

CMS Memo From Gale Arden (Baltimore) to Jay Gavens (Atlanta Region IV)

Center for Medicaid and State Operations
Disabled and Elderly Health Programs Group (DEHPG)

Date: April 14, 2008

To: Jay Gavens, Acting Associate Regional Administrator
Division of Medicaid and Children's Health

From: Gale P. Arden /s/
Director

Subject: Pooled Trusts

Recently, an issue regarding pooled trusts and the imposition of a transfer penalty under Medicaid has surfaced in Georgia. In the course of assisting the Georgia State Medicaid agency in responding to a proposed initiative in the Georgia legislature, it was brought to our attention that in many States within Region IV, individuals age 65 and older are establishing pooled trusts, but the States may not be applying the transfer of assets penalty provisions as required by statute.

A pooled trust is a trust that can be established for a disabled individual under the authority of section 1917(d)(4)(C) of the Social Security Act (the Act). A trust that meets the requirements of this section of the statute is exempt from being treated under the normal Medicaid trust rules in section 1917(d) of the Act. A pooled trust is run by a non-profit organization. The trust (or more accurately, a sub-account within the trust) is established for each individual beneficiary. All the beneficiary sub-accounts are pooled for investment and management purposes. Upon the death of the disabled individual, the balance remaining in the account is paid back to the State Medicaid agency in an amount equal to the medical assistance paid on behalf of the beneficiary. The statute also allows the trust to retain some portion of the balance remaining after the death of the beneficiary.

Although a pooled trust may be established for beneficiaries of any age, funds placed in a pooled trust established for an individual age 65 or older may be subject to penalty as a transfer of assets for less than fair market value. When a person places funds in a trust, the person gives up ownership of those funds. Since the individual generally does not receive anything of comparable value in return, placing funds in a trust is usually a transfer for less than fair market value. **The statute does provide an exception to imposing a transfer penalty for funds that are placed in a trust established for a disabled individual.** However, only trusts established for a disabled individual age 64 or younger are exempt

from application of the transfer of assets penalty provisions (see section 1917(c)(2)(B)(iv) of the Act).

If States are allowing individuals age 65 or older to establish pooled trusts without applying the transfer of assets provisions, they are not in compliance with the statute. As explained above, federal statute requires the application of the transfer rules in this situation; it not a decision for each State to make.

According to the Georgia legislator who contacted our office, many if not most of the States in your region may have elected not to apply the transfer of assets provisions as outlined above in situations where a pooled trust is established for someone age 65 or older. Based on the information we received, we are asking you to initiate contact with the States in your region to determine whether they are out of compliance with the requirements of the Medicaid statute. If a State is not applying the provisions, please work with the State to come into compliance. The eligibility staff in my office is ready and willing to assist you in this effort. They are available to participate in conference calls with the states or the region, as necessary.

I am providing a copy of this memorandum to the other CMS Regional Offices so that they can refresh staff's understanding on this transfer of assets policy.

Cc: Associate Regional Administrators
Division of Medicaid and Children's Health
Regions I-III, V-X