Box 8600
Harrisburg, PA 17105-8600
717.564.9200 Phone
717.561.5334 Fax
haponline.org

care may be delayed or foregone altogether. Furthermore, there is no affordable alternative for prescription coverage for most of the people currently on this program. It is likely that lack of access to care will lead to a further decline in the health status of many of these individuals. Many will not seek treatment until a health emergency arises. As a result, the commonwealth may have to spend more in the long run through long term care.

HAP and DVHC of HAP support your department's plans to automatically check for eligibility for MAWD or MNO spend down. Additionally, we urge the Department of Public Welfare to:

- Take this initiative a step further and automatically check for eligibility for adultBasic, CHIP, and PACE/PACENET.
- Implement a program by which those who are not eligible for any other public program might continue to receive a Medicaid benefit since this coverage is so important to seniors and persons with disabilities.

HAP and DVHC suggest a possible alternative to the proposed rule limiting the time frame of medical bills for recipients under the MNO program. Those individuals not eligible for another program should be able to retain their current coverage under Medical Assistance guidelines. For example, if an individual qualifies for the MNO program under the current rules, but would not qualify under the proposed rules, and they are not eligible for alternative programs such as CHIP or adultBasic, then he/she should be allowed to apply for MA benefits under the current rule (using medical bills that may be older than three months). There would still be cost savings since those that were eligible for other programs would incur less expense for the commonwealth and no expense to the Medicaid program. Yet, the net effect would be that no one would be dropped from the safety net program. In other words, rather than increasing the number of uninsured by having the individuals who would have been affected by the proposed elimination of NMP spend-down terminated or uncovered, we recommend reviewing these cases for eligibility under other programs initially, utilizing Medical Assistance as the insurer of last resort when applicable. Limiting the growth in the number of uninsured Pennsylvanians who are blind, disabled, or chronically ill will ensure that this population has access to the medical services necessary to maintain their lives in the community.

HAP and DVHC also would like to express concerns regarding the limitation in the amount of allowable deductions for outstanding medical expenses to $10,000 when determining contribution toward the cost of the long-term care (LTC) services. Once again, this

limitation will result in a medical expense debt that the MA recipient cannot afford; and ultimately the service provider will not be compensated for care rendered, thus increasing uncompensated care burdens. Although we understand that the intent of this limitation is to encourage individuals who are potentially eligible for MA to apply for MA on a timely basis to prevent a medical expense debt to a LTC facility at the private rate, we do not believe it will, in fact, accomplish this objective.

Finally, we ask you to reconsider the proposed elimination of an optional income deduction that is currently provided for maintenance of a home when the LTC recipient's stay in the LTC facility is expected to be less than six months. We caution you about this proposed change as it could have a serious negative impact on the discharge planning process for individuals in LTC programs. In addition, individuals may hesitate and resist applying for MA to cover the cost of LTC services if they realize that it could affect their ability to maintain their primary residence. This provision is counter to the commonwealth's objective to enable individuals to return to their homes rather than being forced into an institutional setting.

Thank you for the opportunity to express our views on these important regulations. If you or your staff need further clarification of our views, please do not hesitate to contact Anne McHugh, HAP's director, health care finance policy at amchugh@haponline.org, or (717) 561-5317; or Pam Clarke, DVHC's vice president, managed care, at pclarke@dvhc.org, or (215) 735-3265.

Sincerely,

Paula A. Bussard

PAULA A. BUSSARD
Senior Vice President
Policy and Regulatory Services

c: Linda Hicks, Deputy Secretary of Income Maintenance
Edward Zogby, Director, Bureau of Policy