

P A T H

Department of Prevention, Assistance, Transition, and Health Access

BULLETIN NO. 00-02F

FROM: Eileen I. Elliott, Commissioner,
for the Secretary

DATE: 09/15/00

SUBJECT: Medicaid standard spenddown deductions for
assistive community care services, personal care
services, and clarifications to spenddown policy

CHANGES ADOPTED EFFECTIVE: 10/01/2000

INSTRUCTIONS:

- Maintain Manual - See instructions below.
- Proposed Regulation - Retain bulletin and
contents until you receive Manual
Maintenance Bulletin: _____
- Information or Instructions - Retain until
_____.

MANUAL REFERENCE(S):

M400 TOC
M423-423.4

M432-432.4
M433

P-2420 D5

This bulletin implements a standard deduction for assistive community care services (ACCS). The standard deduction for ACCS relates to Medicaid applicants in level III residential care homes with a spenddown requirement. This bulletin also increases in the standard deduction for noncovered personal care services applicable to Medicaid applicants in level IV homes or their own homes with a spenddown requirement. Finally, it incorporates into policy and procedures the content of existing interpretive memoranda concerning deductions from excess income for medically necessary transportation, over-the-counter drugs, and loans.

ACCS deduction for Medicaid applicants in level III homes with a spenddown requirement

ACCS became a Medicaid-covered service on July 1, 1999; consequently, most level III homes enrolled as Medicaid providers and began to receive Medicaid reimbursement for ACCS. Residents of homes enrolled as Medicaid providers may now use ACCS as covered services to spend down to the Medicaid protected income level. If a resident enters into a private pay agreement with a home enrolled as a Medicaid provider, the resident may project and deduct ACCS as if they were not Medicaid-covered services for as much of the accounting period as is needed to meet their spenddown requirement. Residents of the few level III homes that did not enroll may use ACCS as noncovered services to meet their spenddown requirement. Alternatively, residents may claim their actual costs of ACCS, whether or not they are in homes that have enrolled as Medicaid providers.

The department recognizes that documenting actual costs can be difficult. For this reason, the department establishes a standard deduction of \$20 per day and \$600 per month for ACCS. This amount is based on a 1999 survey by the Vermont Department of Aging and Disabilities (DA&D) of the cost of providing services in residential care homes. Residents of level III homes will use the standard deduction for ACCS, not the standard deduction for personal care services, to spend down to the Medicaid protected income level.

Residents who use the standard deduction for ACCS to meet their spenddown requirement are subject to special eligibility dates. Medicaid coverage for all covered services other than ACCS becomes effective on the first day of the accounting period. Medicaid coverage for ACCS begins the day the cumulative daily ACCS deductions exceed the Medicaid group's excess income and resources after deductions of all expenses for which coverage is not available.

Increase in the personal care services standard deduction for residents in level IV homes or their own homes with a spenddown requirement

The department has updated the standard deduction for personal care services used by Medicaid applicants with a spenddown requirement in level IV residential care homes or their own homes. It bases the increase on reconsideration of the standard deduction generated by the McLoud case and its relationship to ACCS. The department increases the \$75 per month (established in February 1993 by McLoud) to \$396 per month. This represents an increase proportional to the increase for ACCS when compared with the standard amounts established under McLoud.

Specific Changes to Existing Regulations

With the approval of the Joint Legislative Committee on Administrative Rules, on every page of 00-P21 the term "Medicaid group" replaces "applicant" because there may be more than one person whose income, resources, and medical expenses are considered in determining eligibility under the spenddown rules.

Page:

M400 P.1-2 Table of Contents. Adds new sections to table of contents.

Since first filing, a reference has been added designating M435-M439 as reserved; and a new section M432.4 has been added describing when assistive community care services may be a noncovered medical expense.

With the approval of the Joint Legislative Committee on Administrative Rules, on this page and throughout this bulletin, the department has modified headings to replace the term "noncovered expenses" with "expenses not covered by Medicaid."

M423 Reorganizes, clarifies, simplifies, and updates existing spenddown regulations applicable to applicants in community living arrangements; adds subsection headings that specify the types of information covered by the regulation (spenddown computation, deductible expenses, and deduction sequence); and incorporates policy content from interpretive memos for the treatment of loans when applicants with a spenddown requirement have loan obligations. Moves procedural content from interpretive memos to related procedures pages forthcoming in a separate procedures bulletin.

M423.2

M423.21

Since first filing, the department has clarified that expenses incurred before the accounting period may be used to meet a spenddown requirement to the extent that the expenses have not been deducted previously in establishing eligibility.

With the approval of the Joint Legislative Committee on Administrative Rules, the department has added language stating that a bill must remain a current liability when it is used to meet a spenddown requirement in a future accounting period. Language has been changed to indicate that an applicant may be responsible for some medical expenses on the first day of Medicaid eligibility. The department has added a sentence stating that special eligibility dates apply to those applicants who use assistive community care services (ACCS) to meet their spenddown requirement.

M430-439 Reorganizes, clarifies, simplifies, and updates existing regulations for noncovered medical expenses; adds subsection headings that specify the types of information covered by the regulation (personal care services, over-the-counter drugs and supplies, and transportation, as well as documentation requirements and amounts); incorporates policy content from interpretive memos for the deduction of medically necessary transportation and over-the-counter drugs and supplies. Moves procedural content from interpretive memos to related procedures pages forthcoming in a separate procedures bulletin.

Deletes reference to personal care services as a noncovered service in level III residential care homes. For those residing in homes enrolled as Medicaid providers of ACCS, ACCS is now a covered service. Adds reference to ACCS as a noncovered service in level III residential care homes not enrolled as Medicaid providers.

Deletes reference to dental care and hearing aids as non-covered services. Moves regulations related to personal care, transportation and over-the-counter drugs and supplies from here to new sections M432.1-M432.3.

Since first filing, the list of noncovered medical expenses has been revised to include (1) private duty nursing services for recipients age 21 and older and (2) dental services in excess of the annual maximum allowed. The cross-reference following the list item describing assistive community care services has been replaced with one to the newly added section M432.4. Reference to level III care provided in a hospital setting has been deleted.

M432 P.2
M432.13 P.2 Issues existing regulations related to noncovered personal care expenses, as new sections M432.1-432.14. Since first filing: the phrase “particular diagnosis” has been replaced with applicant’s medical condition (M432.1); the reference to deductible personal care services has been clarified to expressly reference services listed in the PP&D dated April 1, 1993, as well as those in M740.3 (M432.11); the reference to M740.7 has been deleted (M432.11); the special documentation requirements for immediate family members have been removed (M432.14).

Since first filing, the section on qualified service providers (M432.12) has been modified to specify the relatives for whom the personal care services deduction is not permitted.

With the approval of the Joint Legislative Committee on Administrative Rules, the department has modified the restrictions on qualified service providers to:

- allow persons not living in the home to be considered qualified service providers;
- allow parents to be considered qualified service providers for their children aged 18-20 if they are paid out of the children's own income; and
- clarify that a parent of an adult may be considered a qualified service provider for the other parent of that adult, when the parents are not married to each other.

M432.21 Issues existing regulations related to noncovered over-the-counter drugs and supplies and transportation as new sections M432.2 and M432.3, respectively.

Since first filing, regulations related to noncovered assistive community care services have been added as new section M432.4. The requirements at M432.2 and M432.21, for over-the-counter drugs and supplies, have been edited for accuracy. The organization and numbering sequence for the subsections M432.1 through M432.3 has changed to accommodate the addition of the new section M432.4. The reference to M811.4 has been deleted.

With the approval of the Joint Legislative Committee on Administrative Rules, the department made changes in M432.42 and M432.44 that enable applicants to use the cost of ACCS for less than the full six-month accounting period to meet their spenddown requirements.

M433 Adds option for applicants to use a standard expense deduction for assistive community care services.

P-2420 D5 Adds standard deduction for level III ACCS. Eliminates level III personal care standard deduction rendered obsolete by new standard deduction for ACCS applicable to level III residents. Updates noncovered level IV personal care standard deduction to reflect the actual costs of personal care services more accurately.

Since first filing, the amount of the standard deduction for personal care services has been rounded up to \$396 per month and \$13.20 per day.

Summary of Comments

Written comments were submitted by the Vermont Coalition for Disability Rights, the Council of Vermont Elders, the Office of the Health Care Ombudsman, and the Vermont Ombudsman Project. No one appeared for the public hearing that was held on July 10, 2000, at 10 a.m. in the Agency of Human Services Secretary's Conference Room, State Office Complex, Waterbury, Vermont.

Although the commenters expressed concerns about the affordability of personal care services, all commended PATH for increasing the deductions for personal care services and for expanding access to residential care homes through the coverage of ACCS. The content of all the comments is summarized below.

General comments

Comment: Using the indexing numbers M430-M439 is confusing because there are no sections M435-M439.

Response: The department has added a reference in the table of contents noting that sections M435-M439 are reserved for future use.

Comment: The incorporation of procedural content in PP&Ds through issuance of a separate forthcoming procedures bulletin is problematic. The public should have the benefit of these bulletins before it comments on this one. The department has erred when following this practice in the past.

Response: Before the effective date of this rule, the department will try to issue a procedures bulletin containing updated list of residential care homes, standard prices for over-the-counter drugs and supplies, and transportation costs. The PP&Ds will not be removed until these revised procedures are issued.

Comment: The department should follow the notice requirements in McLoud consent decree to inform the public and department employees about new standards.

Response: The department agrees with this approach. It will develop special procedures for notifying the public about this policy change by modifying the form letters attached to the decree as exhibits D through G. Commenters will be given an opportunity to review and comment on the proposed notices before they are issued.

Comment: Does the department endorse as legal the practice by some level III residential care home providers of accepting a limited number of residents who need ACCS?

Response: Residential care home regulations do not address whether homes may limit the number of private paying versus public paying residents. The department is not aware of any provisions in the Medicaid statute that restrict facilities discretion in this area. The department welcomes further public input providing citations to any legal authority that imposes this requirement.

Comments related to specific proposed regulations

Comment: (M423) Since the term countable income is defined, it would be clearer to use it in place of the term excess income.

Response: The department defines both excess income and countable income in M400.1. As used in the context of M423, the phrase excess income more accurately reflects the department's intent than countable income.

Comment: (M423.2 M432) The regulations should be clarified to reflect that the current practice of allowing a single Medicaid expense to be used in several spenddown periods if it is large enough to meet more than one spenddown.

Response: The department has added language in section M423 clarifying the continuation of its current practice.

Comment: (M423.21) Medically needy individuals should be permitted to project expenses for ACCS services.

Response: An applicant must incur an expense before deducting it for items that will be covered by Medicaid once a spenddown requirement is met. The department has revised the regulations to allow medically needy applicants to project the deductions of assistive community care services when Medicaid will not cover the service after these applicants meet their spenddown requirement.

Comment: (M432) The list of noncovered expenses should include: (1) private duty nursing services for recipients age 21 and older; (2) a cross-reference to M740 because PCS are covered for individuals under age 21 via EPSDT; and (3) dental services in excess of the annual maximum allowed by Medicaid.

Response: The department has added each of these references in the list of noncovered services.

Comment: (M432.11) The department has omitted several services required by the McLoud consent decree from its definition of deductible personal care services. Specifically excluded are: (1) assistance with the preparation of a special diet, (2) assistance with managing money, (3) any medically necessary personal care services, and (4) general supervision of physical or mental well-being if doctor specifically identifies this as a personal care need in relation to a beneficiary's medical condition.

Response: Assistance with a special diet is covered explicitly in the list at M740.3. The department has added express references to managing money and general supervision. The broad description of coverage of medically necessary personal care services in M432.1 applies to subsection M432.11.

Comment: (M432.12) There is no basis in law for the department to impose special requirements on services provided by immediate family members. The regulation should be consistent with 42 CFR § 440.167 and use the term “legally responsible relative.”

Response: In response to these comments, the department reconsidered its proposed policy defining the immediate family members that may qualify or may not as providers of personal care services and, as a result, has substantially revised the proposed rule to allow many more relatives of the applicant to qualify as providers of personal care services. However, the department has not narrowed the definition of ineligible family members as much as the commenters had requested.

Federal regulations do not define legally responsible relative. The commenters seek to have the department define "legally responsible relative" to have the same meaning as "financially responsible relative", which is defined in federal law and regulations. However, comments to the federal regulations relating to "legally responsible relative" (which are included with this filing) clearly state that it is the intent of the regulation to give states flexibility in defining the family members that qualify as providers of personal care services 62 Fed. Reg. 47,896, 47,899 (1997).

In entering into the McLoud consent decree, the department did not intend to allow payments to immediate family members who provide personal care services to qualify as medical expenses that can be deducted from an applicant's spenddown requirement. The McLoud consent decree is silent on this matter, and the department does not recall this subject being raised by any party to the McLoud negotiations. Since Mrs. McLoud resided in a residential care home, it is not surprising that this subject was not raised during these negotiations. This description of the McLoud negotiations is based on the PATH deputy commissioner's recollection of them. She was the department's primary representative throughout the lengthy negotiation process that resulted in the McLoud consent decree.

The department has not revised the proposed regulations to equate "legally responsible relative" with the federally defined term, "financially responsible relative." To do so would, in effect, commercialize some of the closest intra-familial relationships and create an incentive for choosing minor children and minor siblings as providers of personal care services--consequences that the department considers unwelcome and imprudent. However, as indicated above, the department has substantially revised the proposed rule to allow many more relatives of the applicant to qualify as potential providers of personal care services.

Comment: (M432.14) The amount of the standard deduction is substantive and should be included in the regulation to ensure an opportunity for notice and comment if the amount is changed.

Response: The department has added a provision that increases to the standard deduction shall be made through issuance of a procedures change, and that any decreases in the standard deduction amount shall be made through the administrative procedures act.

Comment: The extra criteria for determining the deductible amount for services provided by family members is confusing. There is no legal basis for these criteria.
(M432.14)

Response: The department has eliminated this provision.

Comment: The reference to M811.4 is irrelevant. It is unclear what the department intends to need prior approval.
(M432.2
M432.21)

Response: The section has been revised for additional clarity, and the reference to M811.4 has been removed.

Comment: M740.2 should be included in order to clarify the relationship between ACCS and PCS.
(M740.2)

Response: The department agrees that this clarification is needed and has added a provision in sections M432.41 and M432.44 to clarify that certain PCS deductions are available for applicants residing in level III residential care homes.

Comment: Please explain the department's rationale for the \$210 per month difference in the standard deduction for personal care services compared to ACCS. Does it reflect the monthly cost of nursing overview?
P-2420(12)

Response: The difference between the proposed amounts for these two standard deductions is based on the proportional relationship between the standard deduction for personal care provided by a Level IV RCH and the standard deduction for personal care provided by a Level III RCH that were implemented pursuant to McLoud. The Department of Aging and Disabilities (DAD) has collected data relative to the costs that Level III and Level IV RCHs incur in providing ACCS and personal care services, respectively. Based on DAD's evaluation and recommendation, DAD and PATH mutually concluded that the data available relative to ACCS costs are sufficient and reasonable bases upon which to establish a standard deduction for these services. As a result, the proposed \$600 standard deduction is based on these data.

Based on DAD's evaluation and recommendation, DAD and PATH mutually concluded that the data available relative to personal care services costs are not sufficient and reasonable bases upon which to establish a standard deduction for these services. As a result, the proposed \$396 standard deduction is not based on these data. This amount corresponds to the proportion of \$600 that the current standard deduction for Level IV is of the current standard deduction for Level III.

Changes Authorized by the Legislative Committee on Administrative Rules

The department has made extensive changes to the rule since it was filed in final proposed form. These changes, which reflect the department’s continuing work with commenters, were presented to the Legislative Committee on Administrative Rules on September 6, 2000, and the committee approved them. On pages 2-4 of these bulletin cover pages, in paragraphs beginning with the clause, “With the approval of the Legislative Committee on Administrative Rules,” the department has described specific changes made in detail.

Vertical lines in the left margin indicate significant changes. Dotted lines at the left indicate changes to clarify, rearrange, correct references, etc., without changing regulation content.

MANUAL MAINTENANCE

MANUAL HOLDERS: Please maintain manuals assigned to you as follows.
 You will need both the proposed and the final bulletin to maintain
 Your manuals

Medicaid Procedures

<u>Remove</u>		<u>Insert</u>	
P-2420 D5	(00-21)	P-2420 D5	(00-02F)

Medicaid Policy

<u>Remove</u>		<u>Insert</u>	
TOC P. 1 (M400)	(94-42)	TOC P. 1 (M400)	(00-02)
Nothing		TOC P. 2 (M400)	(00-02F)
M423	(88-21)	M423	(00-02F)
M423.2	(94-42)	M423.2	(00-02F)
M423.3	(94-42)	M423.3	(00-02F)
M430-M439	(93-19F)	M430-M439	(00-02F)
M432 P. 2	(93-19F)	M432 P. 2	(00-02F)
Nothing		M432.2 P. 2	(00-02F)
Nothing		M432.33	(00-02F)
Nothing		M432.34 P.2	(00-02F)
Nothing		M432.43	(00-02F)
Nothing		M432.44 P.2	(00-02F)
M433	(94-42)	M433	(00-02)