

# Legal Authorities Relating to Supplemental Needs Trusts - Federal, State, and New York City

There is a confusing patchwork of Federal and State laws and regulatory guidance governing the use of Supplemental Needs Trusts in the Medicaid context. This article is intended to collect some of these authorities in one place.

One of the prerequisites for using a Supplemental Needs Trust is that the beneficiary must be disabled. These references provide the rules for determining whether an individual is disabled, as well as the process for disability determinations made for purposes of using an SNT. Many of these references are also applicable to individuals requesting disability determinations for purposes other than an SNT, such as obtaining more favorable budgeting rules in the SSI-related category.

**New June 2022 - NYC HRA Medicaid Alert May 31, 2022 - Disability Determination by NYS Disability Review Team (DRT) - Change in Forms Required** - in NYC at least, you no longer submit the proof of Disability documents with the pooled trust to the local district. Instead, you submit a new **DISABILITY DETERMINATION REQUEST (FORM MAP-3177)** with the Trust to the local DSS. Then wait and submit the disability forms directly to the NYS Disability Review Team when they request them.

**NEW DECEMBER 2021 - DOH FORM 5143** replaces the DSS-486T - Medical Report for Determination of Disability (08/2018). See Dec. 2021 HRA Medicaid Alert. This form needs to be filled out by your doctor(s).

**New August 2021** - Form 1151 has been replaced by DOH 5139 and a new HIPPA form is required. See NYC directives (though this is a NYC HRA directive, it is presumably applicable statewide since these are state forms and procedures)

**NEW March 2020** - The State Dept. of Health has rescinded the requirement that a Power of Attorney used to establish an SNT or pooled trust must have a Statutory Gift Rider giving permission to gift assets. GIS 20 MA/03 - Clarification of GIS 19 MA/04, "Clarification of Policy for Treatment of Income Placed in Medicaid Exception Trusts" This directive was issued in response to a letter from the NYSBA Elder Law & Special Needs Section to the NYS DOH.. 8/7/2019. See more here about the directive. Because of this directive, HRA directives that require a Statutory Gift Rider to establish a pooled trust or SNT are NOT enforceable.

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## Federal Authorities

Although it is the local Department of Social Services (or in other states, the state Medicaid agency) that makes the disability determination for purposes of SNTs, most of the standards used are from Federal law. The definition of "disability" used by the Federal Social Security Administration for purposes of SSDI and SSI is adopted by the State-run Medicaid program. Thus, it is useful to make reference to the Federal standards when trying to establish that an individual is eligible to use an SNT for Medicaid purposes.

- Social Security Act

This is the Federal statute that establishes the Social Security Administration and all of the benefits SSA administers, including SSDI and SSI. It contains the basic legal definition of disability.

- ♦ **21<sup>st</sup> Century Cures Act** - enacted Dec. 13, 2016 - corrects what was widely believed to be a drafting error in the previous law, which only allowed a parent, grandparent, legal guardian, or a court to create a first party supplemental needs trust. Under the new law, individuals with disabilities who have the requisite capacity will be able to create special needs trusts for themselves rather than having to rely on others to do so. Amends Section 1917(d)(4)(A) of the Social Security Act (42 U.S.C. 1396p(d)(4)(A)). While a bill is pending in NYS legislature to implement the law in NYS, a directive issued by the NYS Dept. of Health on May 22, 2017 -- GIS 17 MA/008: Policy Change for Trusts Established for Disabled Individuals Under Age 65 -- PDF -- states, "Effective immediately, in the case of a certified disabled Medicaid applicant/recipient, districts must not consider as available income or resources the corpus or income of a trust established by such disabled individual when he or she was under 65 years of age, provided the trust otherwise complies with the "exception trust" provisions set forth in Administrative Directive 96 ADM-8, "OBRA '93 Provisions on Transfers and Trusts."

- Code of Federal Regulations

These are the regulations promulgated by SSA to implement its mandate under the Social Security Act. These regulations have the force of law.

- Social Security Administration "Bluebook" - Listings of Impairments

This manual contains all of the medical criteria for determining whether an individual's impairments meet one of the "listings" on step three of the sequential evaluation process. These are technically an Appendix to the Code of Federal Regulations, and therefore have the same legal weight.

- A Disability Claimant's Capacity to do Past Relevant Work (SSR 82-62)

This ruling from the Social Security Administration discusses how to determine whether a claimant has past relevant work, and whether he or she has the residual functional capacity to return to past relevant work on step four of the sequential evaluation. Because these rulings are considered sub-regulatory guidance, they do not technically have the force of law.

- Evaluation of Disability and Blindness in Initial Claims for Individuals Aged 65 or Older (SSR 03-3p)  
This ruling from SSA discusses special rules and profiles for determining disability in claimants over age 65.
- SSA POMS SI 01120.203 - Exceptions to Counting Trusts Established on or after 1/1/00  
This section of the Program Operations Manual System, the guidance provided to SSA staff, contains rules and procedures for determining whether SNTs are disregarded for purposes of SSI. Some of these policies may also be applicable to Medicaid.

## New York State Authorities - Law, regulations and policy manuals

- N.Y. Social Services Law Â§ 366(2)(b)(2)(b)(2)(iii)  
This N.Y. State statute codifies the exemption of SNTs from income and assets for disabled individuals, and imports the Federal definition of disability.
- N. Y. Social Services Law Â§ 366, subd. 5 (f) - Pooled Trust Notification Act **enacted Dec. 18, 2017** - NEW LAW that requires the State Dept. of Health to "provide written notice to an applicant for or recipient of medical assistance who is or reasonably appears to be eligible for medical assistance except for having income exceeding applicable income levels ... in plain language, that in certain circumstances the medical assistance program does not count income ... if it is placed in a trust .... The notice shall be included with the eligibility notice ...and shall reference where additional information may be found on the department's website...." L. 2018, Ch. 475, enacting A 5175-A /S 1241-A (Search bill number [here](#) )
- 18 N.Y.C.R.R. Â§ 360-5.2  
This is the N.Y. State regulation implementing the definition of disability for purposes of the N.Y. Medicaid program.
- N.Y. Medicaid Disability Manual  
Although N.Y. uses the same definition of "disabled" as the Social Security Administration does for purposes of the SSI and SSDI programs, this manual goes into more detail about how the N.Y. Medicaid program determines disability.
- N.Y. Medicaid Reference Guide  
This enormous manual attempts to consolidate all of the rules governing New York's Medicaid program into one place, and instructs DSS eligibility workers how to implement the program. The **Glossary** section contains the definition of disability.

## NYS Agency Directives

- GIS 20 MA/03 - Clarification of GIS 19 MA/04, "Clarification of Policy for Treatment of Income Placed in Medicaid Exception Trusts" -- rescinds the requirement from GIS 19 MA/04 that a Power of Attorney may be used to establish an SNT or pooled trust only if it has a Statutory Gift Rider. The State rescinded this requirement in response to a demand by the NYS Bar Association that explained how the requirement **violates the state law governing powers of attorneys**. See [Letter](#)

from the NYSBA Elder Law Section to the Dept. of Health, dated 8/7/19.

- ◆ Also see article by Daniel Fish in the New York Law Journal, "New Restrictive Rule Regarding Medicaid and Power of Attorney," Aug. 15, 2019 (download [PDF](#) - Reprinted with permission from the Aug. 15, 2019 edition of the New York Law Journal © 2019 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-257-3382 or [reprints@alm.com](mailto:reprints@alm.com))
- ◆ The State has not yet updated the ATTACHMENT to GIS 19 MA/04, which is an Information Notice that will be included in any Medicaid notice explaining the right to use a pooled trust to eliminate the Spend-down. See discussion of this attachment below.
- ◆ This directive over-rules HRA directives from 2017-18 that required any POA to have a Statutory Gift Rider in order to establish a pooled trust or SNT.
- GIS 19 MA/04 - Clarification of Policy for Treatment of Income Placed in Medicaid Exception Trusts (Feb. 4, 2019) - States several policies including Statutory Gift Rider requirement for POAs:
  - ◆ required a Statutory Gift Rider to be included with any Power of Attorney used to establish an SNT - THIS REQUIREMENT WAS RESCINDED BY GIS 20/MA 03 above.
  - ◆ the income exclusion applies only to income that is placed into the exception trust (also known as supplemental needs trust or pooled trust) during the same month in which the income is received.
  - ◆ Advises districts that recipient may verify past deposits at renewal, and does not have to document each deposit each month.
  - ◆ May qualify for Medicare Savings Program, as well as for Medicaid by depositing income into a trust; local districts "should inform the consumer that the amount deposited monthly into the trust may have to increase to avoid a spenddown. Policy regarding the Medicare Savings Program and the program requirements are provided in 00 OMM/ADM-7 "Medicare Premium Payment Program (MPPP)".
  - ◆ **Attachment I - Form OHIP-0119 Explanation of the Effect of Trusts on Medicaid Eligibility** - this is the long awaited Informational Notice that districts must include when notifying an individual that they have a Medicaid spenddown. Development of this notice was required by **DECEMBER 18, 2017 - the Pooled Trust Notification Act**. As pointed out by the NYSBA Elder Law Section in its Aug. 2019 letter to the State DOH, OHIP-0119 is disappointing for its legal-ese language, and for its vague discussion of trusts generally without enough detail for how to set up a pooled trust to eliminate the spend-down. The notice uses the confusing legal term "assets" to mean deposits of "income" into a pooled trust. For example, here is one key Q&A on the notice, giving an incomplete answer to an important question:

How Do I Request that the Local Social Services District Rebudget My Income Once I have Created a Trust?

You must provide a copy of the trust to your local social services district. You must include a written statement indicating the amount of monthly income that will be placed into the trust each month.

The answer may mislead consumers into thinking they only need to send a copy of the trust to the Medicaid office in order to rebudget their case.. It does not mention that a person over age 65 must submit proof that they are disabled, requiring forms described in this article. Much more must be submitted - see this article.

Attachment II - this is a list of revised state notices

- GIS 17 MA/008: Policy Change for Trusts Established for Disabled Individuals Under Age 65 -- PDF -- May 22, 2017 - states, "Effective immediately, in the case of a certified disabled Medicaid applicant/recipient, districts must not consider as available income or resources the corpus or income of a trust established by such disabled individual when he or she was under 65 years of age, provided the trust otherwise complies with the "exception trust" provisions set forth in Administrative Directive 96 ADM-8, "OBRA '93 Provisions on Transfers and Trusts."
- GIS 15 MA/013 - MBI-WPD Disability Certification and Exception Trusts PDF - This GIS implicitly states that a person whose earned income is too high for MBI-WPD can use a pooled trust or an individual supplemental needs trust (both are types of "exception trusts") to bring their income down to the MBI-WPD level -- until they reach the age of 65 and can no longer be in MBI-WPD. The GIS says that if an individual is certified as disabled for purposes of MBI-WPD, that same certification also establishes disability for use of a pooled or individual trust. This clarification was needed to avoid a catch-22: A working person cannot generally qualify as "disabled" under Social Security disability insurance rules, with some exceptions. Yet in order to qualify for MBI-WPD, one must be "disabled" and be working. Plus - one must be "disabled" under the Social Security rules to enroll in a pooled/individual supplemental needs trust. This GIS clarifies that a certification of disability meets the disability criteria for both MBI-WPD and for a supplemental needs trust.
- 12MA027 - Medical Evidence Gathering for Disability Determinations - Adult Cases (GIS 12-MA-027)  
This GIS announces three new forms, dated June 2012 used for disability determinations. Three of the GIS attachments are the 3 forms described below. All of the following attachments and one other form cover letter to the medical provider are posted here.

DSS-486T (revised 6/2012)(ATTACHMENT I) or **Medical Statement of Disability**, which is completed and signed by the treating physician, describing diagnoses, symptoms, functional limitations, and medical history and; **NOTE:** The form revised in June 2012 shortens this form from the former 25-page form to a 2-page form, which will be less intimidating to doctors. The old form consisted of numerous attachments that elicited information about the different body systems, such as a musculoskeletal or cardiac impairments. Those former attachments, while burdensome, were helpful to show the criteria for "meeting the listings"-- Step Three in the sequential evaluation process

described below. While no longer required, you might find some of these attachments helpful as a guide for the physician to provide information about particular conditions. Click here for the [old 486T](#).

LDSS-1151 (revised 6/2012)(ATTACHMENT II) **Disability Questionnaire** - completed by client or her advocate or family member, describing the disabled child's education, work history, and functional limitations.

LDSS-1151.1 (6/201)(ATTACHMENT III) **Disability Questionnaire Continuation Sheet** - provide names, addresses of all medical providers and hospitals where care received in order for State to obtain medical records.

New **Transmittal Sheet** (ATTACHMENT IV) to be used by the local DSS when forwarding a disability determination request to the Disability Review Team

- 08MA020 - Transfers to Pooled Trusts by Disabled Individuals Age 65 and Over (GIS 08-MA-020)  
This GIS directive clarifies that as long as income placed in the trust is disbursed prior to placement in a nursing home and application for institutional Medicaid, there is no transfer penalty on the income transferred into the trust.
- Additional Special Medical-Vocational Profile for the Medicaid Disability Manual (GIS 06 MA/020)  
This General Information System message from the N.Y. Dep't of Health instructs the local departments of social services on an additional special category under which certain older adults may be found disabled.
- Purposes of Medicaid Disability Reviews (GIS 06 MA/005)
- Pooled Trusts and Disability Determinations for Individuals 65 Years of Age and Over (05 OMM/INF-1)  
This Informational Letter from the N.Y. Dep't of Health to the local departments of social services gives instructions on how to process disability determinations for individuals using Pooled Trusts.
- Letter from DOH to NYC HRA providing clarification of the proper treatment of income placed in a pooled trust (February 2, 2005)
- Letter from Office of Medicaid Management correcting 96 ADM-8 to clarify exemption of income contributed to Exception Trusts pursuant to OBRA '93 (September 23, 1997)

## **New York City Authorities (most recent listed at top)**

- **2022-05-31 NYC HRA Medicaid Alert May 31, 2022 - Disability Determination by NYS Disability Review Team (DRT) - Change in Forms Required** - in NYC at least, you no longer submit the proof of Disability documents with the pooled trust to the local district. Instead, you submit a new **DISABILITY DETERMINATION**

**REQUEST (FORM MAP-3177)** with the Trust to the local DSS (available on [NYC HRA Health Assistance webpage](#) in many languages and [here](#)). Then wait and submit the disability forms directly to the NYS Disability Review Team when they request them.

- 2021-12-20 [HRA Medicaid Alert 12-20-21](#) - DOH Form-5143 replaces the 486-T form for Medical Determination of Disability. Download new DOH-5143 form [here](#).
- 2021-08-12 [HRA MICSA Alert 8-12-2021 Disability Determination Form LDSS-1151 Replaced with DOH-5139](#) - replacing the LDSS-1151 form with the [DOH-5139 form](#) which can be downloaded [here](#) and also requiring a new HIPPA form - [DOH-5173](#) (4/2016) to be used in addition to [OCA Official Form 960 - NY State HIPAA](#) - which will apparently still be used by the local district.
- 2018-12-18 [HRA Medicaid Alert - Change in Email address to send HRA Office of Legal Affairs Draft SNTs for Review](#) (does not affect where to send executed trusts -- to Medicaid office handling Medicaid eligibility/application... see [this article](#) for NYC)
- **TWO HRA DIRECTIVES THAT ARE NOT VALID SINCE GIS 20 MA/03** - Clarification of GIS 19 MA/04, "Clarification of Policy for Treatment of Income Placed in Medicaid Exception Trusts" - **Both rejected SNTs or pooled trusts signed under a Power of Attorney that lacked a Statutory Gift Rider**
  - ◆ [2018-06-25 Deferral of SNT's Submitted with Invalid Power Of Attorney](#). This directive said if an SNT is submitted that is signed with a POA without authority to establish a trust, it will be deferred, with opportunity for applicant to execute a new POA, presuming capacity to do so. **THIS DIRECTIVE IS VOID UNDER GIS 20 MA/03.**
  - ◆ [July 26, 2017 HRA Medicaid Alert - Powers of Attorney and Substantial Gift Riders](#): It stated that Powers of Attorney executed after Sept. 1, 2009 must include a Statutory Gift Rider (SGR) along with the POA form. THIS IS NOT VALID after [GIS 20 MA/03](#)
- 2018-04-26 [Disability Form Completion when Submitting Pooled Trusts over age 65](#) --Reminder to submit completed [LDSS-1151](#) (revised 6/2012) with pooled trusts for those over age 65, or under 65 if they are not receiving SSD/SSI benefits. Implies that must complete Work History section even if work done more than 15 years ago, but don't have to enter physical demands of job if more than 15 years ago. Says should not cross out entire work section even if no work done in last 15 years.
- [Pooled Trust Submissions](#) (Medicaid Alert 4/26/2006)  
This Medicaid Alert discusses the documentation required for pooled trusts on initial application and recertification.
- [Disability Determinations for Individuals with a Pooled Trust](#) (Medicaid Alert 7/7/2005)  
This Medicaid Alert specifies the procedures used in New York City for pooled trust cases.
- [Supplemental Needs Trusts Excluded from MA Eligibility Budgeting](#) (NYC Medicaid Facts Alert May 2004)  
Reminds staff that income contributed to a pooled trust is exempted from the

eligibility computation.

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