BEFORE THE
ADMINISTRATIVE RULES COMMITTEE
OF THE
NORTH DAKOTA LEGISLATIVE COUNCIL

N.D. Admin. Code Chapter 75-02-02.1, Eligibility for Medicaid (Pages 128 – 185)	))))	**REPORT OF THE DEPT. OF HUMAN SERVICES December 10, 2009**

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For its report, the North Dakota Department of Human Services states:

1. The proposed amendment to N.D. Admin. Code chapter 75-02-02.1 to increase the burial allowance is the result of 2009 HB 1477. The proposed amendment to N.D. Admin. Code chapter 75-02-02.1 to change the personal needs allowance for recipients in an ICF-MR is the result of an appropriation provided in 2009 HB 1012.
2. The proposed amendment to N.D. Admin. Code chapter 75-02-02.1 to increase the asset level for the Medicare Savings Programs is a result of a change in federal law (H.R. 6331 Medicare Improvements for Patients and Providers Act of 2008). The proposed amendment to N.D. Admin. Code chapter 75-02-02.1 to change the allowance for medical expenses are due to requirements in federal regulations.
3. The Department of Human Services uses direct and electronic mail as the preferred ways of notifying interested persons of proposed rulemaking. The Department uses a basic mailing list for each rulemaking project that includes the county social service boards, the regional human service centers, Legal Services offices in North Dakota, all persons who have asked to be on the basic list, and internal circulation within the Department. Additionally, the

Department constructs relevant mailing lists for specific rulemaking. The Department also places public announcements in all county newspapers advising generally of the content of the rulemaking, of over 50 locations throughout the state where the proposed rulemaking documents may be reviewed, and stating the location, date, and time of the public hearing.

The Department conducts public hearings on all substantive rule-making. Oral comments are recorded. Oral comments, as well as any written comments that have been received, are summarized and presented to the Department's executive director, together with any response to the comments that may seem appropriate and a re-drafted rule incorporating any changes occasioned by the comments.

4. A public hearing on the proposed rules was held in Bismarck on September 24, 2009. The record was held open until 5:00 p.m. on October 5, 2009 to allow written comments to be submitted. Written comments were received during the comment period. A summary of comments is attached to this report.
5. The cost of giving public notice, holding a hearing, and the cost (not including staff time) of developing and adopting the rules was $1,945.02.
6. The rules were amended to address changes made by the 2009 Legislative Assembly and changes in federal regulations. Additional changes are to clarify existing language. The following specific changes were made:

   Section 75-02-02.1-05. This section is amended to clarify who is included in the medically needy coverage group and who is

included in the poverty level coverage group for purposes of determining Medicaid eligibility.

Section 75-02-02.1-12. This section is amended to remove provisions that are obsolete and to require verification of identity for purposes of determining Medicaid eligibility.

Section 75-02-02.1-16. This section is amended to clarify that residence, for purposes of establishing eligibility for Medicaid, may not be established by an individual claiming residence in another state; and to clarify residence requirements for individuals under the age of twenty-one for purposes of determining Medicaid eligibility.

Section 75-02-02.1-18. This section is amended to remove provisions that are obsolete, to supplement the lists of eligible and ineligible aliens, and to reference acceptable verifications to prove citizenship for purposes of determining Medicaid eligibility.

Section 75-02-02.1-22. This section is amended to increase the asset levels for the Medicare Savings Programs effective January 1, 2010. The new levels will be three times the SSI levels, and will be increased annually according to the CPI, beginning in 2006.

Sections 75-02-02.1-28 and 75-02-02.1-33.2. These sections are amended to incorporate the increase in the burial allowance authorized by the Legislative Assembly in 2009. Additionally, section 75-02-02.1-28 is amended to clarify what constitutes a good-faith effort to sell real property without working an undue hardship. It also establishes the good-faith sale period for other property at 30 days.

Section 75-02-02.1-32. This section is amended to allow individuals to provide evidence showing a lower value for contracts for deed, other than the sum of outstanding payments of principal, and to identify the different ways certain secured and unsecured notes are treated for purposes of determining eligibility for Medicaid.

Section 75-02-02.1-33.1. This section is amended to clarify when income or an asset may be treated as consideration for services or assistance furnished by a family member to an individual applying for Medicaid.

Sections 75-02-02.1-38.1 and 75-02-02.1-39. These sections are amended to allow countable income to be reduced for actual payments made on old medical bills.

Section 75-02-02.1-38.2. This section is being amended to clarify treatment of payments derived from individual interests in Indian trust or restricted lands as disregarded income, and to include wages paid by the Census Bureau for temporary employment related to census activities as disregarded income.

Section 75-02-02.1-40. This section is being amended to provide an increase in the personal needs allowance for recipients in intermediate care facilities for the mentally retarded as authorized by the Legislative Assembly in 2009.

7. No written requests for regulatory analysis have been filed by the Governor or by any agency. The rule amendments are expected to have an impact on the regulated community in excess of $50,000. A regulatory analysis was prepared and is attached to this report.
8. A small entity regulatory analysis and small entity economic impact statement were prepared and are attached to this report.

9. A constitutional takings assessment was prepared and is attached to this report.

10. These rules were not adopted as emergency (interim final) rules.

Prepared by:

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North Dakota Department of Human Services
December 10, 2009

CHAPTER 75-02-02.1
ELIGIBILITY FOR MEDICAID

SECTION 1. Subsections 3 and 4 of section 75-02-02.1-05 are amended as follows:

75-02-02.1-05. Coverage groups. Within the limits of legislative appropriation, the department may provide medicaid benefits to coverage groups described in the approved medicaid state plan in effect at the time those benefits are sought. These coverage groups do not define eligibility for medicaid benefits. Any person who is within a coverage group must also demonstrate that all other eligibility criteria are met.

3. The medically needy coverage group includes:
   a. Eligible caretaker relatives and individuals under age twenty-one in families with deprived children who qualify for and require medical services on the basis of insufficient income, but who do not meet income or age family coverage group requirements, ~~but meet medically needy income and asset standards~~ or who do not qualify under optional categorically needy or poverty level groups;
   b. Individuals under the age of twenty-one who qualify for and require medical services on the basis of insufficient income, but who do not qualify ~~as~~ under categorically needy, optional categorically needy, or poverty level groups, including children in common in stepparent families who are ineligible under the family coverage group and foster care children who do not qualify as categorically needy or optional categorically needy;
   c. Pregnant women whose pregnancy has been medically verified and who qualify on the basis of financial eligibility;
   d. Eligible pregnant women who applied for medicaid during pregnancy, and for whom recipient liability for the month was met no later than on the date each pregnancy ends, continue to be eligible for sixty days beginning on the last day of pregnancy and for the remaining days of the month in which the sixtieth day falls;
   e. Children born to eligible pregnant women who have applied for and been found eligible for medicaid on or before the day of the child's birth, for sixty days, beginning on the day of the child's birth, and for the remaining days of the month in which the sixtieth day falls;
   f. Aged, blind, or disabled individuals who are not in receipt of supplemental security income; and
   g. Individuals under age twenty-one who have been certified as needing the service, or age sixty-five and over in the state hospital who qualify on the basis of financial eligibility.

4. The poverty level coverage group includes:
   a. Pregnant women whose pregnancy has been medically verified and who meet the nonfinancial requirements of the medicaid program

and whose family income is at or below one hundred thirty-three percent of the poverty level;

b. Eligible pregnant women who applied for and were poverty level eligible for medicaid during their pregnancy continue to be eligible for sixty days beginning on the last day of pregnancy, and for the remaining days of the month in which the sixtieth day falls;

c. Children under the age of six who meet the nonfinancial requirements of the medicaid program and whose family income is at or below one hundred thirty-three percent of the poverty level;

d. Children, age six to nineteen, who meet the nonfinancial requirements of the medicaid program and whose family income is at or below one hundred percent of the poverty level;

e. Qualified medicare beneficiaries who are ~~aged, blind, or disabled individuals~~ entitled to medicare part A benefits, who meet the medically needy nonfinancial criteria, have assets no greater than twice the supplemental security income resource standards, and have income at or below one hundred percent of the poverty level;

f. Qualified disabled and working individuals who are individuals entitled to enroll in medicare part A under section 1818a of the Social Security Act [42 U.S.C. 1395i-2(a)], who have income no greater than two hundred percent of the federal poverty level and assets no greater than twice the supplemental security income resource standard, and who are not eligible for medicaid under any other provision;

g. Special low-income medicare beneficiaries who are ~~aged, blind, or disabled individuals~~ entitled to medicare part A benefits, who meet the medically needy nonfinancial criteria, have assets no greater than twice the supplemental security income resource standards, and have income above one hundred percent of the poverty level, but not in excess of one hundred twenty percent of the poverty level; and

h. Qualifying individuals who are ~~aged, blind, or disabled individuals~~ entitled to medicare part A benefits, who meet the medically needy nonfinancial criteria, have assets no greater than twice the supplemental security income resource standards, have income above one hundred twenty percent of the poverty level, but not in excess of one hundred thirty-five percent of the poverty level, and are not eligible for medicaid under any other provision.

History: Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; January 1, 1994; January 1, 1997; July 1, 2003; June 1, 2004; April 1, 2008; January 1, 2010.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02, 50-24.1-31

SECTION 2. Section 75-02-02.1-12 is amended as follows:

75-02-02.1-12. Age and identity.

1. An eligible categorically or medically needy aged applicant or recipient is eligible for medicaid for the entire calendar month in which that individual reaches age sixty-five.
2. Except as provided in subsection 3, an individual who is eligible upon reaching age twenty-one remains eligible for medicaid through the month in which the individual reaches that age.
3. An individual who attains age twenty-one while receiving treatment and continues to receive treatment as an inpatient in an institution for mental diseases remains eligible through the month the individual reaches age twenty-two.
4. Blind individuals ~~and~~, disabled individuals, and caretaker relatives are not subject to any age requirements for purposes of medicaid eligibility.
5. The identity of each applicant must be established and documented.
6. Citizenship status of each applicant must be established and documented.

History: Effective December 1, 1991; amended effective July 1, 2003; June 1, 2004; January 1, 2010.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-01

SECTION 3. Subsections 1 and 2 of section 75-02-02.1-16 are amended as follows:

75-02-02.1-16. State of residence. A resident of the state is an individual who is living in the state voluntarily and not for a temporary purpose. Temporary absences from the state with subsequent returns to the state, or intent to return when the purpose of the absence has been accomplished, do not interrupt continuity of residence. Residence is retained until abandoned or established in another state.

1. For individuals entering the state, the earliest date of eligibility is the date of entry. Residence may not be established for individuals who ~~are receiving medicaid benefits from, or claiming~~ claim residence in~~,~~ another state.
2. Individuals under age twenty-one.
   a. For any individual under age twenty-one who is living independently from the individual's parents or who is married and capable of indicating intent, the state of residence is the state where the individual is living with the intention to remain there permanently or for an indefinite period.
   b. For any individual who is receiving foster care or adoption assistance payments, under title IV-E, from another state and is living in North Dakota, North Dakota is the state of residence for medicaid purposes.
   c. For any individual under age twenty-one not residing in an institution, whose medicaid eligibility is based on blindness or

disability, the state of residence is the state in which the individual is living.

d. For any other noninstitutionalized individual under age twenty-one, the state of residence is the state in which the child is living with the child's parent or caretaker ~~is a resident~~ relative on other than a temporary basis. A child who comes to North Dakota to receive an education, special training, or services in a facility such as the Anne Carlsen facility, a maternity home, or a vocational training center is normally regarded as living temporarily in the state if the intent is to return to the child's home state upon completion of the education or service. A child placed by an out-of-state placement authority, including a court, into the home of relatives or foster parents in North Dakota on other than a permanent basis or for an indefinite period is living in the state for a temporary purpose and remains a legal resident of the state of origin. A resident of North Dakota who leaves the state temporarily to pursue educational goals (including any child participating in job corps) or other specialized services (including a child placed by a North Dakota placement authority, including a court, into the home of out-of-state relatives or foster parents) does not lose residence in the state.

e. For any institutionalized individual, under age twenty-one, who is neither married nor living independently, residence is that of the parents or legal guardian at the time of placement or the state of residence of the parent or legal guardian at the time of medicaid application if the child is institutionalized in the same state. Only if the parental rights have been terminated, and a guardian or custodian appointed, may the residence of the guardian or custodian be used. If the individual has been abandoned by the individual's parents and does not have a guardian, the individual is a resident of the state in which the individual ~~lives~~ is institutionalized.

History: Effective December 1, 1991; amended effective December 1, 1991; July 1, 2003; January 1, 2010.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02; 42 CFR Part 435

SECTION 4. Section 75-02-02.1-18 is amended as follows:

75-02-02.1-18. Citizenship and alienage.

1. An applicant or recipient must be a United States citizen or an alien lawfully admitted for permanent residence. Acceptable documents to establish US citizenship and naturalized citizen status are defined in 42 CFR 435.407.
2. For purposes of qualifying as a United States citizen, the United States includes the fifty states, the District of Columbia, Puerto Rico, Guam, the US Virgin Islands, and the Northern Mariana Islands. Nationals from

American Samoa or Swain's Island are also regarded as United States citizens for purposes of medicaid.

3. ~~In the absence of evidence that an individual is a citizen or lawfully admitted alien, an individual may be presumed to be lawfully admitted if the individual provides proof, documented and entered in the case file, that the individual has resided in the United States continuously since January 1, 1972.~~

~~4.~~ American Indians born in Canada, who may freely enter and reside in the United States, are considered to be lawfully admitted for permanent residence if at least one-half American Indian blood. A spouse or child of such an Indian, or a noncitizen individual whose membership in an Indian tribe or family is created by adoption, may not be considered to be lawfully admitted under this subsection unless the individual is of at least one-half American Indian blood by birth.

~~5~~ 4. The following categories of aliens, while lawfully admitted for a temporary or specified period of time, are not eligible for medicaid, including emergency services, because of the temporary nature of their admission status:

a. Foreign government representatives on official business and their families and servants;
b. Visitors for business or pleasure, including exchange visitors;
c. Aliens in travel status while traveling directly through the United States;
d. Crewmen on shore leave;
e. Treaty traders and investors and their families;
f. Foreign students;
g. International organization representatives and personnel and their families and servants;
h. Temporary workers, including agricultural contract workers; and
i. Members of foreign press, radio, film, or other information media and their families.

~~6~~ 5. ~~Aliens~~ Except for aliens identified in subsection 4, aliens who are not lawfully admitted for permanent residence in the United States are not eligible for medicaid, except for emergency services.

6. Aliens from the Federated States of Micronesia, the Marshall Islands, or Palau are lawfully admitted as permanent non-immigrants and are not eligible for medicaid, except for emergency services.

7. Aliens who lawfully entered the United States for permanent residence before August 22, 1996, and who meet all other medicaid criteria may be eligible for medicaid.

8. The following categories of aliens who entered the United States for permanent residence on or after August 22, 1996, and who meet all other medicaid criteria may be eligible for medicaid as qualified aliens:

a. Honorably discharged veterans, aliens on active duty in the United States armed forces, and the spouse or unmarried dependent children of such individuals ~~may be eligible at any time~~;

b. Refugees and asylees;
c. Aliens whose deportation was withheld under section 243(h) of the Immigration and Naturalization Act; ~~and~~
d. Cuban and Haitian entrants;
e. Aliens admitted as Amerasian immigrants;
f. Victims of a severe form of trafficking;
g. For the first eight months after entry into the United States, Iraqi and Afghan aliens and family members who are admitted under section 101(a)(27) of the Immigration and Naturalization Act;
h. For the period paroled, aliens paroled into the United States for at least 1 year under section 212(d)(5) of the Immigration and Nationality Act;
i. Aliens granted conditional entry pursuant to section 203(a)(7) of the Immigration and Nationality Act in effect prior to April 1, 1980;
j. Aliens granted nonimmigrant status under section 101(a)(15)(T) of the Immigration and Nationality Act or who have a pending application that sets forth a prima facie case for eligibility for that nonimmigrant status;
k. Certain battered aliens and their children who have been approved or have a petition pending which sets forth a prima facie case as identified in 8 U.S.C. section 1641(c), but only if the department determines there is a substantial connection between the battery and the need for the benefits to be provided; and
l. All other aliens, other than for emergency services, only after five years from the date they entered the United States, and then only if the individual is a lawful permanent resident who has been credited with forty qualifying quarters of social security coverage.

9. An alien who is not eligible for medicaid because of the time limitations or lack of forty qualifying quarters of social security coverage may be eligible to receive emergency services that are not related to an organ transplant procedure if:
   a. The alien has a medical condition, including labor and delivery, manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in:
      (1) Placing health in serious jeopardy;
      (2) Serious impairment to bodily functions; or
      (3) Serious dysfunction of any bodily organ or part;
   b. The alien meets all other eligibility requirements for medicaid except the requirements concerning furnishing social security numbers and verification of alien status; and
   c. The alien's need for the emergency service continues.

History: Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; July 1, 2003; June 1, 2004; January 1, 2010.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-01

SECTION 5. Subsection 5 of section 75-02-02.1-22 is amended as follows:

75-02-02.1-22. Medicare savings programs.

5. No person may be found eligible for the medicare savings programs unless the total value of all nonexcluded assets does not exceed:
   a. For periods of eligibility prior to January 1, 2010:
      (1) Four thousand dollars for a one-person unit; or
      ~~b.~~ (2) Six thousand dollars for a two-person unit.
   b. For periods of eligibility on or after January 1, 2010, the asset limit described in 42 U.S.C. 1396d(p)(1)(C).

History: Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; July 1, 2003; June 1, 2004; May 1, 2006; January 1, 2010.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02

SECTION 6. Subsections 2 and 3 of section 75-02-02.1-28 are amended as follows:

75-02-02.1-28. Excluded assets. Except as provided in section 75-02-02.1-28.1, the following types of assets will be excluded in determining if the available assets of an applicant or recipient exceed asset limits:

2. Property which is not saleable without working an undue hardship. Such property may be excluded no earlier than the first day of the month in which good-faith attempts to sell are begun, and continues to be excluded only for so long as the asset continues to be for sale and until a bona fide offer for at least seventy-five percent of the property's fair market value is made. Good-faith efforts to sell must be repeated at least annually in order for the property to continue to be excluded.
   a. Persons seeking to establish retroactive eligibility must demonstrate that good-faith efforts to sell were begun and continued in each of the months for which retroactive eligibility is sought. Information concerning attempts to sell, which demonstrate that an asset is not saleable without working an undue hardship, are relevant to establishing eligibility in the month in which the good-faith efforts to sell are begun, but are not relevant to months prior to that month and do not relate back to prior months.
      (1) A good-faith effort to sell real property must be made for at least three calendar months in which no bona fide offer for at least seventy-five percent of the property's fair market value is received before the property can be shown to be not saleable without working an undue hardship.
      (2) A good-faith effort to sell property other than real property or an annuity must be made for at least thirty days in which no bona fide offer for at least seventy-five percent of the

property's fair market value is received before the property can be shown to be not saleable without working an undue hardship.

b. Property may not be shown to be not saleable without working an undue hardship if the owner of the property fails to take action to collect amounts due and unpaid with respect to the property or otherwise fails to assure the receipt of regular and timely payments due with respect to the property.

3. a. Any prepayments or deposits ~~which total five thousand dollars or less~~ up to the amount set by the department in accordance with state law and the medicaid state plan, which are designated by an applicant or recipient for the burial of the applicant or recipient. Earnings accrued on the total amount of the designated burial fund are excluded.

(1) The burial fund must be identifiable and may not be commingled with other funds. Checking accounts are considered to be commingled.

(2) The value of an irrevocable burial arrangement shall be considered toward the burial exclusion.

(3) The prepayments on a whole life insurance policy or annuity are the premiums that have been paid.

(4) Any fund, insurance, or other property given to another person or entity in contemplation that its value will be used to meet the burial needs of the applicant or recipient shall be considered part of the burial fund.

(5) At the time of application, the value of a designated burial fund shall be determined by identifying the value of the prepayments which are subject to the burial exclusion and asset limit amounts.

(6) Designated burial funds which have been decreased prior to application for medicaid shall be considered redesignated as the date of last withdrawal. The balance at that point shall be considered the prepayment amount and earnings from that date forward shall be disregarded.

(7) Reductions made in a designated burial fund after eligibility is established must first reduce the amount of earnings.

(8) An applicant shall be determined eligible for the three-month prior period when a burial fund is established at the time of application if the value of all assets are within the medicaid burial fund exclusion and asset limit amounts for each of the three prior months. Future earnings on the newly established burial fund must be excluded.

b. A burial plot for each family member.

History: Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; July 1, 2003; June 1, 2004; August 1, 2005; April 1, 2008; January 1, 2010.
General Authority: NDCC 50-06-16, 50-24.1-04

Law Implemented: NDCC 50-24.1-02, 50-24.1-02.3

SECTION 7. Subsections 2 and 5 of section 75-02-02.1-32 are amended as follows:

75-02-02.1-32. Valuation of assets. It is not always possible to determine the value of assets with absolute certainty, but it is necessary to determine a value in order to determine eligibility. The valuation must be based on reasonably reliable information. It is the responsibility of the applicant or recipient, or the persons acting on behalf of the applicant or recipient, to furnish reasonably reliable information. Because an applicant or recipient may not be knowledgeable of asset values, and particularly because that person may have a strong interest in the establishment of a particular value, whether or not that value is accurate, some verification of value must be obtained. If a valuation from a source offered by an applicant or recipient is greatly different from generally available or published sources, the applicant or recipient must provide a convincing explanation for the differences particularly if the applicant or recipient may be able to influence the person providing the valuation. If reasonably reliable information concerning the value of assets is not made available, eligibility may not be determined. Useful sources of verification include:

2. With respect to personal property other than liquid assets:
   a. Publicly traded stocks, bonds, and securities: stockbrokers.
   b. Autos, trucks, mobile homes, boats, farm equipment, or any other property listed in published valuation guides accepted in the trade: the valuation guide.
   c. With respect to harvested grains or produce: grain buyers, grain elevator operators, produce buyers; and, for crops grown on contract: the contract.
   d. With respect to stock in corporations not publicly traded: appraisers, accountants.
   e. With respect to other personal property: dealers and buyers of that property.
   f. With respect to a life insurance policy: the life insurance company.

5. Contractual rights to receive money payments:
   a. Except as provided in subdivision d, the value of contractual rights to receive money payments in which payments are current is an amount equal to the total of all outstanding payments of principal required to be made by the contract unless evidence is furnished that establishes a lower value.
   b. Except as provided in subdivision d, the value of contractual rights to receive money payments in which payments are not current is the current fair market value of the property subject to the contract.
   c. Except as provided in subdivision d, if upon execution the total of all principal payments required under the terms of the contract is less than the fair market value of the property sold, the difference is a disqualifying transfer governed by section 75-02-02.1-33.1 or 75-

02-02.1-33.2, and the value of the contract is determined under subdivision a or b.

d. A contractual right to receive money payments that consists of a promissory note, loan, or mortgage is a disqualifying transfer governed by section 75-02-02.1-33.2 of an amount equal to the outstanding balance due as of the date the lender or purchaser, or the lender's or purchaser's spouse, first applies for medicaid to secure nursing care services, as defined in section 75-02-02.1-33.2, if:
   (1) Any payment on the contract is due after the end of the contract payee's life expectancy as established in accordance with actuarial publications of the office of the chief actuary of the social security administration;
   (2) The contract provides for other than equal payments or for any balloon or deferred payment; or
   (3) The contract provides for any payment otherwise due to be diminished after the contract payee's death.

e. The value of a secured contractual right to receive money payments that consists of a promissory note, loan, or mortgage not described in subdivision d shall be determined under subdivision a or b. For an unsecured note, loan, or mortgage, the value is the outstanding payments of principal and overdue interest unless evidence is furnished that establishes a lower value.

History: Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; July 1, 2003; April 1, 2008; January 1, 2010.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02

SECTION 8. Subsection 7 of section 75-02-02.1-33.1 is amended as follows:

75-02-02.1-33.1. Disqualifying transfers made before February 8, 2006.

7. No income or asset transferred to a parent, stepparent, child, stepchild, grandparent, grandchild, brother, sister, stepsister, stepbrother, great-grandparent, great-grandchild, aunt, uncle, niece, or nephew of the individual or the individual's spouse, purportedly for services or assistance furnished by the transferee to the individual or the individual's spouse, may be treated as consideration for the ~~transferred income or asset~~ services or assistance furnished unless:
   a. The transfer is made pursuant to a valid written contract entered into prior to rendering the services or assistance;
   b. The contract was executed by the individual or the individual's fiduciary who is not a provider of services or assistance under the contract;
   c. Compensation is consistent with rates paid in the open market for the services or assistance actually provided; and

d. The parties' course of dealing included paying compensation upon rendering services or assistance, or within thirty days thereafter.

History: Effective October 1, 1993; amended effective December 1, 1996; July 1, 2003; June 1, 2004; May 1, 2006; April 1, 2008; January 1, 2010.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02; 42 USC 1396p(c)

SECTION 9. Subsections 8 and 13 of section 75-02-02.1-33.2 are amended as follows:

75-02-02.1-33.2. Disqualifying transfers made on or after February 8, 2006.

8. a. An individual shall not be ineligible for medicaid by reason of subsection 2 to the extent the individual makes a satisfactory showing that an undue hardship exists for the individual. Upon imposition of a period of ineligibility because of a transfer of assets or income for less than fair market value, the department shall notify the applicant or recipient of the right to request an undue hardship exception. An individual may apply for an exception to the transfer of asset penalty if the individual claims that the ineligibility period will cause an undue hardship to the individual. A request for a determination of undue hardship must be made within ninety days after the circumstances upon which the claim of undue hardship is made were known or should have been known to the affected individual or the person acting on behalf of that individual if incompetent. The individual must provide to the department sufficient documentation to support the claim of undue hardship. The department shall determine whether a hardship exists upon receipt of all necessary documentation submitted in support of a request for a hardship exception. An undue hardship exists only if the individual shows that all of the following conditions are met:
   (1) Application of the period of ineligibility would deprive the individual of food, clothing, shelter, or other necessities of life or would deprive the individual of medical care such that the individual's health or life would be endangered;
   (2) The individual who transferred the assets or income, or on whose behalf the assets or income were transferred, has exhausted all lawful means to recover the assets or income or the value of the transferred assets or income, from the transferee, a fiduciary, or any insurer;
   (3) A person who would otherwise provide care would have no cause of action, or has exhausted all causes of action, against the transferee of the assets or income of the individual or the individual's spouse under North Dakota Century Code chapter 13-02.1, the Uniform Fraudulent Transfers Act, or any substantially similar law of another jurisdiction; and
   (4) The individual's remaining available assets and the remaining assets of the individual's spouse are less than the asset limit in subsection 1 of section 75-02-02.1-26 counting the value of all assets except:
      (a) A home, exempt under section 75-02-02.1-27, but not if the individual or the individual's spouse has equity in the home in excess of twenty-five percent of the

amount established in the approved state plan for medical assistance which is allowed as the maximum home equity interest for nursing facility services or other long-term care services;

(b) Household and personal effects;

(c) One motor vehicle if the primary use is for transportation of the individual, or the individual's spouse or minor, blind, or disabled child who occupies the home; and

(d) Funds for burial ~~of five thousand dollars or less~~ up to the amount excluded in subsection 3 of section 75-02-02.1-28 for the individual and the individual's spouse.

b. Upon the showing required by this subsection, the department shall state the date upon which an undue hardship begins and, if applicable, when it ends.

c. The agency shall terminate the undue hardship exception, if not earlier, at the time an individual, the spouse of the individual, or anyone with authority to act on behalf of the individual, makes any uncompensated transfer of income or assets after the undue hardship exception is granted. The agency shall deny any further requests for an undue hardship exception due to either the disqualification based on the transfer upon which the initial undue hardship determination was based, or a disqualification based on any subsequent transfer.

13. No income or asset transferred to a parent, stepparent, child, stepchild, grandparent, grandchild, brother, sister, stepsister, stepbrother, great-grandparent, great-grandchild, aunt, uncle, niece, or nephew of the individual or the individual's spouse, purportedly for services or assistance furnished by the transferee to the individual or the individual's spouse, may be treated as consideration for the ~~transferred income or asset~~ services or assistance furnished unless:

a. The transfer is made pursuant to a valid written contract entered into prior to rendering the services or assistance;

b. The contract was executed by the individual or the individual's fiduciary who is not a provider of services or assistance under the contract;

c. Compensation is consistent with rates paid in the open market for the services or assistance actually provided; and

d. The parties' course of dealing included paying compensation upon rendering services or assistance, or within thirty days thereafter.

History: Effective April 1, 2008; January 1, 2010.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02; 42 USC 1396p(c)

SECTION 10. Section 75-02-02.1-38.1 is amended as follows:

75-02-02.1-38.1. Post-eligibility treatment of income. Except in determining eligibility for workers with disabilities or children with disabilities, this section prescribes specific financial requirements for determining the treatment of income and application of income to the cost of care for an individual screened as requiring nursing care services who resides in a nursing facility, the state hospital, the Anne Carlsen facility, a residential treatment facility accredited by the joint commission on accreditation of healthcare organizations, or an intermediate care facility for the mentally retarded, or who receives swing-bed care in a hospital.

1. The following types of income may be disregarded in determining medicaid eligibility:
   a. Occasional small gifts;
   b. For so long as 38 U.S.C. 5503 remains effective, ninety dollars of veterans administration improved pensions paid to a veteran, or a surviving spouse of a veteran, who has neither spouse nor child, and who resides in a medicaid-approved nursing facility;
   c. Payments to certain United States citizens of Japanese ancestry, resident Japanese aliens, and eligible Aleuts made under the Wartime Relocation of Civilians Reparations Act [50 U.S.C. App. 1989 et seq.];
   d. Agent orange payments;
   e. German reparation payments made to survivors of the holocaust, and reparation payments made under sections 500 through 506 of the Austrian General Social Insurance Act;
   f. Netherlands reparation payments based on Nazi, but not Japanese, persecution during World War II [Pub. L. 103-286; 42 U.S.C. 1437a, note];
   g. Radiation Exposure Compensation Act [Pub. L. 101-426; 42 U.S.C. 2210, note]; and
   h. Interest or dividend income from liquid assets.
2. The mandatory payroll deductions under the Federal Insurance Contributions Act [26 U.S.C. 3101 et seq.] and medicare are allowed from earned income.
3. In establishing the application of income to the cost of care, the following deductions are allowed in the following order:
   a. The nursing care income level;
   b. Amounts provided to a spouse or family member for maintenance needs;
   c. The cost of premiums for health insurance in the month the premium is paid or prorated and deducted from income in the months for which the premium affords coverage;
   d. The cost of premiums for long-term care insurance carried by an individual or the individual's spouse in the month the premium is paid or prorated and deducted from income in the months for which the premium affords coverage;

e. Medical expenses for necessary medical or remedial care that are each:
   (1) Documented in a manner which describes the service, the date of the service, the amount of cost incurred, and the name of the service provider;
   (2) Incurred in the month for which eligibility is being determined, or was incurred in a prior month but was actually paid in the month for which eligibility is being determined and was not previously allowed as a deduction or offset of recipient liability, and was not applied previously to recipient liability;
   (3) Provided by a medical practitioner licensed to furnish the care;
   (4) Not subject to payment by any third party, including medicaid and medicare;
   (5) Not incurred for nursing facility services, swing-bed services, or home and community-based services during a period of ineligibility because of a disqualifying transfer; and
   (6) Claimed; and

f. The cost of services of an applicant's or recipient's guardian or conservator, up to a maximum equal to five percent of countable gross monthly income excluding nonrecurring lump sum payments.

4. For purposes of this section, "premiums for health insurance" include any payments made for insurance, health care plans, or nonprofit health service plan contracts which provide benefits for hospital, surgical, and medical care, but do not include payments made for coverage which is:
   a. Limited to disability or income protection coverage;
   b. Automobile medical payment coverage;
   c. Supplemental to liability insurance;
   d. Designed solely to provide payments on a per diem basis, daily indemnity, or nonexpense-incurred basis; or
   e. Credit accident and health insurance.

History: Effective July 1, 2003; amended effective June 1, 2004; May 1, 2006; April 1, 2008; January 1, 2010.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02

SECTION 11. Section 75-02-02.1-38.2 is amended as follows:

75-02-02.1-38.2. Disregarded income.

1. This section applies to an individual residing in the individual's own home or in a specialized facility, workers with disabilities coverage, children with disabilities coverage, and to the medicare savings programs, but does not apply to an individual receiving nursing care services in a nursing facility, the state hospital, the Anne Carlsen facility, a residential treatment facility accredited by the joint commission on accreditation of healthcare

organizations, an intermediate care facility for the mentally retarded, or receiving swing-bed care in a hospital. The following types of income shall be disregarded in determining medicaid eligibility:

a. Money payments made by the department in connection with foster care, subsidized guardianship, or the subsidized adoption program;
b. Occasional small gifts;
c. County general assistance that may be issued on an intermittent basis to cover emergency-type situations;
d. Income received as a housing allowance by a program sponsored by the United States department of housing and urban development or rent supplements or utility payments provided through a housing assistance program;
e. Income of an individual living in the parental home if the individual is not included in the medicaid unit;
f. Educational loans, scholarships, grants, awards, workers compensation, vocational rehabilitation payments, and work study received by a student, or any fellowship or gift, or portion of a gift, used to pay the cost of tuition and fees at any educational institution;
g. In-kind income except in-kind income received in lieu of wages;
h. Per capita judgment funds paid to members of the Blackfeet Tribe and the Gross Ventre Tribe under Pub. L. 92-254, to any tribe to pay a judgment of the Indian claims commission or the court of claims under Pub. L. 93-134, or to the Turtle Mountain Band of Chippewa Indians, the Chippewa Cree Tribe of Rocky Boy's Reservation, the Minnesota Chippewa Tribe, or the Little Shell Tribe of Chippewa Indians of Montana under Pub. L. 97-403;
i. Compensation received by volunteers participating in the action program as stipulated in the Domestic Volunteer Service Act of 1973 [Pub. L. 93-113; 42 U.S.C. 4950 et seq.], including foster grandparents, older American community service program, retired senior volunteer program, service corps of retired executives, volunteers in service to America, and university year for action;
j. Benefits received through the low income home energy assistance program;
k. Training funds received from vocational rehabilitation;
l. Training allowances of up to thirty dollars per week provided through a tribal native employment works program, or the job opportunity and basic skills program;
m. Income tax refunds and earned income credits;
n. Needs-based payments, support services, and relocation expenses provided through programs established under the Workforce Investment Act [29 U.S.C. 2801 et seq.], and through the job opportunities and basic skills program;

o. Income derived from submarginal lands, conveyed to Indian tribes and held in trust by the United States, as required by section 6 of Pub. L. 94-114 [42 U.S.C. 301, note];

p. Income earned by a child who is a full-time student or a part-time student who is not employed one hundred hours or more per month;

q. Payments from the family subsidy program;

r. The first fifty dollars per month of current child support, received on behalf of children in the medicaid unit, from each budget unit that is budgeted with a separate income level;

s. Payments made to recipients under title II of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 [Pub. L. 91-646, 42 U.S.C. 4621 et seq.];

t. Payments made tax exempt as a result of section 21 of the Alaska Native Claims Settlement Act [Pub. L. 92-203];

u. Payments to certain United States citizens of Japanese ancestry, resident Japanese aliens, and eligible Aleuts made under the Wartime Relocation of Civilians Reparations Act [Pub. L. 100-383; 50 U.S.C. App. 1989 et seq.];

v. Agent orange payments;

w. A loan from any source that is subject to a written agreement requiring repayment by the recipient;

x. The medicare part B premium refunded by the social security administration;

y. Payments from a fund established by a state as compensation for expenses incurred or losses suffered as a result of a crime;

z. Temporary assistance for needy families benefit and support service payments;

aa. Lump sum supplemental security income benefits in the month in which the benefit is received;

bb. German reparation payments made to survivors of the holocaust and reparation payments made under sections 500 through 506 of the Austrian General Social Insurance Act;

cc. Assistance received under the Disaster Relief and Emergency Assistance Act of 1974 [Pub. L. 93-288; 42 U.S.C. 5121 et seq.], or some other federal statute, because of a presidentially declared major disaster, and interest earned on that assistance;

dd. Refugee cash assistance or grant payments;

ee. Payments from the child and adult food program for meals and snacks to licensed families who provide day care in their home;

ff. Extra checks consisting only of the third regular payroll check or unemployment benefit payment received in a month by an individual who is paid biweekly, and the fifth regular payroll check received in a month by an individual who is paid weekly;

gg. All income, allowances, and bonuses received as a result of participation in the job corps program;

hh. Payments received for the repair or replacement of lost, damaged, or stolen assets;
ii. Homestead tax credit;
jj. Training stipends provided to victims of domestic violence by private, charitable organizations for attending their educational programs;
kk. Allowances paid to children of Vietnam veterans who are born with spina bifida, or to children of women Vietnam veterans who are born with certain covered birth defects, under 38 U.S.C. 1805 or 38 U.S.C. 1815;
ll. Netherlands reparation payments based on Nazi, but not Japanese, persecution during World War II [Pub. L. 103-286; 42 U.S.C. 1437a, note];
mm. Radiation Exposure Compensation Act [Pub. L. 101-426; 42 U.S.C. 2210, note];
nn. The first two thousand dollars per year of ~~lease~~ payments ~~deposited in~~ derived from individual interests in Indian ~~moneys accounts~~ trust or restricted lands;
oo. Interest or dividend income from liquid assets; ~~and~~
pp. Additional pay received by military personnel as a result of deployment to a combat zone; and
qq. All wages paid by the census bureau for temporary employment related to census activities.

2. For purposes of this section:
   a. "Full-time student" means a person who attends school on a schedule equal to a full curriculum; and
   b. "Student" means an individual who regularly attends and makes satisfactory progress in elementary or secondary school, general equivalency diploma classes, home school program recognized or supervised by the student's state or local school district, college, university, or vocational training, including summer vacation periods if the individual intends to return to school in the fall.

History: Effective July 1, 2003; amended effective June 1, 2004; May 1, 2006; April 1, 2008; January 1, 2010.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02

SECTION 12. Subsection 2 of section 75-02-02.1-39 is amended as follows:

75-02-02.1-39. Income deductions. This section applies to an individual residing in the individual's own home or in a specialized facility, workers with disabilities coverage, children with disabilities coverage, and to the medicare savings programs, but does not apply to an individual receiving nursing care services in a nursing facility, the state hospital, the Anne Carlsen facility, a residential treatment facility accredited by the joint commission on accreditation of healthcare organizations, an intermediate care facility for the mentally retarded, or receiving swing-bed care in a hospital. No deduction

not described in subsections 1 through 14 may be allowed in determining medicaid eligibility.

2. Except in determining eligibility for the medicare savings programs, medical expenses for necessary medical or remedial care may be deducted only if each is:
   a. Documented in a manner which describes the service, the date of the service, the amount of the cost incurred, and the name of the service provider;
   b. Incurred by a member of a medicaid unit in the month for which eligibility is being determined, or was incurred in a prior month but was actually paid in the month for which eligibility is being determined and was not previously allowed as a deduction or offset of recipient liability, and was not previously applied to recipient liability;
   c. Provided by a medical practitioner licensed to furnish the care;
   d. Not subject to payment by any third party, including medicaid and medicare;
   e. Not incurred for nursing facility services, swing-bed services, or home and community-based services during a period of ineligibility determined under section 75-02-02.1-33.1; and
   f. Claimed.

History: Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; July 1, 2003; June 1, 2004; April 1, 2008; January 1, 2010.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02

SECTION 13. Subsection 1 of section 75-02-02.1-40 is amended as follows:

75-02-02.1-40. Income levels.

1. Levels of income for maintenance shall be used as a basis for establishing financial eligibility for medicaid. The income levels applicable to individuals and units are:
   a. Categorically needy income levels.
      (1) Family coverage income levels established in the medicaid state plan are applied to the family coverage group. The family size is increased for each unborn child when determining the appropriate family size.
      (2) Except for individuals subject to the nursing care income level, the income level for categorically needy aged, blind, or disabled recipients is that which establishes supplemental security income eligibility.
   b. Medically needy income levels.
      (1) Medically needy income levels established in the medicaid state plan are applied when a medicaid individual or unit resides in the individual's or the unit's own home or in a

specialized facility, and when a medicaid individual has been screened as requiring nursing care, but elects to receive home and community-based services. The family size is increased for each unborn child when determining the appropriate family size.

(2) The nursing care income ~~level shall be fifty dollars per month and~~ levels established in the medicaid state plan are applied to ~~a resident~~ residents receiving care in a nursing facility, an intermediate care facility for the mentally retarded, the state hospital, the Anne Carlsen facility, a residential treatment facility accredited by the joint commission on accreditation of healthcare organizations, or receiving swing-bed care in a hospital.

(3) The community spouse income level for a medicaid eligible community spouse is subject to subdivision a, paragraph 1 of subdivision b, or subdivision c. The level for an ineligible community spouse is the greater of two thousand two hundred sixty-seven dollars per month or the minimum amount permitted under section 1924(d)(3)(c) of the Act [42 U.S.C. 1396r-5(d)(3)(C)], as adjusted pursuant to section 1924(g) of the Act [42 U.S.C. 1396r-5(g)].

(4) The income level for each ineligible family member in a spousal impoverishment prevention case is equal to one-third of an amount determined in accordance with section 1924(d)(3)(A)(i) of the Act [42 U.S.C. 1396r-5(d)(3)(A)(i)], less the monthly income of that family member. For purposes of this paragraph, "family member" has the meaning given in subsection 1 of section 75-02-02.1-24.

c. Poverty income level.

(1) The income level for pregnant women and children under age six is equal to one hundred and thirty-three percent of the poverty level applicable to a family of the size involved. The family size is increased for each unborn child when determining the appropriate family size.

(2) Qualified medicare beneficiaries. The income level for qualified medicare beneficiaries is equal to one hundred percent of the poverty level applicable to the family of the size involved. The income level applies regardless of living arrangement.

(3) The income level for children aged six to nineteen is equal to one hundred percent of the poverty level applicable to a family of the size involved. The family size is increased for each unborn child when determining the appropriate family size.

(4) The income level for transitional medicaid benefits is equal to one hundred and eighty-five percent of the poverty level

applicable to a family of the size involved. The family size is increased for each unborn child when determining the appropriate family size.

(5) The income level for qualified working and disabled individuals is equal to two hundred percent of the poverty level applicable to the family of the size involved. The income level applies regardless of living arrangement.

(6) The income level for specified low-income medicare beneficiaries is equal to one hundred twenty percent, of the poverty level applicable to a family of the size involved. The income level applies regardless of living arrangement.

(7) The income level for qualified individuals is equal to one hundred thirty-five percent of the poverty level applicable to a family of the size involved. The income level applies regardless of living arrangement.

(8) The income level for workers with disabilities is two hundred twenty-five percent of the poverty level applicable to a family of the size involved. The income level applies regardless of living arrangement.

(9) The income level for children with disabilities is two hundred percent of the poverty level applicable to a family of the size involved. The income level applies regardless of living arrangement.

History: Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; July 1, 2003; June 1, 2004; April 1, 2008; January 1, 2010.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02

north dakota department of human services

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John Hoeven, Governor
Carol K. Olson, Executive Director

SUMMARY OF COMMENTS RECEIVED REGARDING PROPOSED AMENDMENTS TO N.D. ADMIN. CHAPTER 75-02-02.1 ELIGIBILITY FOR MEDICAID

The North Dakota Department of Human Services (the Department) held a public hearing on September 24, 2009, in Bismarck, ND, concerning a proposed amendment to N.D. Administrative Code Chapter 75-02-02.1, Eligibility for Medicaid.

Written comments on these proposed amendments could be offered through 5:00 p.m. on October 5, 2009.

No one attending the public hearing provided comments. One set of written comments was received within the comment period. The commentor was:

1. David Boeck, Protection and Advocacy Project, 400 East Broadway Avenue, Bismarck, ND 58504.

SUMMARY OF COMMENTS

Comment 1: Section 75-02-02.1-05: There is an error in paragraph (4)(e); "benets" should be "benefits".

It is an improvement to remove the redundant old descriptor of "aged, blind, and disabled" for Medicare beneficiaries.

DHS Response: The error has been corrected.

Comment 2: Section 75-02-02.1-12: Many people are exempt from documenting citizenship status under federal law. The proposed rule allows no exceptions. State law must conform to federal law on this point.

Persons who are exempt from documenting citizenship status include:

- Certain newborn children
- SSI beneficiaries
- Persons entitled to or enrolled in any part of Medicare
- Persons receiving Title II (of the Social Security Act) benefits
- Persons in foster care and receiving assistance under Title IV-B of the Act

(Citations have been omitted from this summary. To see the citations, please see the document with the comments as submitted which is attached to this summary.)

DHS Response: Subsection 6 of the draft rule states that the citizenship status of each applicant must be established and documented. The rule is not intended to go into the details of how the process occurs, but is intended to identify that a determination regarding citizenship status must be made and documented. The Department accommodates the exceptions indicated in federal law.

Comment 3:

a. Section 75-02-02.1-18: Subsection 1: The federal law appears to require coverage for a broader range of aliens. See 45 CFR § 435.408(b) and 8 USC § 1641 (b) and (c). The proposed rule should provide coverage for that range of aliens.

North Dakota hospitals must provide care to everyone who goes to the hospital emergency room with a medical emergency. The hospital ends up absorbing the cost if a patient is unable to pay. Broader Medicaid coverage will provide some benefit to North Dakota hospitals.

This is a controversial issue but North Dakota probably sees very few undocumented aliens seeking medical care. Even one uncovered patient can be very significant to a small hospital. Undocumented aliens without health care would present unwelcome costs to North Dakota charities and other social programs. This would be a drain on the State economy.

Denial of health care is not a well-designed strategy for keeping undocumented aliens out of North Dakota. North Dakotans do not want to see other people suffer for lack of medical care; North Dakotans would not ignore people with legitimate medical needs.

North Dakota should not confuse health policy with immigration policy. They are different issues that call for different approaches. There are specific immigration laws for keeping undocumented aliens out of the U.S. and for returning them to their own countries. If immigration laws are inadequate, it is important to reform the immigration laws, not health care access.

DHS Response: We were unable to verify the existence of 45 CFR § 435.408(b), so no changes are made relative to that citation. Upon review of 8 USC § 1641, the Department agrees that there are four groups identified under 8 USC § 1641 that were not included in the initial draft rule should have been included and they have been added.

In response to the rest of the discussion about the provision of health care to those who have none, the Department notes that emergency services are covered for aliens who meet certain Medicaid criteria (see subsection 9 of the rule). The rule follows the requirements found in federal law for providing those services.

b. Section 75-02-02.1-18: Paragraph (8)(a): This would read more smoothly if "their unmarried dependent children" were to replace the proposed "unmarried dependent children of such individuals".

DHS Response: The change suggested in the comment is a change to existing language. Existing language is accurate, and no change is needed.

c. Section 75-02-02.1-18: Paragraph (8)(e): The nouns should agree in number, i.e., "aliens" and "immigrants" or "an alien" and "immigrant".

DHS Response: The grammar has been corrected.

d. Section 75-02-02.1-18: Paragraph (8)(f): The meaning of "severe form of trafficking" is unclear. Is this trafficking in children from third world countries, women from third world countries, slaves, drugs, or something else?

DHS Response: Individuals who qualify for special immigrant status related to trafficking will be identified by INS to be victims of trafficking as provided in INS laws. The state does not determine whether an applicant is a victim of a severe form of trafficking, but determines eligibility based on an applicant's status as a victim as identified by INS. No change is needed.

Comment 4:

a. Section 75-02-02.1-28: Subsection (2)(a): This should be more easily understood by the uninitiated. The "uninitiated" includes almost all new applicants for Medicaid services and almost all new Medicaid workers.

The subsection needs to combine the definitions of "good faith effort to sell" in 75-02-02.1-01 (12) and "property that is not saleable without working an undue hardship" in 75-02-02.1-01(23) with N.D.A.C. section 75-02-02.1-32 (valuation of assets). This subject is very complex and this subsection should include a checklist. (The example provided with this comment is quite lengthy and is not reproduced here. Please see the document with the comments as submitted which is attached to this summary.)

DHS Response: The suggested change does not address the substance of the proposed change; rather it sets forth an example of a rewrite to multiple rules which the commentor believes is easier to read and understand than the current rules provide. No change is needed.

b. Section 75-02-02.1-28: Subsection 3: There is no way for the Department to change eligibility criteria "in accordance with state law" except to promulgate rules as required in the Administrative Agencies Practices Act. Of course, no applicant or recipient would object if the Department were to increase the amount of excluded prepayments and deposits.

DHS Response: The Department is required to change eligibility criteria when there has been a legislative change in the eligibility criteria. The language "in accordance with state law" is used to preclude the Department from having to change administrative rules each time the Legislative Assembly adopts a change in eligibility criteria; in this case, the increase in the burial allowance. No change is needed.

N.D. Admin. Code Chapter 75-02-02.1
Summary of Comments
October 21, 2009

Comment 5: It is nice to see the proposed rule in section 75-02-02.1-38.2(1)(qq) includes a new provision for disregarding income from temporary employment by the Census Bureau.

DHS Response: No change is needed.

Comment 6: Section 75-02-02.1-40 (1)(b)(2): The Department would not be complying with state law if it were to change benefits by relying on the State Medicaid Plan and ignoring its obligation to promulgate rules as required in the Administrative Agencies Practices Act. Of course, no applicant or recipient would object if the Department were to increase only the nursing care income levels.

DHS Response: The state Medicaid plan is the agreement the state has with the federal government regarding administration of the Medicaid program. The state is required to follow the state plan to ensure federal funding. The levels identified in the state plan are the levels identified through state law and the language in the plan. The recent change required the medically needy income level to be a percentage of the federal poverty level, which can change annually. The proposed rule change is intended to simplify the process by avoiding annual emergency rule changes to stay consistent with the change in the poverty level and to timely correspond with income level changes. No change is needed.

Comment 7: The Department's website includes a section on "public notices." The announcement of proposed rules does not appear there. It seems they belong there.

DHS Response: This is not a comment on any of the proposed rule changes, so no change is needed. Additionally, notice of proposed rulemaking was completed as required under the Administrative Agencies Practices Act. All of that notwithstanding, the Department will consider the suggestion for future rulemaking projects.

Prepared by:

Julie Leer

Julie Leer, Director
Legal Advisory Unit
N.D. Dept. of Human Services

In Consultation with: Curtis Volesky, Medical Services

October 21, 2009

Cc: Curtis Volesky, Medical Services

August 25, 2009

MEMORANDUM

TO: Julie Leer, Legal Advisory Unit

FROM: Curtis Volesky, Director, Medicaid Eligibility Policy

SUBJECT: Regulatory Analysis for N.D. Admin. Code ch. 75-02-02.1, Eligibility for Medicaid

To fulfill the requirements of N.D.C.C. § 28-32-08, the following regulatory analysis of proposed N.D. Administrative Code chapters 75-02-02.1, Eligibility for Medicaid are provided. The impacts of the proposed amendments are expected to exceed $50,000.

Purpose:

The proposed rules implement increases to the asset levels for the Medicare Savings Programs effective January 1, 2010, as required by the Medicare Improvements for Patients and Providers Act of 2008. This change will allow more Medicare beneficiaries with lower income to qualify for benefits.

The proposed rules make changes to the 'Age and Identity' and 'Citizenship and Alienage' sections to remove provisions that are no longer effective, to increase the lists of eligible and ineligible aliens, and to reference acceptable verifications to prove citizenship and identity. These changes are made as a result of requirements established by the Deficit Reduction Act of 2005, and to provide additional clarification in the rule.

The proposed rules make changes to the 'Excluded Assets' and 'Disqualifying Transfers' sections incorporate the increase in the burial allowance as a result of a state law change passed during the 2009 legislative session.

The proposed rules add language to the 'State of residence,' 'Excluded Assets,' and 'Valuation of Assets' sections to eliminate ambiguity and provide clarification. The changes are made to coincide with federal policies and per requests during appeals. These changes are not expected to allow additional individuals, or prevent individuals, from becoming eligible for Medicaid.

The proposed rule change disregards wages paid by the Census Bureau for temporary employment related to census activities as income. The change is made to adopt a Department policy. The rule change will prevent individuals from becoming ineligible for Medicaid or, by reference, SCHIP if they obtain such employment.

The proposed rules make changes to the 'Post Eligibility Treatment of Income' and 'Income Deductions' sections allow countable income to be reduced for actual payments made on old medical bills. This deduction is required to be allowed per federal regulations.

The proposed rule changes the 'Income Levels' section to allow for an increase in the personal needs allowance for recipients in intermediate care facilities for the mentally retarded (ICF-MR). This change is being made as a result of an appropriations measure passed during the 2009 legislative session.

Classes of persons affected:

- Aged and disabled individuals;
- Individuals who become temporarily employed by the Census Bureau; and
- Individuals residing in intermediate care facilities for the mentally retarded.

Probable Impact:

The following list identifies those changes that may have an impact and describes the impact:

- Medicare Savings Programs asset levels. The asset levels for the Medicare Savings Programs are currently at $4,000 for a one person unit and $6,000 for a two person unit, which is twice the SSI level. The new levels will be three times the SSI levels, and increased annually by the CPI. This change will allow more Medicare beneficiaries with lower income to qualify for benefits. This change is mandated by federal law and is expected to increase expenditures of the Medicaid program due to the increased number of individuals that will qualify for assistance.

- Increased burial allowance. Effective August 1, 2009, state law changed to increase the burial allowance from $5000 to $6000. This change will allow individuals who set aside money for burial expenses to qualify for Medicaid sooner as they will have fewer assets to spend down on their care. As a result, Medicaid will cover those medical expenses, which will increase expenditures to the Medicaid program.

- Disregard of Census employment wages. All Census employment wages were previously counted as earned income in determining Medicaid eligibility. This change disregards wages paid by the Census Bureau for temporary employment related to census activities as income. The rule change will prevent individuals from becoming ineligible for Medicaid or SCHIP if

they obtain such employment. As a result, the Census Bureau will also have a larger pool of potential employees to assist with the census as individuals will not fear losing their Medicaid coverage. If the income were counted, it could mean potential savings to the Medicaid and SCHIP programs by reducing benefits paid out; however, because individuals continue to qualify, there is no savings.

- Personal needs allowance. The personal needs allowance for recipients in intermediate care facilities for the mentally retarded (ICF-MR) is currently $50 per month. This change will increase that amount to $85 per month. The change will allow these recipients more spendable income to better meet their needs as they are learning to transition into community life. Allowing recipients to retain more of their monthly income reduces the amount they contribute to their cost of care, and increases the amount the Medicaid program pays.

Probable costs:

The changes implemented by these rule changes are for the benefit of individuals who seek coverage and should have no negative fiscal impact on them. The changes allow additional individuals to be eligible, so there are fiscal impacts to the Medicaid program. The expected annual impact to the Medicaid program due to the increase in the Medicare Savings Programs asset levels is currently unknown due to limited data to indicate the number of additional individuals that will apply, when they would apply, and whether they would qualify. The fiscal impact to the Medicaid program for the increase in the burial allowance is expected to be $283,000 for the biennium. Allowing income deductions for paid medical expenses is expected to have a fiscal impact on the Medicaid program, however, the amount is unknown as there is no current data to indicate the number of individuals that will pay old bills and claim the deduction, or the amount of those payments. The increase in the personal needs allowance will reduce recipient liability paid by some recipients so is expected to have a fiscal impact of $362,880 for the biennium.

The remaining rule changes are not expected to have any fiscal costs.

Alternative methods:

The most cost effective and user friendly methods were utilized wherever possible to implement these changes.

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Curtis Volesky, Director, Medicaid Eligibility

DATE: August 25, 2009

SUBJECT: Small Entity Regulatory Analysis Regarding Proposed Amendments to N.D. Admin. Code ch. 75-02-02.1, Eligibility for Medicaid

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The purpose of this small entity regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This regulatory analysis pertains to proposed amendments to N.D. Admin. Code ch. 75-02-02.1. The proposed rules are designed to implement federal law, changes authorized during the 2009 legislative session, and department policies.

Consistent with public health, safety, and welfare, the Department has considered using regulatory methods that will accomplish the objectives of applicable statutes while minimizing adverse impact on small entities. For this analysis, the Department has considered the following methods for reducing the rule's impact on small entities:

1. Establishment of Less Stringent Compliance or Reporting Requirements

The only small entities affected by this proposed amendment are small political subdivisions consisting of the County Social Service Boards of counties with populations of fewer than five thousand people. Like all other County Social Service Boards in North Dakota, County Social Service Boards of counties with populations of fewer than five thousand people are responsible for locally administered economic assistance programs, including Medicaid. N.D.C.C. § 50-01.2-03.2(1)(a). The County Social Service Boards must meet, or assist the North Dakota Department of Human Services in meeting, compliance and reporting requirements imposed by federal and state laws. Those requirements must be uniformly applied throughout the state. The proposed amendments will not alter in any material way any required compliance or reporting requirement of County Social Service Boards. For these reasons, establishment of less stringent compliance or reporting requirements for these small entities was not considered.

2. Establishment of Less Stringent Schedules or Deadlines for Compliance or Reporting Requirements for Small Entities

The proposed amendment will not alter in any material way any required schedules or deadlines for compliance or reporting requirement of County Social Service Boards. For this reason, and because Medicaid policy must be uniformly applied throughout the state, the establishment of less stringent schedules or deadlines for compliance or reporting requirements for these small entities was not considered.

3. Consolidation or Simplification of Compliance or Reporting Requirements for Small Entities

The proposed amendment will not alter in any material way any required compliance or reporting requirement of County Social Service Boards. For this reason, and because Medicaid policy must be uniformly applied throughout the state, neither consolidation nor simplification of compliance or reporting requirements for these small entities was considered.

4. Establishment of Performance Standards for Small Entities to Replace Design or Operational Standards Required in the Proposed Rule

The County Social Service Boards are responsible for meeting performance standards as well as operational standards imposed by federal and state law. The proposed amendments do not impose any design standards or impose any additional operational standards, and will not alter in any material way any required performance standards or operational standards for County Social Service Boards. For this reason, and because Medicaid policy must be uniformly applied throughout the state, establishment of new performance standards to replace operational standards were not considered.

5. Exemption of Small Entities from All or Any Part of the Requirements Contained in the Proposed Rule

Because Medicaid policy must be uniformly applied throughout the state, the proposed rules do not exempt County Social Service Boards of counties with populations of fewer than five thousand people from all or any part of the requirements contained in the proposed rule.

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Curtis Volesky, Director, Medicaid Eligibility CV

DATE: August 25, 2009

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed Amendments to N.D. Admin. Code ch. 75-02-02.1, Eligibility for Medicaid

The purpose of this small entity economic impact statement is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This impact statement pertains to proposed amendments to N.D. Admin. Code ch. 75-02-02.1. The proposed rules are designed to implement federal law, changes authorized during the 2009 legislative session, and department policies. The proposed rules are not anticipated to have an adverse economic impact on small entities.

1. Small Entities Subject to the Proposed Rules

The small entities that are subject to the proposed amended rules are: The only small entities affected by this proposed amendment are small political subdivisions consisting of the County Social Service Boards of counties with populations with less than five thousand. Like all other County Social Service Boards in North Dakota, County Social Service Boards of counties with populations with less than five thousand are responsible for locally administered economic assistance programs, including Medicaid. N.D.C.C. § 50-01.2-03.2(1)(a). Medicaid policies and practices must be uniformly applied throughout the state. See 42 U.S.C. § 1396a(a)(1), which requires that a state plan for medical assistance (Medicaid) must "provide that it shall be in effect in all political subdivisions of the state, and, if administered by them, be mandatory upon them."

~~The following small entities may also be subject to the rule: None.~~

2. Costs for Compliance

The administrative and other costs required for compliance with the proposed rule are expected to be: While some additional applications may be received and require processing for Medicare Savings Programs, any increase will be minimal. The remaining rule changes are technical in nature, or are changes in standards. Accordingly, no additional administrative or other costs will be incurred by County Social Service Boards due to these proposed amendments.

3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rule: None.

The probable benefit to private persons and consumers who are affected by the proposed rule: The increase in the asset levels for the Medicare Savings Programs will allow additional persons to be eligible, and will allow currently eligible persons to remain eligible with higher assets. Aged and disabled individuals who set funds aside for funeral expenses will be allowed to set more funds aside and still qualify for coverage. Families who become temporarily employed by the Census Bureau will not have their benefits affected by that employment. Individuals who make payments on old medical bills they are responsible for will be able to receive credit for the entire amount paid, which will reduce their recipient liability for current medical expenses. Individuals who are residing in an intermediate care facility for the mentally retarded will be allowed to keep more money each month to meet their personal needs. The remaining rule changes are technical in nature and create no additional costs to private persons or consumers.

4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be: The increase in the Medicare Savings Programs levels will allow additional individuals to be eligible. Accordingly, there will be increased costs to the Medicaid program; however, due to the limited data available, the increased costs are unknown at this time. The fiscal impact to the state for the increase in the burial allowance is expected to be $283,000 for the biennium, of which $92,683 is state funds. The allowance for the medical expense deduction is expected to have a fiscal impact to the state, however, any amount is currently unknown as there is no data to indicate the number of individuals that will pay old bills and claim the deduction, or the amount of those payments. The increase in the personal needs allowance will reduce recipient liability paid by some

recipients so is expected to have a fiscal impact of $362,880 for the biennium, of which $118,857 would be state funds.

5. Alternative Methods

The Medicare Improvements for Patients and Providers Act of 2008 requires the Medicare Savings Programs asset level calculations as proposed. For all other rule changes where state options or flexibility were permitted, options were considered and choices made to provide for the most effective policy while being the least intrusive or costly to small entities.

north dakota
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John Hoeven, Governor
Carol K. Olson, Executive Director

TAKINGS ASSESSMENT

concerning proposed amendments to N.D. Admin. Code chapter 75-02-02.1.

This document constitutes the written assessment of the constitutional takings implications of this proposed rulemaking as required by N.D.C.C. § 28-32-09.

1. This proposed rulemaking does not appear to cause a taking of private real property by government action which requires compensation to the owner of that property by the Fifth or Fourteenth Amendment to the Constitution of the United States or N.D. Const. art. I, § 16. This proposed rulemaking does not appear to reduce the value of any real property by more than fifty percent and is thus not a "regulatory taking" as that term is used in N.D.C.C. § 28-32-09. The likelihood that the proposed rules may result in a taking or regulatory taking is nil.

2. The purpose of this proposed rule is clearly and specifically identified in the public notice of proposed rulemaking which is by reference incorporated in this assessment.

3. The reasons this proposed rule is necessary to substantially advance that purpose are described in the regulatory analysis which is by reference incorporated in this assessment.

4. The potential cost to the government if a court determines that this proposed rulemaking constitutes a taking or regulatory taking cannot be reliably estimated to be greater than $0. The agency is unable to identify any application of the proposed rulemaking that could conceivably constitute a taking or a regulatory taking. Until an adversely impacted landowner identifies the land allegedly impacted, no basis exists for an estimate of potential compensation costs greater than $0.

5. There is no fund identified in the agency's current appropriation as a source of payment for any compensation that may be ordered.

6. I certify that the benefits of the proposed rulemaking exceed the estimated compensation costs.

Dated this 26th day of August, 2009.

by: Julie Lee
N.D. Dept. of Human Services