CMS/

Center for Medicaid and State Operations

October 21, 2002

Robert J. Richardson
1006 Strawberry Run
Reading, PA 19606

Dear Mr. Richardson:

This is in response to your letter to Thomas Scully concerning New Jersey's Medicaid laws. Your inquiry was referred to this office for reply.

The issues you raise pertain to certain sections of the New Jersey Administrative Code. One of these sections (10:71-4.10(f)) establishes rules for determining whether an asset was transferred to a third party for the sole benefit of a spouse, child, or disabled individual and provides, among other things, that the written transfer instrument must name the State as the primary remainder beneficiary. If the written instrument does not include such a provision, the transfer is not considered to have been for the sole benefit of the individual in question, making the transfer subject to penalty under the Medicaid transfer of assets for less than fair market value provisions.

The second section (10:71-4.10(p) 2.1) provides that if an annuity is purchased for a community spouse with any portion of the couple's resources and the annuity purchase price exceeds the amount of the share of resources protected for the community spouse (a maximum of $89,280 in 2002), the excess over that amount will be counted as a resource in determining the applicant's eligibility.

You believe these requirements may be contrary to Federal statute. You ask for clarification concerning these provisions, particularly with regard to whether State law can supercede Federal Medicaid statute.

States have considerable flexibility in administering their Medicaid programs, particularly in areas either not addressed by the applicable Federal statute, and in areas for which the Secretary has not issued, usually by regulation, specific policy. However, State flexibility does not extend to policies and practices which are contrary to Federal statute. We understand and appreciate New Jersey's efforts to conserve public funds by attempting to limit the amount of resources that can be sheltered in annuities. However, the Federal Medicaid statue does not support either of these specific State policies cited in your letter.

The issue of New Jersey's requiring that it be named as the primary remainder beneficiary in any annuity as a condition of the annuity not being penalized as a transfer of assets for less than fair market value has been raised previously. As the State was recently made aware, we find no authority in either Federal statute or operating policy that would provide a basis for this requirement.

Similarly, we have addressed on several occasions the issue of limiting the amount of a couple's resources that can be used to purchase an annuity for the benefit of the community spouse to a maximum of $89,280. Although we have not addressed this issue specifically with regard to the New Jersey Medicaid program, our other correspondence on the matter has made it clear that the Federal Medicaid statute does not permit such a limitation.

You asked a total for four specific questions concerning the issues raised in your letter. Our answers to your questions are below.

Q. Is there an amount of non-countable assets a New Jersey resident may have?
A. We assume you are asking whether there is a limit to the amount of assets belonging to a couple that can be owned by a community spouse. While Federal statute limits the amount of the couple's assets that can be protected for the benefit of the community spouse (a maximum of $89,280 in 2002), the statue doe not otherwise limit the amount of assets the community spouse can own.

Q. Can state laws supercede Federal laws to quality for Medicaid?
A. As explained previously, States have considerably flexibility in administering their Medicaid programs. However, States cannot adopt policies which are contrary to Federal statute.

Q. What amount of non-countable income can a person have?
A. Assuming you are asking about income belonging to the community spouse, under Federal statute no income belonging to the community spouse is considered to be available to the institutionalized spouse when determining that spouse's eligibility. Therefore, there is no Federal limit on the amount of income a community spouse can have.

Q. Are residents required to name the State as primary beneficiary?
A. As explained previously, we find no support in the Federal Medicaid statute or operating policy for such a requirement.

Sincerely,
Thomas E. Hamilton
Director
Disabled and Elderly Health Programs Group