

# RULES AND REGULATIONS

## Title 55—PUBLIC WELFARE

### DEPARTMENT OF PUBLIC WELFARE

#### [55 PA. CODE CH. 181]

#### Medical Assistance Income

#### *Statutory Authority*

The Department of Public Welfare (Department), by this order, adopts an amendment to Chapter 181 (relating to income provisions for categorically needy NMP-MA and MNO-MA) to read as set forth in Annex A under the authority of sections 201(2) and 403(b) of the Public Welfare Code (code) (62 P. S. §§ 201(2) and 403(b)).

Notice of proposed rulemaking is omitted in accordance with section 204(1)(iv) of the act of July 31, 1968 (P. L. 769, No. 240) (CDL) (45 P. S. § 1204(1)(iv)) and 1 Pa. Code § 7.4(1)(iv) because the administrative regulations relate to Commonwealth grants and benefits. Additionally, notice of proposed rulemaking is omitted for good cause as unnecessary under section 204(3) of the CDL and 1 Pa. Code § 7.4(3).

The amendment affects the Federal Medical Assistance Program (MA) and is a result of a decision by the United States District Court for the Eastern District of Pennsylvania which ordered this change. The Court Order is very specific and does not allow any administrative discretion in its application. After the decision, a written directive from the Department of Health and Human Services (DHHS) was received advising that the Court Order is to be followed instead of the Federal regulations as previously interpreted by DHHS.

This amendment is a benefit to MA recipients who receive aid and attendance benefits from the Federal Department of Veterans' Affairs (VA). By order of the Court the Department implemented the required change effective retroactive to March 1, 1991.

Failure to conform State regulations with the Court Order and the written directive from DHHS will seriously jeopardize Federal Financial Participation (FFP) and might subject the Commonwealth to the imposition of legal sanctions by the Court. This would be contrary to the public interest. Both the Court Order and the directive of DHHS are very specific, allowing for no alternative means of compliance. Therefore, the Department has no discretion and must implement the requirements in this amendment to reduce the potential for quality control errors and allow continued receipt of Federal funds. Accordingly, the Department is formalizing the amendment found in Annex A with proposed rulemaking omitted.

#### *Purpose*

The purpose of the amendment is to incorporate court ordered requirements relating to the treatment of VA aid and attendance benefits when determining the posteligibility contribution toward cost of care in a nursing facility (NF) under § 181.452 (relating to posteligibility determination of income available from an MA eligible person toward the cost of care). These requirements

specify that the VA aid and attendance benefit received by an MA recipient in an NF is not counted as income when determining the amount of income a recipient is expected to pay toward the cost of care in the NF.

Previously, this benefit was only not counted as income in determining eligibility for MA, as the Department had been directed by DHHS.

The amendment also provides for a clarification to the limited exception to not counting the VA aid and attendance benefit in the posteligibility determination not at issue in the litigation, involving the VA's statutory right to decide how an incompetent veteran or an incompetent spouse or child of a veteran may use the benefit. As the VA has the legal right to determine an incompetent beneficiary's use of the benefit, the county assistance office (CAO) must count the benefit if the VA provides a written request to the CAO to count the benefit toward the cost of care. (38 U.S.C.A., Chapter 55, Minors, Incompetents, and Other Wards; 38 CFR (relating to pensions, bonuses, veterans' relief); and Section 1, *Fiduciary and Field Examination Program Manual*, Chapter 6, Adult Beneficiaries.)

#### *Background*

Prior to March 1, 1991, the VA aid and attendance benefit was not counted as income in the posteligibility determination of a nursing facility patient's contribution toward cost of care for those MA recipients receiving this benefit. The Health Care Financing Administration (HCFA) had threatened to deny FFP unless the Department changed its regulations and counted this income. An amendment was necessary to assure Federal funding for the MA Program.

As a result effective March 1, 1991, the Department implemented regulations to count as available income in the posteligibility determination that portion of VA pension identified as an aid and attendance benefit. The rulemaking was published at 21 Pa.B. 624 (February 16, 1991) amending § 181.452. The amendment had incorporated Federal requirements specified by the HCFA under 42 CFR 435.725(c) and 435.832(c).

Subsequent to the issuance of these regulations, a class action lawsuit, *Genevieve Ginley et al. v. John F. White, Jr. et al.*, Civil Action No. 91-3290, was filed against DHHS and the Department in the United States District Court for the Eastern District of Pennsylvania.

On January 29, 1992, the Court ordered the DHHS and the Department to treat VA aid and attendance benefits as income which is not counted in the posteligibility determination of the patient pay amount retroactive to March 1, 1991. The DHHS did not appeal the court decision and by letter dated February 20, 1992, instructed the Commonwealth to follow the Court Order. Accordingly, the Department is amending the treatment of these benefits. The reference to the housebound allowance is also used in the amendment in the same manner as found in the current regulations. This is because a veteran in the community who receives a housebound allowance, and who later enters a nursing facility, will continue to receive an allowance designated as aid and attendance for a veteran in an institution. However, there is a period of time before the VA converts the designation of the allowance from that of housebound to aid and attendance. The use of both terms in the regulations

clarifies that the allowance of a veteran in an institution is not counted even if it has not yet been classified by the VA.

#### *Need for the Amendment*

The amendment is needed to incorporate the court ordered change into Chapter 181. The required revisions will assure compliance with the court decision and avoid fiscal and court sanctions and possible loss of Federal funding for Pennsylvania's MA Program. Recipients who receive VA aid and attendance benefits will have more income for personal use because these benefits will not be counted as income in determining what amount the recipient must pay toward the cost of nursing facility care.

#### *Summary*

*Posteligibility Determination of Income Available From an MA Eligible Person Toward The Cost of Care (§ 181.452(a)(3)(iii), (b)(3), (c), (d), (d)(2)(i), (d)(3)(iv) and (e)).*

Current regulations identify the VA aid and attendance benefit as an item which is defined as not income and therefore excluded when determining MA eligibility but is counted as income when determining posteligibility contribution toward cost of care. This amendment eliminates this different treatment and makes clear that VA aid and attendance benefits do not count as income in either the MA eligibility or posteligibility determination. The VA aid and attendance portion of a VA benefit is not counted as available income when determining posteligibility contribution toward cost of care.

The VA aid and attendance benefit must be counted toward cost of care only if the VA states, in writing, that the benefit is for an incompetent veteran or incompetent spouse or child of a deceased veteran who is determined incompetent by the VA and that the benefit must be counted toward cost of care.

#### *Affected Persons and Organizations*

The amendment will affect all applicants and recipients in nursing facilities who receive a VA aid and attendance benefit when determining what they are expected to contribute toward the cost of their Title XIX care and whether they are eligible for a contribution by the Department toward cost of care.

#### *Accomplishments/Benefits*

The amendment will have a positive impact on the affected persons and enable the Department to remain in compliance with the court decision and the Federal requirements. The amendment will accurately reflect the Federal requirements and thereby will eliminate the imposition of Federal Quality Control errors, preventing Federal fiscal sanctions relating to treatment of VA aid and attendance benefits.

#### *Fiscal Impact*

It is anticipated that implementation of the amendment will result in a cost to the Commonwealth during Fiscal Year 1994—1995 of approximately \$3.161 million in State funds. The amendment has been implemented under the Order of the United States District Court for the Eastern District of Pennsylvania in the class action, *Genevieve Ginley et al. v. John F. White, Jr. et al.*, Civil Action No. 91-3290 effective retroactively to March 1, 1991.

#### *Paperwork Requirements*

There will be no additional reports or new forms needed to comply with the changes, nor will there be additional legal, accounting or consulting assistance required to fulfill the requirements of the amendment.

#### *Effective Date*

The amendment will be effective upon publication in the *Pennsylvania Bulletin* as final rulemaking and apply retroactively to March 1, 1991.

#### *Sunset Date*

No sunset date is applicable. The Department continuously reviews the MA Program and regulations through the Federally monitored Quality Control process. The HCFA staff conduct audits periodically on specific aspects of the MA Program.

#### *Public Comments*

Although the amendment is being adopted without prior notice, interested persons are invited to submit written comments within 30 days from the date of this publication for consideration by the Department as to whether the amendment should be revised. The comments should be sent to the Department of Public Welfare, Patricia H. O'Neal, Director, Bureau of Policy, Room 431, Health and Welfare Building, Harrisburg, PA 17120, (717) 787-4081.

Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5886 (Voice users), or may use the Department's TDD by calling (800) 541-5886. Persons who require another alternative, should contact Tom Vracarich at (717) 783-2209.

#### *Regulatory Review Act*

Under section 5.1(c) of the Regulatory Review Act (71 P. S. § 745.5a(c)), on March 13, 1998, the Department submitted a copy of this amendment with proposed rulemaking omitted to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Health and Human Services and the Senate Committee on Public Health and Welfare. On the same date, the final-omitted regulation was submitted to the Office of Attorney General for review and approval under the Commonwealth Attorneys Act (71 P. S. §§ 732-101—732-506).

Under section 5.1(d) of the Regulatory Review Act, this final-omitted regulation was deemed approved by the House and Senate Committees on April 2, 1998, and was approved by IRRC on April 7, 1998.

#### *Findings*

The Department finds that:

(1) Public notice of intention to amend the administrative regulations amended by this order is unnecessary and omitted under section 204(1)(iv) of the CDL, and the regulations thereunder, 1 Pa. Code § 7.4(1)(iv). Proposed rulemaking is not required because the administrative regulations relate to Commonwealth grants and benefits and because the amendment has been implemented under the Order of the United States District Court for the Eastern District of Pennsylvania in the class action,

*Genevieve Ginley et al. v. John F. White, Jr. et al.*, Civil Action No. 91-3290 effective retroactive to March 1, 1991 with the clarification of the VA statutory right of determination for incompetent beneficiaries under 38 U.S.C.A. Chapter 55.

(2) Adoption of the amendment in the manner provided in this order is necessary and appropriate for the administration and enforcement of the code.

*Order*

The Department, acting under the Code orders that:

(a) The regulations of the Department, 55 Pa. Code Chapter 181, are amended by amending § 181.452 to read as set forth in Annex A, with ellipses referring to the existing text of the regulation.

(b) The Secretary of the Department shall submit this order and Annex A to the Office of Attorney General and the Office of General Counsel for approval as to legality and form as required by law.

(c) The Secretary of the Department shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect upon publication in the *Pennsylvania Bulletin* as final rulemaking and apply retroactively to March 1, 1991.

FEATHER O. HOUSTOUN,  
*Secretary*

*(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 28 Pa.B. 1901 (April 18, 1998).)*

**Fiscal Note:** 14-424. (1) General Fund; (2) Implementing Year 1997-98 is \$3,876,000; (3) 1st Succeeding Year 1998-99 is \$4,147,000; 2nd Succeeding Year 1999-00 is \$4,437,000; 3rd Succeeding Year 2000-01 is \$4,748,000; 4th Succeeding Year 2001-02 is \$5,050,000; 5th Succeeding Year 2002-03 is \$5,436,000; (4) Fiscal Year 1996-97 \$716,144,000; Fiscal Year 1995-96 \$648,550,000; Fiscal Year 1994-95 \$593,822,000; (7) Medical Assistance—Long Term Care; (8) recommends adoption.

**Annex A**

**TITLE 55. PUBLIC WELFARE**

**PART II. PUBLIC ASSISTANCE MANUAL**

**Subpart D. DETERMINATION OF NEED AND AMOUNT OF ASSISTANCE**

**CHAPTER 181. INCOME PROVISIONS FOR CATEGORICALLY NEEDY NMP-MA AND MNO-MA**

**Subchapter D. POSTELIGIBILITY DETERMINATION OF ELIGIBILITY FOR MA PAYMENT TOWARD COST OF CARE IN INSTITUTIONS**

**POSTELIGIBILITY DETERMINATION PROVISIONS**

**§ 181.452. Posteligibility determination of income available from an MA eligible person toward the cost of care.**

(a) The total gross income of an aged, blind or disabled MA eligible person's income includes:

\* \* \* \* \*

(3) *Aged, blind and disabled categories.* Some income that is identified as excluded in Subchapter B (relating to aged, blind and disabled categories) is not excluded under

this subchapter and is counted when determining the MA eligible person's total gross income. This includes:

(i) The income exclusion as specified in § 181.122 (relating to earned income exclusion).

(ii) The income exclusions as specified in § 181.123 (relating to unearned income exclusions).

(4) *Income from nontrust property.* Unless the instrument specifically provides otherwise as follows:

\* \* \* \* \*

(b) The total gross income of an AFDC-related category and a GA-related category MA eligible person's total income includes:

\* \* \* \* \*

(3) Income that is identified as a type of income that is not counted when determining MA eligibility is counted when determining the MA eligible person's total gross income. This includes income specified in § 181.263 (relating to other types of income not counted for the AFDC and GA categories).

\* \* \* \* \*

(c) For an MA eligible person in the aged, blind or disabled related categories or an MA eligible person in the AFDC-related or GA-related categories, the veterans aid and attendance and housebound allowance portion of the Veterans Affairs pension as specified in § 181.81(9) (relating to items that are not income) is excluded and is not counted when determining the MA eligible person's total gross income unless if the Veterans Administration states, in writing, that the benefit is for an incompetent veteran or incompetent spouse or child of a deceased veteran who is determined incompetent by the Veterans Administration and that the benefit shall be counted toward cost of care.

(d) The following amounts are deducted from the MA eligible person's total gross income identified in subsection (a) for persons in the aged, blind and disabled categories, or subsection (b) for persons in the AFDC- or GA-related categories and adjusted as applicable by the treatment of Veterans Administration benefits under subsection (c) for all MA eligible persons in the following order:

\* \* \* \* \*

(2) If the MA-eligible person's spouse remains at home, an amount for the maintenance needs of the spouse.

(i) The maintenance need for the spouse in the community is reduced by the community spouse's available income. The available income is obtained by determining the community spouse's total gross earned income as specified in §§ 181.91—181.96 (relating to types of earned income counted for the aged, blind and disabled categories); the total gross unearned income as specified in §§ 181.101—181.109.

\* \* \* \* \*

(3) If the MA-eligible person has a community spouse and dependent children, dependent parents or dependent siblings of either member of the couple living at home with the community spouse, an amount for the maintenance needs of the other family members.

\* \* \* \* \*

(iv) The family member maintenance need amount is reduced by the family member's available income. The available income is obtained by determining the family

member's total gross earned income as specified in §§ 181.91—181.96; the total gross unearned income as specified in §§ 181.101—181.109. The income of a dependent child or a child regardless of age who is blind or disabled who does not receive SSI minus the exemptions specified in § 181.110(c) (relating to income deemed available from the spouse) shall also be obtained.

\* \* \* \* \*

(e) The amount that the MA eligible person is expected to pay toward the cost of care is the amount that remains

and as adjusted under subsection (c), if applicable, and after the deductions in subsection (d) are applied to the person's total gross income as determined under subsections (a) and (b).

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[Pa.B. Doc. No. 98-962. Filed for public inspection June 19, 1998, 9:00 a.m.]

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